Waterfall II Application

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

(1) ANTHONY VICTOR LOMAS

(2) STEVEN ANTHONY PEARSON

(3) PAUL DAVID COPLEY

(4) RUSSELL DOWNS

(5) JULIAN GUY PARR

(as the joint administrators of the above named company)

Applicants

- AND -

(1) BURLINGTON LOAN MANAGEMENT LIMITED

(2) CVI GVF (LUX) MASTER S.À R.L

(3) HUTCHINSON INVESTORS LLC

(4) WENTWORTH SONS SUB-DEBT S.À R.L

(5) YORK GLOBAL FINANCE BDH, LLC

Respondents

SKELETON ARGUMENT ON BEHALF OF THE FOURTH RESPONDENT

PART 1 - INTRODUCTION

1. This skeleton argument is filed on behalf of Wentworth Sons Sub-Debt S.à.r.l. ("Wentworth"). Capitalised terms used but not otherwise defined herein are defined in the Waterfall II Application dated 12 June 2014 (the "Application") as amended unless the context requires otherwise.

2. The parties to the Application have agreed that it would be appropriate to structure the hearing by dividing the issues to be determined into groups of related issues as follows[1]:

   (1) Issues 34, 35 and 38 which concern the interpretation of the CRA and the CDDs; and

   (2) Issue 36A which concerns the enforceability of the release provisions in the CRA and the CDDs.

3. The LBIE administration has been one of the largest and most complex ever. The Administrators were faced with the task of considering the claims of thousands of creditors arising from incredibly complex financial transactions. The claims were derived from multiple and sometimes conflicting contractual documentation. Moreover, the claims involved difficult valuation questions, claims for the return of trust assets, claims for client money under CASS 7 and unsecured claims. In short, the nature and complexity of claims raised the possibility of endless litigation.

4. From an early date, therefore, the Administrators were looking to find alternative ways to agree claims for the purposes of both asset distribution and distributions to unsecured financial creditors. There were potentially enormous savings in cost, and the prospect of making distributions substantially more quickly than if claims were dealt with on a

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[1] Wentworth understands there to be no substantive issue for decision on Issue 9, which concerns the question of whether a creditor's accession to the CRA would impact upon the answers to Issues 7 and 8: see Part 6 below.

bilateral basis with each creditor separately. This would benefit the estate as a whole and all its stakeholders.

5. This desire for a quicker and cheaper distribution of assets and money led, initially, to the proposal for a scheme of arrangement dealing both with assets held on trust and a distribution to unsecured creditors. Once the Court found that there was no jurisdiction for such a scheme, the Administrators, in conjunction with creditor representatives, developed the CRA and, thereafter, the various forms of CDD.

6. It is a common feature of bilateral compromises that they seek to achieve certainty and finality of the relationship between the compromising parties. The agreements in this case are no exception. There are two essential features of any such compromise: first, the identification of the sum at which the creditor's claim was agreed (or an agreed mechanism for arriving at that sum) and, second, the waiver and release of all other claims as between LBIE and the creditor.

7. This is a perfectly legitimate and commercially sensible process for the Administrators to adopt, especially when faced with the prospect of endless litigation with and among sophisticated creditors with significant financial resources. The Administrators owe duties to the estate as a whole, and all of its stakeholders, in whose interest it is that the claims of creditors are determined as quickly and cheaply as possible.

8. Although the language used in the CRA and the various forms of CDD is not uniform, in most cases the language clearly and unambiguously releases all claims (in both directions) in exchange for the compromise as to the sum claimed.

9. It is not suggested by the SCG that the release of claims is generally ineffective. Instead, it is claimed that the compromise and release effected by the CRA and various forms of the CDD (1) carries no commercial value and (2) does not prevent creditors asserting non-provable claims against LBIE, either as a matter of construction or because to allow the Administrators to enforce the compromises and releases agreed upon would breach the principle in *Ex Parte James* or constitute 'unfair harm' within the meaning of paragraph 74 of Schedule B1 to the Insolvency Act 1986.

10. The two types of non-provable claim that are in issue are, first Currency Conversion Claims and, second, non-provable claims to interest.

11. The SCG's arguments should be rejected, for the reasons developed in this skeleton. What follows is a brief overview.

12. First, the width of the language used in the agreements is wholly incompatible with the notion that the compromise and release of claims was to be limited to such claims as would otherwise be admitted to proof.

13. Second, the twin objectives of certainty and finality are also incompatible with that notion.

14. So far as Currency Conversion Claims are concerned, the *sine qua non* of the claim is a contractual entitlement to be paid in a currency other than sterling. The claim exists because the creditor is not paid, via distributions in sterling from the insolvency estate, the full amount of its foreign currency debt once the sterling payments are reconverted to the foreign currency at the date of payment. The reason that such a claim is maintainable against a surplus arising after payment of all proved debts and Statutory Interest is because the enforced conversion of the claim into sterling under Rule 2.86 is for the purposes of proof only.[2]

15. Where a creditor has no contractual right to be paid in a currency other than sterling, then there is simply no basis for a Currency Conversion Claim. Where a creditor who once had a right to be paid in a foreign currency has entered into a compromise of its claims which crystallises them into a sum denominated in sterling, then it equally has no Currency Conversion Claim. The reason it does not get paid in the foreign currency is that it has compromised any right it had to be paid in a foreign currency and instead *agreed* to be paid in sterling. Where, as is the case in all of the relevant CDDs under consideration, the creditor has expressly released all of its claims other than the right to be paid that specific sterling sum, the matter is put beyond any doubt.

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[2] Judgment in Waterfall I.

16. So far as non-provable claims to interest are concerned, the wording of the relevant agreements, in barring or releasing claims to interest (other than pursuant to Rule 2.88) is clear, as developed below.

17. In these circumstances, the SCG advances the alternative argument that the Administrators should not be entitled to enforce that part of the CRA or relevant CDDs that precludes creditors from asserting Currency Conversion Claims or non-provable claims to interest.

18. For reasons developed at Part 5 below, there is no conceivable basis upon which the Administrators' conduct can be said to fall foul of the principle in *Ex Parte James* or that the enforcement of contracts freely entered into between creditors and LBIE could be said to constitute unfair harm within the meaning of paragraph 74 of Schedule B1.

19. The release of potential claims by the creditor is but one part of the overall bargain between the creditor and LBIE, by which a fixed sum was agreed upon for the creditor's claim and all claims (both ways) between LBIE and the creditor were compromised. There can be no justification for relieving the creditor of part only of the overall bargain made. Moreover, the SCG does not and could not contend that it would accord with natural justice to require the bargain as a whole to be undone, thus destroying the savings in time and costs which the CRA/CDD process was designed to achieve.

PART 2: ISSUE 34

Whether (as a matter of construction) a creditor's Currency Conversion Claim and/or any other non-provable claim has been released in circumstances in which the creditor entered into either:

(i) *a Foreign Currency CDD incorporating a Release Clause;*

(ii) *a Sterling CDD incorporating a Release Clause; or*

(iii) *the CRA.*

A PRINCIPLES OF INTERPRETATION

20. The principles of construction are well known. The "golden rule", as stated in *Lewison, The Interpretation of Contracts* (5th Ed) at para 5.01, is:

> "*The words of a contract should be interpreted in their grammatical and ordinary sense in context, except to the extent that some modification is necessary in order to avoid absurdity, inconsistency or repugnancy.*"

21. The task for the Court is therefore to consider the ordinary and natural meaning of the wording of the release provisions found in the CRA and the CDDs as viewed against the relevant factual matrix.

22. The provisions in issue on this application are waivers and releases of claims. The same principles of construction apply to such clauses as apply to all contracts: *BCCI v Ali* [2002] 1 AC 251, at [8].

23. The process has been described in recent authorities as an "iterative" one, involving "*checking each of the rival meanings against other provisions of the document and investigating its commercial consequences*": see for example *Napier Park European Credit Opportunities Fund Ltd v Harbourmaster Pro-rata CLO 2 BV* [2014] EWCA Civ 984, per Longmore LJ at [31], approving the description of the process by Lord Mance in *Re Sigma Finance Corp* [2010] 1 All ER 571.

24. Where, however, the words the parties have used are clear and unambiguous, then the Court should be slow to depart from them unless they produce a commercial absurdity. In this regard:

(1) It has been made clear by Lord Hoffmann, on a number of occasions, that the primary source for understanding what the parties meant is their language interpreted in accordance with conventional usage: see *BCCI v Ali* [2002] 1AC 251, at [39]; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1109, at [14]-[15].

(2) In *Skanska Rashleigh Weatherfoil Ltd v Somerfield Stores Ltd* [2006] EWCA Civ 1732, Neuberger LJ cautioned against departing from the natural meaning of the words in the contract (at [21]-[22]):

> "*…The contract will contain the words the parties have chosen to use in order to identify their contractual rights and obligations. At least between them, they have control over the words they use and what they agree, and in that respect the words of the written contract are different from the surrounding circumstances or commercial common sense which the parties cannot control, at least to the same extent.*
>
> *Particularly in these circumstances, it seems to me that the court must be careful before departing from the natural meaning of the provision in the contract merely because it may conflict with its notions of commercial common sense of what the parties may must or should have thought or intended. Judges are not always the most commercially-minded, let alone the most commercially experienced, of people, and should, I think, avoid arrogating to themselves overconfidently the role of arbiter of commercial reasonableness or likelihood."*

(3) Sir Anthony Clarke MR stated the principle in the following terms in *Pratt v Aigaion Insurance Company SA* [2009] 1 Lloyd's Rep 225, at [12]:

> "*As Lord Mustill put it in Charter Reinsurance v Fagan [1997] AC 313, at 384C-D: 'Subject to [the use of a specialist vocabulary] the inquiry will start, and usually finish, by asking what is the ordinary meaning of the words used'*."

(4) In *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900, Lord Clarke stated as follows (at [23]):

> "*Where the parties have used unambiguous language, the court must apply it.*"

25. Moreover, the Court should be slow to impose its own notions of commerciality on the parties. For example:

(1) In *Chartbrook Ltd v Persimmon Homes Ltd*, Lord Hoffmann identified that it is not for the Court to introduce its own concepts of fairness when construing an instrument. He stated as follows (at [20]):

> "*It is of course true that the fact that a contract may appear to be unduly favourable to one of the parties is not a sufficient reason for supposing that it does not mean what it says. The reasonable addressee of the instrument has not been privy to the negotiations and cannot tell whether a provision favourable to one side was not in exchange for some concession elsewhere or simply a bad bargain.*"

(2) In *Pink Floyd Music Ltd v EMI Records Ltd* [2011] 1 WLR 770, Lord Neuberger MR outlined the caution that a Court must take before departing from the natural and ordinary meaning of the words used in the contract (at [20]-[21]):

> "*Further, as Lord Hoffmann also made clear in Investors Compensation [1998] 1 WLR 896, there is a difference between cases of ambiguity, which may result in giving the words a meaning they can naturally bear, even if it is not their prima facie most natural meaning, and cases of mistake, which may result from concluding that the parties made a mistake and used the wrong words or syntax. However, he emphasised the court does "not readily accept that people have made mistakes in formal documents" — Chartbrook [2009] 1 AC 1101, para 23. He also pointed out in paragraph 20, that, as the court, and therefore the notional reasonable person, cannot take into account the antecedent negotiations, the fact that the natural meaning of the words appears to produce "a bad bargain" for one of the parties or an "unduly favourable" result for another, is not enough to justify the conclusion that something has gone wrong. One is normally looking for an outcome which is "arbitrary" or "irrational", before a mistake argument will run.*
>
> *Accordingly, before the court can be satisfied that something has gone wrong, the court has to be satisfied both that there has been "a clear mistake" and that it is clear "what correction ought to be made" (per Lord Hoffmann in Chartbrook [2009] 1 AC 1101, paras 22-24, approving the analysis of Brightman LJ in East v Pantiles (Plant Hire) Ltd (1981) 263 EG 61, as refined by Carnwath LJ in KPMG LLP v Network Rail Infrastructure Ltd [2007] Bus LR 1336).*"

(3) In *Anthracite Rated Investments (Jersey) Ltd v Lehman Brothers Finance SA* [2011] 2 Lloyd's Rep 538, Briggs J expressed the point in the following terms (at [70]):

> "*Finally, there is an important difference between a conclusion that the ordinary or grammatical meaning of the language of a particular provision leads to a conclusion that flouts business common sense, and the subjection of a complex and carefully prepared scheme to reinterpretation on the grounds of mere fairness or enhanced reasonableness. The former is legitimate but the latter is not.*"

B THE NATURE OF THE CLAIMS WHICH HAVE BEEN RELEASED

26. Issue 34, as amended, concerns the release of so-called "Currency Conversion Claims" and other non-provable claims. The only other non-provable claim that has so far been identified is the claim of creditors to receive such contractual or other pre-commencement entitlement to interest on their claims as has not been satisfied by the payment of Statutory Interest. The following possibilities were canvassed in Part A of the Application: a claim for interest calculated on the basis of *Bower v Marris*; a claim for such interest as would be payable if it continued to be compounded beyond the relevant period contemplated by Rule 2.88(7); and a claim for damages for late payment of money.[3]

27. Although these two different types of claim have been identified, in truth they have the same legal basis, namely a creditor's (alleged) entitlement to satisfaction of such contractual rights as it had prior to the commencement of the insolvency process which have not been satisfied from payments made under the statutory process by way of dividend and Statutory Interest.[4]

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[3] Issue 34 proceeds on the assumptions that (a) Currency Conversion Claims exist, which depends upon the outcome of the appeal in Waterfall I; and (b) there is a non-provable claim in respect of unsatisfied claims to interest, which depends upon the outcome of the decision in Part A of Waterfall II, and any appeal therefrom.

[4] The interplay between the two different aspects of the claim to be remitted to pre-commencement contractual rights (interest/currency) is one of the issues in Part A of Waterfall II.

28. The release provisions in the relevant agreements are addressed in the following order:

(1) First, the release of non-provable claims in respect of interest by the CRA; and

(2) Second, the release of non-provable claims by the CDDs.

C THE CRA

29. A copy of the CRA is at [3/315-492].

30. Wentworth's position in relation to the CRA is, in summary, that a creditor who entered into the CRA waived any right it may have had to a non-provable claim for interest. Where a creditor had a contractual entitlement to be paid in USD, Wentworth does not contend that the CRA had any effect on such creditor's right, if any, to a Currency Conversion Claim[5]. The impact of the CRA on creditors with a contractual entitlement to be paid in sterling or another non-USD currency is considered in connection with Issue 38 below.

C1: The CRA in context

31. The genesis of the CRA is set out at the SAF, [29]-[48] [1/18]. In brief, the form and content of the CRA evolved from the draft scheme of arrangement, which was developed initially in response to the Administrators' desire to provide a relatively streamlined procedure for returning Trust Assets to creditors.

32. Once it was held that the Court had no jurisdiction to sanction a scheme in relation to Trust Assets, the Administrators set about including the core terms from the draft scheme in the terms of a bilateral contract which operated so as to compromise the claims in relation to Trust Assets and the claims in relation to financial contracts, with a view to obtaining the agreement of as many creditors as possible to such terms.

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[5] Wentworth does contend, however, as dealt with in Part D5 below, that a creditor who entered into a CDD in respect of its claim under the CRA (referred to as a CRA CDD) where its claim was denominated in sterling, does not retain a Currency Conversion Claim.

33. Although the CRA was proposed for collective approval (and became effective only once a critical mass of creditors had signed up to it), it was developed in conjunction with a working group including representatives of each of the members of the creditors' committee.

C2: The purpose of the CRA

34. The purpose of the CRA is primarily to be gleaned from its terms as a whole and the documents supplied to creditors along with it.

35. Similar to the practice of providing an explanatory statement along with a scheme of arrangement, the CRA was provided to creditors along with a detailed circular (the "Circular") explaining its purpose and key terms. A copy of the Circular is at [3/209-313].

36. Recital (B) to the CRA [3/323] provides that LBIE and the Signatories have entered into the CRA *"to release, modify and agree all Claims of the Signatories relating to Trust Assets and Financial Contracts … in exchange of mechanisms to: (i) determine the Asset Claims to Trust Assets and to effect Distributions and Appropriations of Distributable Trust Assets to TA Signatories*[6] *… (iv) determine, quantify and crystallise the value of unsecured claims … of TA Signatories …. (v) determine the Net Financial Liability, Pre-Administration Client Money Shortfall Claim and Net Financial Claim of all Signatories…*"

37. "*Financial Contract*" is defined (p.III-139 of the Circular [3/453]) as any bilateral or multilateral contract entered into before the Administration Date relating to one or more transactions or positions of a financial nature. This included Master Agreements (such as ISDA, GMSLA etc.). The other defined terms, so far as material, are explained further below.

38. The objective of the CRA was stated in clear terms at paragraph 4 of the Letter from the Administrators at p.I-2 of the Circular [3/217]:

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[6] A "*TA Signatory*" is a Signatory that asserts, or LBIE believes has, an Asset Claim (in essence, a proprietary claim to assets held by LBIE).

> *The objective of the [CRA] is to establish standard methods for the termination and valuation of Financial Contracts and to expedite the process of asset distribution in order to bring finality to Signatories in respect of these positions."*

39. The purpose of the mechanism for the termination and valuation of Financial Contracts is further addressed at paragraph 4.3 of the Letter [3/219]. It makes clear that it is aimed at establishing a single net claim against or liability to LBIE and that a net claim against LBIE is to constitute the claim of the creditor against LBIE for the purposes of any distributions by LBIE:

> "*The Agreement establishes a mechanism for the termination and close-out of all Financial Contracts between a Signatory and the Company. The claims or liabilities under each such contract are netted off under the [CRA] to determine a single net claim against or liability to the Company. In the event that the net figure is a claim against the Company, this will be an ascertained unsecured claim against the Company for the purposes of any future distribution from the general estate of the Company.*

40. Creditors were informed by paragraph 5 of the same letter that the advantages of entering into the CRA included that it was expected to, among other things, expedite the return of Trust Assets and "*provide finality and certainty regarding the financial position between Signatories and the Company*".

41. Creditors were also informed (at paragraph 4.1(v) of the Reader's Guide to the CRA, p.I-19 of the Circular [3/234]) that:

> *"One of the main purposes of the [CRA] from the Company's perspective is to obtain a release from the Signatories to claims they might otherwise have against the Company and the Administrators, including any claims for consequential damage … In exchange for the releases being provided by the Signatories, the Signatories receive new claims against the Company*"

C3: The material terms of the CRA

42. Part II of the Circular (pages II-1 to II-40) [3/216-287] contains a summary of the principal provisions and effect of the CRA. It is divided into 18 Parts. Before turning to the provisions which are directly relevant to the release of claims to interest, the following matters are highlighted:

(1) Part 1 contains general provisions, including as to the effect of the CRA on creditors' unsecured claims, and the claims of LBIE against creditors [3/234-235].

(2) Part 7 contains the mechanism for determining creditors' claims [3/237]. In brief:

(a) Open financial contracts are deemed to be terminated (19.1) [3/350];

(b) The Close-out Amount (defined as the single net amount payable to or from LBIE as a result of termination of a Financial Contract) is determined in accordance with, in order of hierarchy: (i) the Contractual Valuation Methodology (in essence, the valuation mechanism contained in the relevant Financial Contract); (ii) the Agreed Valuation Methodology (in essence, the methodology agreed between the parties if it is not practicable to use the Contractual Valuation Methodology); or (iii) the Fallback Valuation Methodology (20.1 & 20.2) [3/350-51];

(c) The valuation of the Close-out Amount is, however, always subject to the Overriding Valuation Provisions (20.4) [3/351], including that (i) it is to be determined (save in relation to Short Positions or Rehypothecated Securities) as at the Open Contract Termination Date (the last business day in the month in which the creditor acceded to the CRA), and (ii) no interest is to accrue on unpaid liabilities due from LBIE after the Administration Date save to the extent such interest would accrue under Rule 2.88.

(d) All Close-out Amounts shall be denominated in US dollars, and any Close-out Amount denominated in another currency is converted into US dollars as of the Relevant FX Conversion Time (which for these purposes is the Administration Date) (24.1) [3/361-62].

(e) Where the Close-out Amount is expressed as a positive number, then it becomes the creditor's Net Financial Claim. Where it is a negative

number, then it is the creditor's Net Financial Liability (25.1 & 25.2) [3/362].

(3) Part 11 ("*Appropriation and Distribution*") contains provisions dealing with the appropriation of trust assets to reduce amounts owing by LBIE to the creditor including the Net Financial Liability of the creditor.

43. The basic architecture of the CRA, so far as it affects creditors' unsecured claims, is that creditors waive and release all Claims (very broadly defined) against LBIE in exchange for the right to claim as new obligations of LBIE the net amount determined to be due to them under the CRA.

44. This is achieved by the following provisions:

(1) **Clause 4.2**: each signatory agrees to "*waive and release…all Claims…in respect of any Financial Contract*" [3/326].

(2) "*Claim*" is defined very broadly as a claim in law or in equity "*of whatsoever nature*" [3/446], and includes claims arising from the termination of any contractual obligation, or any failure of a person to perform any contractual obligation, or any claim for loss computed by reference to value which may have been available had an obligation been duly performed in a timely manner, or otherwise.

(3) Such released claims are defined (with other released claims) as the "Released Claims" [3/326].

(4) **Clause 4.4.2:** *"All Signatories shall have their Released Claims exchanged for the following as appropriate…"* [3/327]:

(a) "*the right to have their Net Contractual Position, Allocations, Distributions and Appropriations determined on the basis set out in this Agreement*" ("Net Contractual Position" means the Close-out

Amount, i.e. the amount payable on termination of a Financial Contract: clause 24.2);

(b) "*the right to claim as a new obligation of the Company their Net Financial Claim (if any)*" ("*Net Financial Claim*" means a "*Net Contractual Position in respect of a Signatory expressed as a positive number will represent an amount due and owing by the Company to that Signatory, which shall constitute an ascertained unsecured claim of that Signatory in the winding up of the Company or any distribution of the Company's assets to its unsecured creditors*"; and

(c) "*an Ascertained Claim (if any) for such amount as is determined under this Agreement*" (An "*Ascertained Claim*" is "*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) Such claims are defined as the "*New Claims*".

(6) **Clause 24.1**: "*All Close-out Amounts shall be denominated in US dollars*." It stipulates a spot rate for the conversion of non-US dollar amounts at close of business on the date of the Administrators' appointment.

(7) The Net Financial Claim so ascertained was to be set off against (any) Trust Assets held for the Creditor.

45. Express provision is made for interest accruing on creditors' claims.

46. First, by **Clause 25.1** [3/362]: "*For the avoidance of doubt no interest shall accrue on any Net Financial Claim, save to the extent provided in Rule 2.88 of the Insolvency Rules*".

47. Second, by **Clause 20.4.7** [3/352]: "*[I]n determining the Close-out Amount in respect of a Financial Contract, no interest shall accrue on any unpaid liability of [LBIE] from the Administration Date save to the extent that such interest would accrue under Rule 2.88 of the Insolvency Rule*."

C4: The effect of the CRA is to release any non-provable claims for interest

48. The clear and unambiguous wording of the CRA removes the right of creditors to claim interest on their claim against LBIE save to the extent that they are entitled to interest under Rule 2.88.

49. First, the nature of "*Claims*" released is clearly broad enough to include a claim for interest.

50. Second, the only claim which remains after execution of the CRA is the Net Financial Claim (described as a new obligation of LBIE in clause 4.4.2 [3/327]), and clause 25.1 [3/362]states expressly that no interest shall accrue on that claim save as provided under Rule 2.88.

51. Third, the effect of clause 20.4.7 [3/352] is as follows:

(1) It is part of clause 20.4 which sets out the Overriding Valuation Provisions, pursuant to which the Close-out Amounts due to all creditors are to be determined;

(2) It applies to the determination of a Close-out Amount, i.e. to the calculation of the amount due upon termination of a Financial Contract. The Close-out Amount is required to be determined so far as possible in accordance with the provisions of the relevant Financial Contract (clauses 21.1 & 21.2 [3/352]);

(3) The mechanism for determining a Close-out Amount under a Financial Contract will often require amounts due either way under the contract to be netted off as at the calculation date;

(4) Where Clause 20.4.7 states that in determining the Close-out Amount "*no interest shall accrue on any unpaid liability*" it can only be referring to interest which the relevant contract provides should be calculated on unpaid liabilities up to the calculation date, and thus is taken into account in the netting process to arrive at the Close-out Amount;

(5) In other words, it can only be referring to interest which the Financial Contract requires to be paid;

(6) The fact that it provides a saving for the accrual of such interest, to the extent it would accrue under Rule 2.88, confirms that such interest does not *otherwise* accrue.

52. Fourth, the consequence of the above provisions is that any contractual right to interest on the creditor's sole remaining claim against LBIE is removed, as part of the overall compromise intended to provide finality as between the creditor and LBIE. Accordingly, the essential pre-requisite for a non-provable claim to interest, namely the remission to contractual rights, is removed.

53. Fifth, to the extent that it is contended that any right to interest is not premised upon remission to a contractual right to interest, then such right is clearly released by the wide definition of Claims released, and by the bar in clause 25.1 [3/362] "*for the avoidance of doubt*" of *any* interest accruing on the Net Financial Claim after the Date of Administration, save to the extent provided in Rule 2.88.

54. If the SCG suggests that it was not the purpose of the CRA to release any claims other than those which would be provable, then that is clearly wrong. First, the language of the release provisions (set out above) cannot be read as limited in that way. Second, such limitation is flatly inconsistent with the fact that one of the purposes of the agreement was to enable any net liability of the creditor to LBIE to be offset against the creditor's entitlement to recover trust property. Since the claim to recover trust property stands outside the proof process, it is essential in determining the existence and quantum of any net liability of the creditor to LBIE, in order to identify the extent to which such net liability could be set against the trust claim, that the liabilities taken into account extend beyond those which could qualify for proof.

D THE CDDs

55. The documents to be considered in the context of Issue 34 include numerous forms of CDD.

56. As a preliminary point, Wentworth does not contend that a CDD which defines the creditor's non-released claim in the foreign currency of its original contractual entitlement has the effect of releasing a Currency Conversion Claim, to the extent that such claims are otherwise found to exist, by that creditor. Such a CDD does, however, release other non-provable claims (including non-provable claims to interest).

57. In attempting to categorise the universe of CDD templates in use during the course of the administration, there are two key distinguishing elements: first, the type of template, which varied according to the purpose for which the template was designed (e.g., creditors with or without client money claims, or trust asset claims) and, second, the amendments made across many of the template-types over time (e.g. to include language expressly preserving the right to Statutory Interest, or – in the latest versions – to Currency Conversion Claims).

58. The universe of CDD templates used during the course of the administration, along with the time when such templates were introduced, is described in Lomas 10. Appendix A to Lomas 10 [2/2/30-38] lists the many categories, and sub-categories of those templates. Since creditors were sometimes permitted to negotiate bespoke variations (Lomas 10, [8], [45] and [57]) [2/2/3, 15 and 19], the total universe of CDDs in use will be greater, but such bespoke variations are outside the ambit of this application. Exhibit AVL10 contains examples of each of the templates referred to in Appendix A.

59. The actual versions of the various templates exhibited in AVL10 are, however, of limited use for the purposes of this application, because save for a few exceptions Mr Lomas has exhibited only the latest versions of each template. They therefore include all of the language expressly preserving claims to Statutory Interest and Currency Conversion Claims.

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

61. So far as the release of Currency Conversion Claims is concerned, however, the only version of each CDD template that it is relevant to consider is the version *prior* to the inclusion of the preservation language. Wentworth accepts that those carve-outs are effective, and Wentworth does not therefore contend that there has been a release of any Currency Conversion Claim where the relevant CDD contains that carve-out language.

62. The parties are agreed that it would assist to approach the questions of construction raised by Part B by reference to real examples of CDDs entered into by creditors. These real examples were provided by the Administrators during the afternoon of 29 April 2015. They can be found in the CDD Bundle.

63. Wentworth focuses in this skeleton on a selection only of the CDDs in the CDD Bundle, on the basis that the arguments as to construction, once demonstrated in relation to the selected CDDs, are equally applicable to the remaining variants. The late production of the example CDDs to be included in the CDD Bundle means that Wentworth and its legal advisors have not had sufficient time before the date for service of this skeleton to complete a detailed review of every example CDD. To the extent that there are any further differences in any of the remaining CDDs that Wentworth would wish to rely on, it will bring them to the attention of the Court at the hearing.

64. For the purposes of the questions raised by this application, the CDD templates can be divided into the following categories:

(1) **Agreed Claims CDDs**. In the period 30 November 2010 to April 2011 (Lomas 10, [53]-[54]), the principal template was that for Agreed Claim CDDs. The Agreed Claims CDDs were intended to accommodate the uncertainty over whether the creditor's claim was a Client Money Claim, or a claim against the administration estate. It did this by agreeing the amount of the creditor's claim,

but leaving it for later determination or agreement whether it constituted a client money claim (Lomas 10, [49] SAF, [68]). The Administrators have provided six real examples of Agreed Claim CDDs:

(a) An Agreed Claims Sterling CDD with no carve-outs to the release clause for Statutory Interest or Currency Conversion Claims: Tab 2(a) of the CDD Bundle [11/4];

(b) An Agreed Claims Sterling CDD with a carve out to the release clause for Statutory Interest, but no carve-out to the release clause for Currency Conversion Claims: Tab 2(b) of the CDD Bundle [11/5];

(c) An Agreed Claims Sterling CDD with a carve out to the release clause for both Statutory Interest and Currency Conversion Claims: Tab 2(c) of the CDD Bundle [11/6**]**;

(d) An Agreed Claims Foreign Currency CDD with no carve-outs to the release clause for Statutory Interest or Currency Conversion Claims: Tab 1(a) of the CDD Bundle [11/1];

(e) An Agreed Claims Foreign Currency CDD with a carve out to the release clause for Statutory Interest, but no carve-out to the release clause for Currency Conversion Claims: Tab 1(b) of the CDD Bundle [11/2]; and

(f) An Agreed Claims Foreign Currency CDD with a carve out to the release clause for both Statutory Interest and Currency Conversion Claims: Tab 1(c) of the CDD Bundle [11/3].

(2) **Admitted Claims CDDs**. From April 2011, once the uncertainty over client money claims had diminished, the Administrators introduced the Admitted Claims CDD which operated such that the agreed amount of a claim would become an Admitted Claim immediately upon execution (Lomas 10, [54] and [73]) [2/2/18 and 24-25]. All Admitted Claims CDDs fixed the claim of the

creditor in sterling. The Administrators have provided three real examples of Admitted Claims CDDs:

(a) An Admitted Claims CDD with no carve-outs to the release clause for Statutory Interest or Currency Conversion Claims: Tab 3(a) of the CDD Bundle [11/7]. This is the CDD which was appended to Wentworth's position paper;

(b) An Admitted Claims CDD with a carve out to the release clause for Statutory Interest, but no carve-out to the release clause for Currency Conversion Claims: Tab 3(b) of the CDD Bundle [11/8]; and

(c) An Admitted Claims CDD with a carve out to the release clause for both Statutory Interest and Currency Conversion Claims: Tab 3(c) of the CDD Bundle [11/9].

(3) **Aggregator CDDs**. These were designed for use by funds to whom the claims of a number of original creditors had been assigned. These CDDs released the claims of the original creditors that had been transferred to the fund (Lomas 10, [62]) [2/2/21]. The Administrators have provided five real examples of Aggregator CDDs:

(a) An Agreed Claims Sterling CDD with no carve-outs to the release clause for Statutory Interest or Currency Conversion Claims Tab 4(b) of the CDD Bundle [11/11];

(b) An Admitted Claims CDD with no carve-outs to the release clause for Statutory Interest or Currency Conversion Claims: Tab 4(e) of the CDD Bundle [11/14];

(c) An Agreed Claims Foreign Currency CDD with no carve-outs to the release clause for Statutory Interest or Currency Conversion Claims: Tab 4(a) of the CDD Bundle [11/10];

(d) An Agreed Claims Foreign Currency CDD with a carve out to the release clause for Statutory Interest, but no carve-out to the release clause for Currency Conversion Claims: Tab 4(c) of the CDD Bundle [11/12]; and

(e) An Agreed Claims Foreign Currency CDD with a carve out to the release clause for both Statutory Interest and Currency Conversion Claims: Tab 4(d) of the CDD Bundle [11/13].

(4) **CRA CDDs**. Those creditors who entered into a CRA released certain claims in return for a Net Financial Claim as defined under the CRA. Although it was not strictly necessary for such creditors also to enter into a CDD, LBIE's policy was to request creditors to do so (Lomas 10, [63]) [2/2/21-22]. The form of the CRA CDDs differ from the other templates, largely because of their interaction with the CRA. There are, broadly, two types of release clause included in the CRA CDDs, a wide version that is similar to the Agreed Claim CDD, and a narrow version which denominated the Net Financial Claim in an amount and releases certain rights and claims. The Administrators have provided eight real examples of CRA CDDs:

(a) A CRA Sterling CDD with wide release language and no carve-outs to the release clause for Statutory Interest or Currency Conversion Claims: Tab 5(a)(i) of the CDD Bundle [11/15];

(b) A CRA USD CDD with wide release language and no carve-outs to the release clause for Statutory Interest or Currency Conversion Claims Tab 5(a)(ii) of the CDD Bundle [11/16];

(c) A CRA Sterling CDD with narrow release language and no carve-outs to the release clause for Statutory Interest or Currency Conversion Claims: Tab 5(b)(i) of the CDD Bundle [11/17];

(d) A CRA USD CDD with narrow release language and no carve-outs to the release clause for Statutory Interest or Currency Conversion Claims: Tab 5(b)(ii) of the CDD Bundle [11/18];

(e) An Original Tiered CDD with no carve-outs to the release clause for Statutory Interest or Currency Conversion Claims: Tab 5(c) of the CDD Bundle [11/19];

(f) An Original Tiered CDD with a carve out to the release clause for Statutory Interest, but no carve-out to the release clause for Currency Conversion Claims Tab 5(d) of the CDD Bundle [11/21];

(g) An Additional Tiered CDD with a carve out to the release clause for Statutory Interest, but no carve-out to the release clause for Currency Conversion Claims: Tab 5(e) of the CDD Bundle [11/22]; and

(h) An Additional Tiered CDD with a carve out to the release clause for both Statutory Interest and Currency Conversion Claims: Tab 5(f) of the CDD Bundle [11/23].

65. As noted above, over time there were carve-outs introduced to the release of claims:

(1) In **early September 2012**, the Administrators agreed to insert language into the various CDD templates expressly carving out claims in respect of Statutory Interest from the scope of the releases (Lomas 10, [70] and [73]) [2/2/23-25].

(2) In **February 2014**, the Administrators agreed to insert language into the various CDD templates expressly carving out Currency Conversion Claims from the scope of the releases (Lomas 10, [78]-[80]) [2/2/26-27].

66. The Release Clause in each of the CDD templates is in materially the same form as the wording appended to the Application Notice, and set out at Lomas 10, [59] [2/2/19], save (a) for the CRA CDDs, and (b) for minor variations which will be picked up in considering the detail of the CDDs below.

67. Many of the arguments relating to construction of the CDDs are the same, irrespective of the particular form of CDD under consideration.

68. For that reason, the structure adopted in this part of the skeleton is to address one form of CDD (the Admitted Claims CDD) in particular detail, before addressing any differences that exist in relation to the other forms.

69. The reason the Admitted Claims CDD is addressed first is because the Agreed Claim Amount in such CDDs was always denominated in sterling, such that this form of CDD is economically the most significant in connection with the release of Currency Conversion Claims.

D1 THE CDDS IN CONTEXT

70. The factual context in which the CDDs were entered into is summarised in the SAF [1/18]. The summary in the following paragraphs is taken from the SAF.

71. In April 2010, the Administrators envisaged that approximately 4,500 counterparties were likely to be creditors of LBIE (Lomas 10 at [32]; SAF 50).

72. The majority of LBIE's unsecured creditors have claims arising under complex financial trading contracts (Lomas 10 at [33]; SAF 51).

73. The "Consensual Approach" (known internally within LBIE as Project Canada) was described to creditors in the Administrators' Fourth Progress Report dated 14 October 2010 (section 6.1). This approach was developed in consultation with the Unsecured Creditors' Resolution Working Group, which included members of the Creditors' Committee (Lomas 10 at [42]; SAF 52).

74. One of the objectives of Project Canada was to simplify and accelerate the claims determination and distribution process by developing and implementing an alternative framework to the standard insolvency proving regime (Lomas 10 at [34] and [42]). The Administrators intended to use CDDs, amongst other things, to streamline the process of creditors agreeing the valuation of their claim amounts, to enable them to make

distributions in respect of these claims (Lomas 9 at [61]; Lomas 10 at [47-48]; and Fourth Progress Report, page 29; SAF 53).

75. Project Canada proceeded on the basis that LBIE would offer a creditor a single number representing LBIE's determination of the creditor's claim taking account of the positions under all Financial Contracts between LBIE and the creditor (the "LBIE Determination") (Lomas 10 at [44]). The LBIE Determination was usually made in the currency of a creditor's entitlement (to the extent the creditor's underlying entitlements were denominated in more than one currency, in the currency in which the largest element of the aggregate claim was denominated; SAF 54).

76. LBIE formally commenced the communication of LBIE Determinations to creditors in November 2010 (Lomas 10 at [46]; SAF 55).

77. Creditors were advised that the LBIE Determination was not intended to be a matter for negotiation and that they were entitled either to accept or reject it. If the LBIE Determination was accepted, the agreement would be formalised in a CDD (provided the other terms thereof were accepted by the creditor). Creditors were also advised that if the LBIE Determination was rejected then they would be able to negotiate their claims on a bilateral basis at a later stage (Lomas 10 at [45]), albeit this alternative would have taken significant time to conclude and, in exceptional cases, may have required court adjudication (Fourth Progress Report, page 29; SAF 56).

78. The LBIE Determination was presented to the creditor as a single number. No breakdown of the claim amount recorded in each CDD was agreed as between LBIE and the relevant creditor; neither was the value attributed by LBIE to individual Financial Contracts or trading positions usually shared with the creditor (Lomas 11 at [68]; SAF 57).

79. When the Administrators provided creditors with a draft CDD for their consideration, it was usual practice that the creditor received a standard form covering email. The precise wording of this email evolved over time but generally highlighted that (Lomas 10 at [56]):

(1) the terms of the CDD, once executed, would establish the agreed claim amount which the counterparty would have against LBIE (Lomas 10 at [56.1]); and

(2) the counterparty should take independent professional advice on the contents of the deed before executing it (Lomas 10 at [56.2]).

80. Whilst the CDDs were circulated under cover of an email that stated they were non-negotiable, LBIE did consider proposed amendments at the request of creditors on a case by case basis (Lomas 10 at [57] to [58]; SAF 84).

81. The Administrators have sought, so far as reasonably possible, to ensure that CDDs remain relatively standardised, although they have evolved to some extent over time (Lomas 10 at [57]; SAF 59).

82. In particular, the Administrators have made global revisions to the CDD templates from time to time in circumstances where a particular amendment was being commonly accepted by LBIE (Lomas 10 at [58]; SAF 60).

83. As at July 2014, over 1,500 CDDs had been entered into with approximately 1,180 different counterparties.

84. The primary purpose of the CDDs was stated by the Administrators to be to provide an efficient process for agreeing the amount of a creditor's claim such that distributions could be expedited (Lomas 10 at [48]; SAF 63).

85. Part of this purpose, from the Administrators' perspective, was served by ensuring that, once a claim amount (whether an "Agreed Claim" or "Admitted Claim") had been agreed, it could not subsequently be reopened by the creditor (Lomas 10 at [48]); SAF 64).

86. Entering into a CDD:

(1) gave a creditor certainty as to the amount of its claim and, upon the claim becoming an Admitted Claim pursuant to the terms of the CDD, an entitlement to

participate in such dividends as would be paid in the Administration (Lomas 10 at [48]; SAF 65);

(2) enabled a creditor more easily to realise immediate value by selling its claim (Lomas 10 at [48] and [63]).

87. The CDDs contained a transfer notice mechanism that ensured that in the event that the creditor wanted to sell its claim both the creditor and the Administrators had a defined process by which the claim assignment would be acknowledged by LBIE. The transfer notice has become widely recognised in the market as the accepted procedure for LBIE acknowledging the assignment of claims (Lomas 10 at [48] and [63]; SAF 66).

88. The release provisions in the variations of CDD template are considered in the following order:

(1) First, the release of non-provable claims by the Admitted Claims CDD;

(2) Second, the release of non-provable claims by the Agreed Claims CDD, identifying any different or additional arguments that apply in the case of that template;

(3) Third, the release of non-provable claims by the Aggregator CDDs, identifying any different or additional arguments that apply in the case of that template; and

(4) Fourth, the release of Currency Conversion Claims by the CRA CDDs (any other non-provable claims having been released by the CRA).

D2: ADMITTED CLAIMS CDDS

89. In summary, Wentworth's position in relation to Admitted Claims CDDs is as follows:

(1) The CDD has the effect of releasing a Currency Conversion Claim, both where the CDD did not contain any carve-out language for Statutory Interest and where it contained such language.

(2) The CDD had the effect of releasing a non-provable claim for interest, irrespective of whether it included any carve-out language relating to Statutory Interest or Currency Conversion Claims.

90. The real examples of the Admitted Claims CDDs are at Tabs 3(a)-(c) of the CDD Bundle [11/7-9].

91. The analysis set out in the following paragraphs considers the provisions of the Admitted Claims CDD that was appended to Wentworth's position paper and which has been provided by the Administrators as the real example of an Admitted Claims CDD with no carve-outs to the release clause for Statutory Interest or Currency Conversion Claims. It can be found at Tab 3(a) of the CDD Bundle [11/7].

92. The CDD was entered into by a creditor with a proof of debt in respect of an FBF Master Agreement. The amount of the proof was not agreed between the creditor and LBIE. The CDD was a compromise that fixed the amount of the claim to be admitted to proof (as an Admitted Claim) in the Agreed Claim Amount, £18,070,281.

D2.1: The relevant provisions of the Admitted Claims CDD

93. The relevant provisions of the deed are as follows.

(1) Recital B records:

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

(2) The release clause, Clause 2, provides:

> "*[LBIE] and the Creditor irrevocably and unconditionally agree that notwithstanding the terms of any contract to which the Creditor and [LBIE] are party (including the Creditor Agreement):*

2.1 the Creditor shall have an Admitted Claim ***in an amount equal*** *to the Agreed Claim Amount;*

2.2 the Admitted Claim, ***shall be fixed at*** *the Agreed Claim Amount, and* ***shall constitute the Creditor's entire claim*** *against [LBIE];*

2.3 ***save solely for the Admitted Claim****, the Creditor and [LBIE] and the Administrators, are* ***hereby each irrevocably and unconditionally released and forever discharged from*** *any and all losses, costs, charges, expenses,* ***Claims*** *(including* ***all Claims for interest****, costs and orders for costs), demands, actions, causes of action, liabilities, rights and obligations (including those which arise hereafter upon a change in the relevant law)* ***to or against each other*** *and* ***howsoever arising****,* ***whether known or unknown****, whether arising in equity or under common law or statute or* ***by reason of breach of contract*** *or in respect of any* ***tortious*** *or negligent act or omission (whether or not loss or damage caused thereby has yet been suffered) or otherwise,* ***whether arising under the Creditor Agreement 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 [LBIE] and/or the Administrators on the date hereof****; and*

2.4 ***the Creditor*** *will not take any steps* ***to prove for, or to Claim for****, any debt in the Administration (or other insolvency process) of [LBIE],* ***or otherwise bring any Claim****, action, demand or issue (or continue) any Proceedings* ***against [LBIE] 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 [??] above.*"

(Emphasis added)

(3) The Admitted Claim is defined as:

"*[A]n unsecured claim of a creditor of [LBIE] which qualifies for dividends from the estate of [LBIE] available to its unsecured creditors* ***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)*"

(Emphasis added)

(4) The Agreed Claim Amount is defined as "£*18,070,281*".

(5) Claim is defined as:

"*[A] claim in law, 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;

(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

(iv) including ***a Proprietary Claim****.*

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

(Emphasis added)

94. On an ordinary and natural reading of the release clause, in the context of the agreement as a whole, it clearly and unambiguously releases *all* claims (including any non-provable claims) of the creditor against LBIE, other than the right to be paid the sterling amount fixed by the agreement. The wording of the release clause in this respect admits of no doubt.

D2.2: Currency Conversion Claim

95. So far as the creditor's ability to claim for any shortfall arising in respect of its original contractual right to be paid what was due under its contract in a foreign currency (i.e. a Currency Conversion Claim) is concerned:

(1) The Admitted Claim is "*fixed*" at the Agreed Claim Amount, which is defined as a sterling sum - £18,070,281: see Clause 2.1.

(2) The Admitted Claim (i.e. £18,070,281) represents the only claim of the Creditor against LBIE – it is described as the Creditor's "*entire claim*" against LBIE: see Clause 2.2.

(3) Save solely for that Admitted Claim (i.e. a claim of £18,070,281) all other Claims are released by the Creditor against LBIE, *and* by LBIE against the Creditor: see Clause 2.3. The claims released are defined in the broadest possible terms, and include:

(a) all Claims at the date of the compromise (as opposed to at the date of the Administration);

(b) all Claims "*howsoever arising*";

(c) all Claims "*known or unknown*";

(d) all Claims "*whether in existence now or coming into existence at some time in the future*";

(e) all Claims "*whether or not in the contemplation*" of the parties at the date of the compromise; and

(f) all Claims "*including those which arise hereafter upon a change in the relevant law*".

(4) Additionally, the Creditor (but not LBIE) is bound not to prove *or otherwise claim* against LBIE for the Claims released: see Clause 2.4.

96. In light of these provisions, the essential foundation of a Currency Conversion Claim, namely the survival of (and remission to) the creditor's right to be paid its contractual debt in the relevant foreign currency, is destroyed, because (a) the creditor has agreed that it shall hereafter have only one claim, and that claim is denominated in sterling;

and (b) the creditor has otherwise released all and every other right under or in connection with its original contractual claim.

D2.3: Interest

97. Additionally, the release clause in the CDD clearly and unambiguously releases any right which the creditor may have had to a non-provable claim for interest. The release clause expressly includes "*all claims for interest*" among those released.

98. In light of the very broad words of release summarised above, the essential foundation of a non-provable claim to interest, namely the survival of (and remission to) the creditor's original contractual or other pre-commencement right to be paid interest, is destroyed.

99. This conclusion is unaffected by Wentworth's acceptance that the CDD does not release a creditor's right to Statutory Interest. Such right is not released because the creditor is expressly permitted to prove its Admitted Claim in the administration of LBIE, and the right to Statutory Interest is an adjunct to the right to prove. Rule 2.88(7) creates a statutory entitlement to be paid, out of any surplus remaining after payment of all debts proved, interest, from the Date of Administration, on the debts proved. This acceptance does not carry with it, however, any right to interest other than that which is payable by statute upon a provable debt. The foundation of any such non-provable right is the original contractual or other pre-commencement right of the creditor which, as noted above, no longer exists after execution of the CDD.

D2.4: Variations on Admitted Claims CDD

100. Two possible variations to the Admitted Claims CDD are considered here: first, where the express carve-out for Statutory Interest is included (a real example of such an Admitted Claims CDD is at CDD Bundle, Tab 3(b) [11/8]); and second, where the express carve-out for Currency Conversion Claims is included (a real example of such an Admitted Claims CDD is at CDD Bundle, Tab 3(c) [11/9]).

101. The first variation, the carve-out of the right to Statutory Interest, has no impact on the conclusion advocated above, i.e. that any non-provable claim for interest is released. Such a carve-out merely makes express what is already implicit and, if anything, strengthens the conclusion that any *other* claim for interest must have been intended to be within the clear words of release, including "*all claims for interest*".

102. In the second variation, Wentworth accepts that there is no release of a Currency Conversion Claim. However, the language of the release clause still clearly and unambiguously releases the creditor's right to any non-provable claim to interest.

D2.5: SCG's principal arguments to restrict the natural construction of the CDDs

103. The theme underpinning the SCG's argument on the construction of the CDDs is that Wentworth's argument ignores the factual matrix and relies on the words alone. The background evidence, however, provides no reason for concluding that the natural and ordinary meaning of the words used in the Admitted Claims CDD (or indeed any of the CDDs) does not reflect the parties' intentions.

104. In this section, the principal arguments of the SCG are addressed, as they apply to the Admitted Claims CDD.

105. By way of preliminary point, it appears to be the SCG's case that, having regard to the purpose of the CDDs, they should not be construed as releasing either Currency Conversion Claims or non-provable claims to interest.

106. The purpose of the Admitted Claims CDD is primarily apparent from its terms, as follows:

(1) Recital (B) (quoted above) makes it clear that LBIE and the creditor wish to release each other in respect of "*any and all*" claims of whatever nature and howsoever arising, and that this is to be the *quid pro quo* for agreeing all claims of the creditor at a single, fixed sum.

(2) The width of the Release Clause itself demonstrates that a purpose of the Admitted Claims CDD is to provide certainty and finality as between the creditor and LBIE. This is particularly apparent from the fact that all claims, whether in contemplation or not, and whether currently known to law or not, are released. It is also apparent from the fact that the release is reciprocal.

(3) The provision for transfer in clause 3.2 demonstrates that a purpose of the deed was to enable the creditor freely to transfer its rights against LBIE, irrespective of any restriction that there might have been in the underlying contracts.

107. There is nothing in the purpose for which the CDDs were entered into as revealed by the SAF, nor in the circumstances in which they were entered into as revealed by the SAF, to call into question the plain meaning of the words used, the consequence of which is to release any Currency Conversion Claim and non-provable claims to interest.

108. In any event, if one were to ask whether the limitation on the broad release language, for which the SCG contends, were more or less consistent with the purpose of the CDD than giving the release language its full effect, the answer would be that it is clearly *more* consistent with the purposes of certainty, finality, the saving of costs for the benefit of the both parties, and the transferability of the creditors' claims that the release language is given its full effect.

D2.6 A compromise for the purpose of proof only?

109. The SCG seeks to avoid the natural construction of the words used in the release clause by interpreting the compromise as one intended to achieve finality as to the amount of the proved debt *only*, thereby implying that unsatisfied pre-commencement rights remain to be asserted against the insolvency surplus. That interpretation is unsustainable. The wording of the real example of the Admitted Claims CDD considered above is expressly inconsistent with that interpretation and there is nothing in the background evidence to support the unnatural construction proposed by the SCG.

110. So far as the background evidence is concerned:

(1) Project Canada proceeded on the basis that LBIE would offer a creditor a single number representing LBIE's determination of the creditor's claim taking account of the positions under all Financial Contracts between LBIE and the creditor - the LBIE Determination (Lomas 10 at [44]) [2/2/15].

(2) Creditors were advised that the LBIE Determination was not intended to be a matter for negotiation and that they were entitled either to accept or reject it. If the LBIE Determination was accepted, the agreement would be formalised in a CDD (provided the other terms thereof were accepted by the creditor). Creditors were also advised that if the LBIE Determination was rejected then they would be able to negotiate their claims on a bilateral basis at a later stage (Lomas 10 at [45]) [2/2/15], albeit this alternative would have taken significant time to conclude and, in exceptional cases, may have required court adjudication (Fourth Progress Report, page 29 [2/2/15]; SAF 56).

(3) The primary purpose of the CDDs was stated by the Administrators to be to provide an efficient process for agreeing the amount of a creditor's claim such that distributions could be expedited (Lomas 10 at [48] [2/2/15]; SAF 63).

(4) Part of this purpose, from the Administrators' perspective, was served by ensuring that, once a claim amount (whether an "Agreed Claim" or "Admitted Claim") had been agreed, it could not subsequently be reopened by the creditor (Lomas 10 at [48]) [2/2/16]; SAF 64).

111. So far as the express wording of the agreement is concerned:

(1) Recital (B) provides that the purpose of the agreement is to agree that the creditor's Claims against LBIE under the Creditor Agreements are limited to the Agreed Claim Amount, without any such limitation as "*for the purposes of proof*";

(2) The release clause itself provides that LBIE and the creditor are each "*irrevocably and unconditionally released and forever discharged…*" of Claims;

(3) The Claims that are released are defined by reference to those existing "*now*" or in the future (clause 2.1.2), and are not limited to Claims that existed as at the Date of Administration (i.e. they are not limited to provable claims), but instead included claims arising post-administration which would of necessity be unavailable for proof;

(4) The definition of "*Claim*" that is released expressly included Proprietary Claims, being claims that were not provable, thus demonstrating the breadth of the compromise beyond facilitating the admission of a proof of debt;

(5) By clause 2.1.3 the Creditor agrees not to prove for, or to Claim for, any debt in the Administration (or other insolvency process) "*or otherwise bring any Claim, action, demand or issue (or continue) and Proceedings against the Company*…" This language expressly goes beyond promising not to prove or claim in the administration and is consistent only with the release being of *all* claims whether provable or not;

(6) Moreover, the agreement not to bring Proceedings includes an agreement not to exercise remedies (including, for example, enforcing a lien) only exercisable outside the process of proof and distribution;

(7) The release is mutual. It would be contrary to the express words by which the release is effected, which is the *same* as regards the release by Creditor and the release by LBIE, and the commercial logic of a *reciprocal* release:

(a) for LBIE to be held to have released *all* its rights against the Creditor for *all* purposes; and

(b) for the Creditor to have released its rights against LBIE *only* for the purpose of proof such that the Creditor might be remitted to all rights in all respects to the extent unsatisfied at the end of the statutory process.

D2.7 No compromise of a claim not contemplated by the parties?

112. The SCG rely on the fact that, until about March 2013 (when the possibility of a Currency Conversion Claim was first raised with the Administrators by a creditor), the concept of a Currency Conversion Claim was not in the contemplation of the Administrators and had not been discussed between the Administrators and any creditor. They also rely on the fact that until 12 April 2013 the Administrators had not, in the progress reports, provided illustrative outcome estimates indicating a potential surplus.

113. It is unclear whether the SCG contends that the possibility of a Currency Conversion Claim was not in the contemplation of the Administrators or the creditors at the time they entered into an Admitted Claims CDD. Whilst the Administrators do not appear to have contemplated the existence of such a claim prior to March 2013, it is simply unknown whether any creditor did so.

114. Similarly, it is unclear whether the SCG contends that the possibility of a non-provable claim for interest was not in the contemplation of the Administrators or the creditors at the relevant time or times. As to this, there is no evidence.

115. Even assuming, however, that neither of these non-provable claims was in the contemplation of any of the parties to the relevant CDDs, that is irrelevant to the construction of the release clause, since it expressly includes claims even though they may not have been in any of the parties' contemplation (as well as claims "*whether in existence now or coming into existence at some time in the future*", and "*including those which arise hereafter upon a change in the relevant law*").

116. That wording is sufficient to distinguish this case from the position discussed by the majority of the House of Lords in *BCCI v Ali*, namely that the Court should be "*slow*" to infer a release of claims the parties did not "*know of and could not have known of*": [10][7]. In that case Lord Bingham expressly recognised that an appropriately drafted release provision would operate so as to release both claims known to the parties and

[7] *BCCI v Ali* was concerned with a claim not merely unknown to the law but precluded by the known law at the time the release letter was entered into. The release letter was entered into in 1990 and it was not until seven years later that the House of Lords recognised a claim for stigma damages: see [6] and [33].

claims of which the parties were unaware: at [9]. The wording in the Admitted Claims CDD is markedly wider than that in the release clause in *BCCI v Ali*.[8] In particular, it includes a release of all claims "*howsoever arising*", "*whether in existence now or coming into existence at some time in the future*", "*whether or not in the contemplation*" of the parties, and "*including those which arise hereafter upon a change in the relevant law*".

D2.8 No compromise of a claim (said to be) extraneous to the purpose of administration?

117. The SCG appears to suggest that an Admitted Claims CDD cannot be construed to reach a result that was not part of the purpose of the Administration and not part of the function of the Administrators.

118. For example, at paragraph 34(2)(i) of its position paper, the SCG says that there would have been no proper reason for the Administrators to require the release of non-provable claims, which would have benefitted only subordinated creditors and shareholders at the expense of creditors.

119. It is clearly, however, within the proper exercise of the Administrators' powers to reach a compromise with a creditor on terms that creates finality between them. There are significant advantages to the estate and its general body of creditors, including the saving of time and costs in determining claims. The suggestion that only subordinated creditors and shareholders stood to benefit is wrong. The release of potential additional claims by one creditor benefits all other creditors of the estate, and the release of potential non-provable claims benefits all other creditors with potential non-provable claims. Subordinated creditors and shareholders benefit only if and when there is a sufficient surplus to pay all non-provable claims in full.

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[8] The release provision in *BCCI v Ali* was in the following terms (at [3]):

> "*The applicant agrees to accept the terms set out in the documents attached in full and final settlement of all or any claims whether under statute, common law or in equity of whatsoever nature that exist or may exist and, in particular, all or any claims rights or applications of whatsoever nature that the applicant has or may have or has made or could make in or to the industrial tribunal, except the applicant's rights under [the bank's] pension scheme.*"

120. Moreover, the individual creditor, who executed a CDD, benefitted from the mutual nature of the releases, and from the ability to realise value from its claim more easily by selling it.

D3 AGREED CLAIM CDDS

121. The real examples of the Agreed Claims CDDs are at CDD Bundle, Tabs 1(a)-(c) [11/1, 2 and 3] and Tabs 2(a)-(c) [11/4-6].

122. In summary, Wentworth's position in relation to Agreed Claims CDDs is as follows:

(1) Where the Agreed Claim Amount was denominated in sterling (but not where it was denominated in the relevant foreign currency), the CDD has the effect of releasing a Currency Conversion Claim, both where the CDD did not contain any carve-out language and where it contained carve-out language for Statutory Interest.

(2) The CDD had the effect of releasing a non-provable claim for interest, irrespective of whether it included any carve-out language relating to Statutory Interest or Currency Conversion Claims.

123. The Agreed Claims CDDs were utilised to enable a Creditor to agree its Agreed Claim against LBIE in the Agreed Claim Amount postponing only the determination of whether or not that claim was, in whole or in part, a Client Money Claim (and thus to be satisfied from the Client Money Pool) ("CMC") or was instead to be claimed against the administration estate: Lomas 10, [49] [2/2/16]. The object was to compromise the contractual claim in a definite amount, whatever the ultimate character of that claim.

124. The analysis set out in the following paragraphs considers the provisions of the Agreed Claims Sterling CDD with no carve-outs to the release clause for Statutory Interest or Currency Conversion Claims which has been provided by the Administrators. This CDD can be found at Tab 2(a) of the CDD Bundle [11/4].

D3.1: The relevant terms of the Agreed Claims Sterling CDD

125. The relevant terms of the Agreed Claims Sterling CDD are as follows:

(1) Recital B is in materially the same terms as Recital B to the Admitted Claims CDD.

(2) By clause 2.1, LBIE and the creditor agree that:

> "*the Agreed Claim shall be limited to, and in an amount equal to, the Agreed Claim Amount and shall constitute the Creditor's entire Claim against [LBIE]*"

(3) "*Agreed Claim*" is defined as

> "*the Creditor's Claims against [LBIE] under and in connection with the Creditor Agreements, including for the avoidance of doubt any Client Money Claim arising under or in connection with the Creditor Agreements, but shall exclude any Trust Assets Claims (if any) whether or not arising under and/or in connection with the Creditor Agreements*"

(4) "*Agreed Claim Amount*" is a sum denominated in sterling (as noted above, Wentworth contends that a Currency Conversion Claim is released only where the Agreed Claim Amount is denominated in sterling);

(5) "*Claim*" is defined as "*a claim in law, in equity or otherwise and of whatsoever nature*", and includes a claim to exercise any remedy for losses computed by reference to value which may have been available had an obligation been duly performed in a timely manner.

(6) The Release Clause, at 2.1.1 is in materially the same terms as the Release Clause in the Admitted Claims CDD and provides for the release of *all* claims against LBIE other than the claim for the Agreed Claim Amount in sterling. It also expressly includes a release of Client Money Claims (other than as might be determined on the basis of the Agreed Claim in the Agreed Claim Amount) and Trust Asset Claims (the latter being defined as proprietary claims to assets held in the name of or to the order of LBIE).

(7) By clause 2.1.2, the Creditor agreed to not to take any steps to prove for, or to Claim for, any debt in the Administration or otherwise to bring any Claim, action, demand or issue (or continue) and Proceedings against LBIE in respect of any of the Claims referred to in the Release Clause 2.1.1.

126. On an ordinary and natural reading of the release clause, in the context of the agreement as a whole, it clearly and unambiguously releases all claims (including any non-provable claims) of the creditor against LBIE, other than the right to be paid, and to prove in the administration of LBIE for, the sterling amount fixed by the agreement. The wording of the release clause in this respect admits of no doubt.

D3.2: Currency Conversion Claim

127. So far as the creditor's ability to claim for any shortfall arising in respect of its original contractual right to be paid what was due under its contract in a foreign currency (i.e. a Currency Conversion Claim) is concerned:

(1) The Agreed Claim is "*fixed*" at the Agreed Claim Amount, which is defined as a sterling sum;

(2) The Agreed Claim, in such sterling sum is agreed to be the only claim of the Creditor against LBIE – it is described as the Creditor's "*entire claim*" against LBIE: see Clause 2.1.

(3) Save solely for that Agreed Claim (i.e. the sterling amount which constitutes the limit and entire amount of the Agreed Claim), all other Claims are released by the Creditor against LBIE, *and* by LBIE against the Creditor: see Clause 2.1.1.

(4) The width of that Release Clause is the same as in relation to the Admitted Claims CDD, save that it operates to release proprietary claims via a different route, namely by expressly including a release of any Client Money Claim or Trust Asset Claim (as opposed to releasing all Claims, which are defined to include Proprietary Claims).

128. These minor differences are not sufficient to distinguish the reasoning – set out above – applicable to the Admitted Claims CDD to demonstrate that the Currency Conversion Claim cannot have survived. As with the Admitted Claims CDD, the essential foundation of a Currency Conversion Claim, namely the survival of (and remission to) the creditor's right to be paid its contractual debt in the relevant foreign currency, is destroyed, because (a) the creditor has agreed that it shall hereafter have only one claim, and that claim is denominated in sterling; and (b) the creditor has otherwise released all and every other right under or in connection with its original contractual claim.

129. The SCG seeks to avoid this conclusion by contending that it would be arbitrary to distinguish between those cases where the Agreed Claim Amount is expressed in sterling (thereby releasing any Currency Conversion Claim under the release clause) or in the foreign contractual currency (where such claim is not released).

130. This argument is misconceived. As noted above, a Currency Conversion Claim is simply one aspect of the creditor's claim to be remitted to its pre-commencement contractual rights to payment.

131. The choice of the creditor to agree an Agreed Claims CDD which defined the Agreed Claim Amount in sterling, which defined that claim as the sole claim of the creditor, and which released any other claim the creditor might have had necessarily removes the possibility of a Currency Conversion Claim: the choice to define the sole remaining claim as a claim in sterling necessarily means that *in relation to that claim* in the event of there being sufficient in the administration estate to pay 100% of proved debts, the claim will be satisfied in full. No question of a shortfall between the contractual entitlement and the amount received by way of dividends from the estate can arise.

132. Thus the cases in which a Currency Conversion Claim can arise, and where it cannot, are not a matter of happenstance, but are necessarily defined by the creditor's choice to define its Agreed Claim Amount in sterling or not and the release provision at clause 2.1.1.

133. In any event, the fact that a creditor whose Agreed Claim Amount was in the same currency as its underlying contractual right might have a non-provable Currency Conversion Claim (depending on later currency movements) is no reason to give the wording of the release clause in a CDD where the Agreed Claim Amount was in sterling anything other than its clear and unambiguous meaning.

134. There is a further issue which arises in relation to Agreed Claims CDDs where the underlying contractual entitlement was in whole or in part in foreign currency (for example EUR) and the Agreed Claim Amount was in a different foreign currency (for example in dollars). A similar issue arises in relation to the CRA and both points are addressed below in the context of Issue 38.

D3.3: Non-provable claim to Interest

135. Additionally, the release clause in the Agreed Claims CDDs clearly and unambiguously releases any right which the creditor may have had to a non-provable claim for interest.

136. The creditor has agreed to limit its claim against LBIE to the Agreed Claim Amount (a fixed sum), and waived all other claims, including "*all claims for interest*" among those released.

137. Accordingly, the essential foundation of a non-provable claim to interest, namely the survival of (and remission to) the creditor's original contractual or other pre-commencement right to be paid interest, is destroyed.

138. This conclusion is reinforced by the fact that one of the purposes of the Agreed Claims CDD was to leave open the possibility that the Agreed Claim might in the future be characterised either as a Client Money Claim, or as a claim to be admitted to proof in the administration (or other insolvency proceedings) of LBIE: see Lomas 10, [49] [2/2/16]:

> "*[I]n late 2010, there was a degree of uncertainty as regards the extent of a creditor's client money entitlement. The original CDD template (an "Agreed Claims CDD") accommodated that uncertainty by agreeing the amount of a creditor's claim but leaving it for a later determination of agreement as to*

whether the claim constituted a Client Money Claim…or an unsecured creditor claim (or a combination of the two)."

139. In other words, the Agreed Claim is fixed at a particular sum, and the only remaining question is whether that sum ranks for payment against the client money pool or against the insolvency estate. If it turned out that it ranked for payment against the CMP, and the CMP out 100c/$ in respect of clients' client money entitlements ("CME"), then the Agreed Claims CDD necessarily contemplates that there is no further claim, of any nature whatsoever, against the insolvency estate.

140. This provides an additional reason (over and above those set out at paragraphs 93-94 and 97-99 above in relation to the Admitted Claims CDD) why the SCG's argument that the compromises are limited for the purpose of proof cannot be correct. The Creditor in agreeing to limit its Agreed Claim in the Agreed Claim Amount was therefore:

(1) not exclusively concerned with a proof against the administration estate (contrary to the SCG's essential argument); and

(2) necessarily accepted that the satisfaction of its Agreed Claim from the CMP, if a Client Money Claim and if paid in full, would be full satisfaction of its CME *and* its underlying claim as agreed in that amount by the Agreed Claim CDD.

141. Finally, the same point also provides a further answer to the SCG's argument that the distinction between those cases where a Currency Conversion Claim survives, and those where it does not, is arbitrary.

D3.4: Variations on Agreed Claims CDD

142. Three possible variations to the Agreed Claims CDD are considered here: first, where the express carve-out for Statutory Interest is included (a real example of such an Agreed Claims CDD is at CDD Bundle, Tab 2(b) [11/5]); second, where the express carve-out for Currency Conversion Claims is included (a real example of such an Agreed Claims CDD is at CDD Bundle, Tab 2(c) [11/6**]**); and third, where the Agreed

Claim Amount was in the same foreign currency as its underlying contractual right (a real example of such an Agreed Claims CDD is at CDD Bundle, Tab 1(a) [11/1]);

143. The first variation, the carve-out of the right to Statutory Interest, has no impact on the conclusion advocated above, i.e. that any non-provable claim for interest is released. Such a carve-out merely makes express what is already implicit and, if anything, strengthens the conclusion that any *other* claim for interest must have been intended to be within the clear words of release, including "*all claims for interest*".

144. In the second variation, Wentworth accepts that there is no release of a Currency Conversion Claim. However, the language of the release clause still clearly and unambiguously releases the creditor's right to any non-provable claim to interest.

145. In the third variation, Wentworth accepts that there is no release of a Currency Conversion Claim. However, the language of the release clause still clearly and unambiguously releases the creditor's right to any non-provable claim to interest.

D4 AGGREGATOR CDDS

146. The real examples of the Aggregator CDDs are at CDD Bundle, Tabs 4(a)-(e) [11/10-14].

147. In summary, Wentworth's position in relation to Aggregator CDDs is that:

(1) Where the Agreed Claim Amount was denominated in sterling (but not where it was denominated in the relevant foreign currency), the CDD has the effect of releasing a Currency Conversion Claim, both where the CDD did not contain any carve-out language and where it contained carve-out language for Statutory Interest.

(2) The CDD had the effect of releasing a non-provable claim for interest, irrespective of whether it included any carve-out language relating to Statutory Interest or Currency Conversion Claims.

148. Certain of the Aggregator CDDs used language which reflected the language of an Agreed Claims CDD (where the characterisation of the claims which the creditor purchased remained uncertain, as between a Client Money Claim and an unsecured claim against the estate). An example is at CDD Bundle, Tab 4(a) [11/10].

149. Other Aggregator CDDs used language reflecting that in an Admitted Claims CDD, presumably for use by an assignee that had purchased claims which were certainly not Client Money Claims. An example is at CDD Bundle, Tab 4(e) [11/14].

150. The language of each is materially similar to, respectively, the language of the Agreed Claims CDD and the Admitted Claims CDD which are considered above, save only that the terms of the Release Clause do not expressly release "*all claims to interest*".

151. The absence of that specific language does not, however, affect the conclusion as to the release of a non-provable claim for interest. That is because the remainder of the wording of the Release Clause (including the incredibly wide definition of the Claims released which include any claim for failure to perform "*any contractual, legal or regulatory obligation or otherwise*", and any claim to exercise any remedy for "*losses computed by reference to value which may have been available had an obligation been performed on time*) is sufficiently broad to include the release of a contractual or other right to interest, to the extent that such right is not satisfied by Statutory Interest.

152. Accordingly, the arguments set out above in support of the conclusions that both the Admitted Claims CDD and the Agreed Claims CDD have the effect of releasing Currency Conversion Claims and non-provable claims to interest apply equally to the relevant form of Aggregator CDDs.

D5 CRA CDDs

153. The Administrators developed a number of CDDs specifically for creditors who had previously entered into the CRA ("CRA-CDDs"). The first occasion a CRA CDD was entered into by a CRA signatory was 12 January 2012 (Lomas 10 at [64]).

154. The CRA CDDs contain either:

(1) release clauses similar to the release clause in the Agreed Claim CDDs and the Admitted Claim CDDs; or

(2) more narrow release provisions whereby particular types of claims are preserved for future determination or agreement.

155. Where the creditor's Net Financial Claim under the CRA was fully agreed, the creditor would enter into a single CRA-CDD. An example of a wide release CRA-CDD is at Tab 5(a) of the CDD Bundle [11/15 and 16]. An example of a narrow release CRA-CDD is at Tab 5(b) [11/17 and 18].

156. In other cases, where the creditors' Net Financial Claim had not been agreed in all respects, the creditor entered into an 'original tiered' CRA CDD (examples of which are at Tabs 5(c) [11/19] and 5(d) [11/21] of the CDD Bundle), compromising all of its claims save for those identified as remaining outstanding (its "Minimum Net Financial Claim"), and subsequently entered into an 'additional tiered' CRA-CDD once those outstanding claims (its "Remaining Net Financial Claim") were agreed. Examples of such CDDs are at Tabs 5(e) [11/22] and 5(f) [11/23] of the CDD Bundle. They contain the narrow release provisions.

157. Where LBIE and the creditor reached agreement as to the amount of its claim LBIE requested that the creditor enter into a CDD primarily because a CDD is generally considered by the Administrators to be a more straightforward and less time-consuming way of documenting the unsecured claim than issuing the various notices required under the CRA. The creditors could also transfer their claims pursuant to the transfer notice appended to the CDD (Lomas 10 at [63]).

158. By definition, any creditor entering into a CRA-CDD has already entered into the CRA, as a result of which, for the reasons set out above, the creditor had waived any right to be paid interest save for interest accruing under Rule 2.88. Wentworth relies on the terms of the CRA-CDDs, therefore, only for the purpose of establishing the release of any remaining Currency Conversion Claims that a creditor may have following its entry into the CRA.

159. Accordingly, this part of the skeleton focuses only on CRA CDDs where the sum at which the creditor's claim is fixed is denominated in sterling.

160. In summary, although the mechanism of the release provisions is different, as between the wide and narrow versions, it is Wentworth's case that they both clearly and unambiguously have the effect of releasing any Currency Conversion Claim that might otherwise have survived. Moreover, this is so for each version (tiered, or un-tiered) of the CRA CDDs.

161. The construction arguments are developed below by reference to the CRA CDD at Tab 5(a) of the CDD Bundle [11/15**]** (an example of the wide language in the context of an un-tiered CDD) and Tab 5(d) of the CDD Bundle [11/21] (an example of the narrow language in the context of an original tiered CRA CDD).

D5.1 Un-tiered CRA CDD (wide release language: CDD Bundle Tab 5(a) [11/15]

162. The relevant provisions of this CRA CDD (which need to be read in conjunction with the CRA) operate in essentially the same way as those referred to above in relation to the Admitted Claims CDD:

(1) By clause 2.1.1 the creditors Net Financial Claim (i.e. the sole claim which remains to it after entry into the CRA) is "*limited to, and in an amount equal to, the Net Financial Claim Amount and shall constitute the Creditor's entire Claim against [LBIE]*"

(2) "*Net Financial Claim Amount*" is defined as "*[a sum in £] 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 US dollars to pounds sterling shall mean the following exchange rate [x:y]*"

(3) Clause 2.1.3 provides that "*the Net Financial Claim, in an amount equal to the Net Financial Claim Amount, shall constitute an Ascertained Claim and shall quality for dividends from the estate of [LBIE] available to its unsecured*

creditors 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"

(4) Clause 2.1.4 contains the release language, which is materially the same as the wide release language contained in the Admitted Claims CDD considered above. The wide language of release applies to any and all Claims "*save solely for the Net Financial Claim*".

(5) Clause 2.1.5 contains language barring the creditor from taking any action, whether to prove or claim in the administration or "*otherwise bring any Claim…*" in respect of any and all such Claims and matters referred to in clause 2.1.4.

163. For the same reasons advanced above in relation to the Admitted Claims CDD, this language clearly and unambiguously limits by agreement the creditor to a single, sterling denominated, claim against LBIE, and releases for all purposes any right it may previously have had to be paid a sum in USD. The essential premise of a Currency Conversion Claim is thus removed.

D5.2 Original tiered CRA CDD (narrow release language): CDD Bundle Tab 5(d) [11/21]

164. The relevant provisions of this CDD (which need to be read in conjunction with the CRA) are as follows:

(1) Clause 2.1.1: The Minimum Net Financial Claim is equal to the Minimum Net Financial Claim Amount.

(2) "*Minimum Net Financial Claim Amount*" is a sterling denominated amount: "*being the value of the Minimum Net Financial Claim converted to pounds sterling at the 'official exchange rate' set out in Rule 2.88(2) of the Insolvency Rules which for the purpose of converting US dollars to pounds sterling shall mean the following exchange rate [x:y]*".

(3) The "*Minimum Net Financial Claim*" is the creditors Net Financial Claim (as defined in the CRA) determined on the basis of certain Settlement Assumptions in respect of the Pending Transactions, specifically:

(a) the Net Financial Claim is a Net Contractual Position (if positive): see Clause 25.1 of the CRA;

(b) the Net Contractual Position is a Close-out Amount (in respect of a given Financial Contract) or aggregate of Close-out Amounts (if more than one Financial Contract): Clause 24.2 of the CRA;

(c) the Settled Assumptions are those set out in Appendix to CDD in respect of Pending Transactions; and

(d) the Pending Transactions are those identified in Appendix to CDD.

(4) So determined, the Minimum Net Financial Claim – in an amount equal to the Minimum Net Financial Claim Amount – "*shall constitute an Ascertained Claim and shall qualify for dividends from the estate of the Company available to its unsecured creditors pursuant to the Insolvency Rules and the Insolvency Act (or, if applicable, as amended or replaced pursuant to a scheme of arrangement or a company voluntary arrangement)*": Clause 2.1.2 of the CRA CDD.

(5) Under the CRA, the Ascertained Claim is "*an ascertained, unsecured claim in the winding-up of the Company or any distribution of the Company's assets generally to its unsecured creditors*": Clause 96 (Definitions) of the CRA.

(6) Clause 2.1.4 contains the release and waiver provisions. It provides:

(a) at Clause 2.1.4(i), that the Creditor "*waives any right to dispute the calculation of the Net Contractual Position [i.e. Close-out Amounts] and/or Net Financial Claim to the extent that it relates to the Minimum Net Financial Claim (whether under the CRA or otherwise)*";

(b) at Clause 2.1.4(iv), that the Creditor "*release and discharges various Client Money Claims*";

(c) at Clause 2.1.4(v), that the Creditor releases and discharges the Certain Excluded Claims

(d) "*Certain Excluded Claims*" include: "*Claims*" referred to in paragraphs (i), (ii), (iii) and (v) of the definition of "Excluded Claims" in the CRA specifically "*any Claim*" [3/452-53]:

(i) that is an Ownership Claim for in respect of Excluded Property other than Appropriated Assets;

(ii) for loss or damage relating to the failure of LBIE to perform any of its obligations with regard to Excluded Property;

(iii) that is a Retention Claim;

(iv) …

(v) against LBIE under a contract (a) which is not a Financial Contract and (b) where LBIE, in its absolute discretion, determines that it is not in the interests of the unsecured creditors as a whole to have the obligations under that contract resolved through this Agreement;

(e) "*Certain Excluded Claims*" also include (to the extent that those Claims arise as a consequence of the Company and the Creditor entering into this Deed) the Claims referred to in paragraph (iv) of the definition of Excluded Claims in the CRA, i.e claims against LBIE "*for breach of any of the terms of [the CRA] or for any failure on the part of [LBIE] to discharge their obligations under [the CRA]*".

(f) The release of such claims is extremely wide, and includes claims arising hereafter "*upon a change in the relevant law*", whether

"*known or unknown*", whether "*existing now or hereafter*", and "*whether or not in the contemplation of LBIE or the Administrators on the date hereof*".

165. It is this last release that is particularly relevant, for the following reasons:

(1) The premise of a Currency Conversion Claim is a continuing right to be paid in a foreign currency. Such a right was contained in the CRA: as noted above, by clause 4.4.2 of the CRA the Released Claims were exchanged for, among other things, the right to claim as a new obligation of LBIE their Net Financial Claim (payable pursuant to clause 24.1 of the CRA in USD).

(2) In consequence of LBIE and the creditor entering into a CRA CDD, and stipulating that the creditor's Minimal Net Financial Claim shall be a sterling denominated amount, LBIE will not satisfy the obligation under clause 4.4.2 to pay the Net Financial Claim in USD.

(3) It is the non-payment of the amount in USD of the Net Financial Claim created by the CRA that would have given rise to a Currency Conversion Claim.

166. The terms of clause 2.1.4(v), however, clearly and irrevocably release and discharge any such claim.

PART 3: ISSUE 35

Whether (as a matter of construction) a creditor's claim to Statutory Interest has been released in whole or in part in circumstances in which the creditor entered into either:

(i) a CDD incorporating a Release Clause; or

(ii) the CRA.

167. Issue 35 concerns the extent to which the CRA or a CDD has released a creditor's right to Statutory Interest.

168. It is not, and never has been, Wentworth's case that the CRA or any CDD released creditors' rights to Statutory Interest, even (in the case of CDDs[9]) prior to any language being incorporated to that effect. That is because each of the CDDs describes the Agreed Claim Amount (or other fixed sum defined as the sole claim against LBIE) as one which qualifies for dividends in the administration or liquidation of LBIE. The right to Statutory Interest is an integral aspect of the rights granted to a creditor in respect of a claim qualifying for dividends in the administration or liquidation.

169. Wentworth instead makes a different point, that the release of the creditor's *contractual* rights to interest by the CDDs has the consequence that, although the right to Statutory Interest is implicitly preserved in respect of that creditor, it is entitled only to interest at the Judgments Act Rate.

170. The argument, shortly stated, is as follows:

(1) All CDDs release any contractual right to interest and, in the case of Agreed Claim CDDs and Admitted Claim CDDs, that release is express.

(2) Absent an express saving for Statutory Interest, the preservation of that right follows from the definition of the Admitted Claim and reference to that claim as one qualifying under the Act and Rules.

(3) Putting these points together, there is an express release of any contractual right to interest and a necessary application of Statutory Interest by virtue of the application of the Act and Rules to the Admitted Claim.

(4) Hence, the apparent intention is that the Act and Rules should operate on the premise of the now agreed rights, which expressly release any contractual right to interest.

(5) Accordingly, when determining "*the rate apart from administration*" under Rule 2.88(9), it is necessary to take account of the fact that the rate that *would* have

[9] Such preservation language was always in the CRA: see clause 25.1.

applied apart from administration, being the right under the contract which the creditor had with LBIE, has been released by the creditor;

(6) In those circumstances, the creditor is to be treated in the same way as a creditor with no contractual right to interest at all, and thus entitled to interest at the Judgments Act Rate, but no more.

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

PART 4: ISSUE 38

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

172. Issue 38 raises the question whether the CRA *gives rise* to a Currency Conversion Claim that would not otherwise have existed.

173. It relates primarily to a creditor whose contractual entitlement prior to the entry into the CRA was denominated in sterling. The question is whether, by agreeing to its claim being converted into USD under the CRA, that creditor can claim for any shortfall in that new USD entitlement, by reason of the re-conversion of its claim into sterling for the purpose of distributions from the administration. Wentworth contends that it cannot.

174. The relevant provisions of the CRA are as follows:

(1) Clause 4.4.2 which, in exchange for the Released Claims, provides the creditor with the right to claim as a new obligation of LBIE their Net Financial Claim.

(2) Clauses 24.2 and 25.1 which provide that the Net Financial Claim is a positive Close-out Amount in respect of a Financial Contract (or a positive sum of aggregated Close-out Amounts in respect of multiple Financial Contracts);

(3) Clause 24.1 which provides that to the extent that a Close-out Amount is denominated in a currency other than USD, it is to be converted to USD using the Spot Rate as of the Relevant FX Conversion Time;

(4) The Relevant FX Conversion Time is (for the purpose of Clause 24.1) the close of business in London on the Administration Date.

175. The conversion of the Close-out Amount into USD was an essential feature of the CRA, for the purpose of enabling such Close-out Amount (where negative) to be offset against Trust Asset entitlements: see Part 11 of the CRA. It was in addition necessary

as a matter of administrative convenience, to ensure that it was possible to tell when the threshold amount of acceptances had been reached.

176. However, to the extent that a creditor had a positive Net Contractual Position, such that it had a Net Financial Claim, then that amount constitutes an ascertained unsecured claim in the winding-up of LBIE or any distribution of LBIE's assets to its unsecured creditors (Clause 25.1).

177. Such ascertained unsecured claim would necessarily be converted into sterling pursuant to Rule 2.86 (if the distribution was in an administration) or Rule 4.91 (if the distribution was in a liquidation).

178. That conversion from USD into sterling would be at the rate prevailing on the Administration Date (i.e. the same date as of which the original contractual entitlement was converted into USD for the purposes of the CVA).

179. Accordingly, the effect of the CRA on a creditor with an entitlement to be paid in sterling was to convert that claim into USD (as at the Date of Administration), for the purposes required under the CRA, but on the basis that any net sum owing to the creditor would be re-converted into sterling (as at the Date of Administration) for the purposes of actual distribution to the creditor within the insolvency proceedings of LBIE.

180. In the light of the above, the entry into the CRA by a sterling creditor does not give that creditor a Currency Conversion Claim:

(1) A Currency Conversion Claim is based on the shortfall between the creditor's pre-commencement right to receive foreign currency and the foreign currency equivalent of sums received from the insolvency process.

(2) The sterling creditor had no pre-commencement right to receive foreign currency;

(3) Although it is granted a new right pursuant to the CRA to receive USD, such right is granted in circumstances where it is known that the right will be re-converted into sterling (at the same rate as its original conversion from sterling to USD, thus

giving rise to no risk of currency loss or gain because of movements in the intervening period).

(4) The conversion into USD is, therefore, for the purpose of enabling the provisions of the CRA – particularly those relating to the offset of Net Financial Liability against proprietary claims to trust assets – to be given effect to, but not for the purpose of any actual distribution in respect of the Net Financial Claim to the creditor.

(5) Since the right to receive USD granted by the CRA is for a limited purpose, and one which was not intended to be for the purpose of making a distribution to the creditor from the insolvency estate, it is insufficient to found a Currency Conversion Claim.

181. Where the creditor's original claim was denominated in a currency other than USD or sterling, then the consequences of it entering into the CRA are as follows:

(1) In the first place, its agreement to be paid otherwise than in its original currency means that it no longer has a contractual entitlement to be paid in that original currency, and thus has no continuing right to claim a shortfall in receipts from the administration estate in that original currency.

(2) Secondly, the release of all Claims in exchange for the right to claim as a new obligation of LBIE its Net Financial Claim (expressed in USD) reinforces the conclusion that it no longer has any continuing right to be paid in its original currency.

(3) Accordingly, the essential foundation of a Currency Conversion Claim, namely the continuing contractual right to be paid in the original foreign currency, to which right the creditor is remitted upon the emergence of an insolvency surplus, is missing.

(4) Finally, in considering whether the agreement within the CRA to receive payment in USD can *create* a Currency Conversion Claim, the same arguments apply as in

relation to a creditor whose original contractual entitlement was in sterling. For the reasons set out above in relation to such sterling creditor, the CRA does not create a Currency Conversion Claim based on the USD entitlement in relation to a foreign (non USD) currency creditor.

182. A similar issue arises in relation to the Agreed Claims CDD where the currency of the creditor's underlying claim was (in whole or part) in a foreign currency (for example EUR) different to the foreign currency in which the Agreed Claim Amount was then denominated (for example USD).

183. Wentworth contends that in those circumstances, the position is materially the same as in relation to the equivalent circumstances just considered in relation to the CRA.

184. First, as a result of the combination of the provisions of the Agreed Claims CDD which limit the creditor's claim to the Agreed Claim Amount and release all other claims, the creditor has no continuing right to be paid in the original currency, and thus has no basis for a Currency Conversion Claim built upon the non-payment of its claim in the original currency.

185. Second, the agreement to denominate the Agreed Claim Amount in a different foreign currency (for example USD) does not *create* a Currency Conversion Claim based on the non-receipt of the full amount of the Agreed Claim Amount expressed in USD. In summary:

(1) The Agreed Claims CDD expressly provides (by clause 3.2.1) that where the Agreed Claim Amount is expressed in a foreign currency, then it would be converted into sterling for the purposes of it later being admitted as an Admitted Claim for the purpose of qualifying for dividends from the administration estate;

(2) The conversion of the creditor's claim (or part of it) into USD was, therefore, expressly only for limited purposes, which purposes did not include the admission of the claim for the purposes of receiving any dividends from the administration estate.

(3) The agreement to denominate the Agreed Claim Amount in USD, therefore, is not sufficient to found a Currency Conversion Claim to the extent that the creditor receives less (from distributions from the administration estate) than the amount of its Agreed Claim Amount in USD.

PART 5: ISSUE 36A

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

186. The SCG cannot rely on the rule in *Ex parte James* (1873-74) LR 9 Ch App 609 or paragraph 74 of Schedule B1 to the Insolvency Act 1986 to preclude the enforcement by the Administrators of the releases in the CDDs or the CRA.

Ex parte James: legal principles

187. The rule in *Ex parte James* permits the Court to restrain an officer of the Court from acting in a dishonourable manner.

188. There is no basis upon which it could be applied to restrict the enforcement of release provisions in the compromise agreements which, objectively constructed, release claims that creditors might otherwise have been able to assert against an insolvency surplus.

189. In *In re TH Knitwear (Wholesale) Ltd* [1988] Ch 275, in which the Court of Appeal held that the rule in *Ex parte James* applied only to officers of the Court, Slade LJ, with whom the other members of the Court expressed agreement, said (at 289):

> "*The entire basis of the principle, as I discern it from the cases, is that the court will not allow its own officer* ***to behave*** *in a* ***dishonourable*** *manner.*"
>
> (Emphasis added.)

190. He added (at 289):

"*There is no doubt much to be said in favour of the principle. However, where it is invoked it is likely, save in the most obvious cases, to introduce a less welcome element of uncertainty.*"[10]

191. Slade LJ's observation as to the basis for the rule in *Ex parte James* corresponds to earlier statements by the Court of Appeal:

(1) In *Re Thellusson; Ex parte Abdy* [1919] 2 KB 735, Atkin LJ expressed the touchstone as a lack of honesty (at p.764):

> "*We were pressed in argument with the contention put before the Court in Re Tyler [1907] 1 KB 865 at 868, that "great difficulties will arise in the administration of bankruptcy if the Court is to decide according to what it considers high minded without regard to law or equity." I think that these difficulties are exaggerated. But while one may agree that opinions as to rules of honesty differ, the difficulty of recognising honesty when she appears, affords no inadequate reason for discarding her altogether. The advantages of maintaining a high standard of commercial morality in my judgment far outweigh the suggested inconveniences of administration. If I may repeat the words of Lord Esher the proposition strikes me as a good, a righteous and a wholesome one, and I eagerly desire to adopt it.*"

(2) In *Re Wigzell; Ex parte Hart* [1921] 2 KB 835, Salter J had described the relevant principle as being (at 845):

> "*[T]hat where a bankrupt's estate is being administered by the trustee under the supervision of a Court, that Court has a discretionary jurisdiction to disregard legal right, and that such jurisdiction should be exercised wherever the enforcement of legal right would, in the opinion of the Court, be contrary to natural justice … The question to be decided is … one of ethics, not of law.*
>
> *Legal rights can be determined with precision by authority, but questions of ethical propriety have always been, and will always be, the subject of honest difference amongst honest men. The effect of exercising the jurisdiction which these decisions have asserted and defined is to deprive the creditors of money which is divisible among them by law. I feel sure that such a power should not be used unless the result of enforcing the law is such that, in the opinion of the Court, it would be pronounced to be obviously unjust by all right-minded men.*"

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[10] Echoing this observation, Newey J said in *Re Alitalia Linee Aeree Italiane SpA* [2011] EWHC 15 (Ch): "*The principle in Ex parte James is "anomalous" (as Slade LJ said in TH Knitwear), and the Courts should be cautious about extending it.*"

(3) On appeal, Lord Sterndale MR said (at 851) concerning the effect of *Ex parte James*:

> "*It seems to me to have been established practically that there must be read into s 45 of the Bankruptcy Act 1914, after the second proviso, a third proviso: "Provided that the transaction whenever it takes place is one which it would not be honourable or high minded for a trustee to impeach.*"

(4) Scrutton LJ said (at 857): "*[O]wing to the decisions of this Court judges sworn to administer the law and endeavouring to apply the law find themselves brought into a region which is not law, but ethics; a matter on which individual minds may easily differ.*"

(5) He continued (at 858):

> "*Now the decisions of this Court have established that though in law the money is the money of the trustee for the creditors, yet he may be restrained from enforcing his claim to it or retaining it if (and a series of phrases none of which are very definite have been used) it were* ***not honourable*** *— if it were* ***not high minded*** *— if it would be* ***contrary to natural justice*** *— if it would be* ***shabby*** *— if it would be a* ***dirty trick*** *for him to retain it — or to take perhaps the most temperate statement of the principle, which I find given by Buckley LJ in Re Tyler [1907] 1 KB 865 at 873 and cited with approval by Atkin LJ in Thellusson's case [1919] 2 KB 735 at 762:*
>
> > *"Assuming that he (the officer of the Court) has a right enforceable in a Court of justice, the Court of Bankruptcy or the court for the administration of estates in Chancery will not take advantage of that right if to do so would be* ***inconsistent with natural justice and that which an honest man would do****." I desire to say very respectfully that it seems to me that when we have got into this atmosphere we have reached a region of uncertainty.*"
>
> (Emphasis added.)

192. In *Kleinwort Benson v Lincoln City Council* [1999] 2 AC 349, the House of Lords held that a mistake of law is an unjust factor as much as a mistake of fact, recognising that the distinction formerly drawn between mistakes of law and mistakes of fact was unprincipled and subject to too many exceptions, such as the rule in *Ex parte James*: [1999] 2 AC 349 at 353, 372, 407 and 417. Prior to that case, *Ex parte James* was

principally an exception to the bar against restitution for a mistake of law. In *Reg. v. Tower Hamlets London Borough Council, Ex parte Chetnik Developments Ltd.* [1988] AC 858, 874-75, Lord Bridge reviewed *Ex parte James* and the line of cases which had applied the rule expressed in that case (such as *Ex parte Simmonds* (1885) 16 QBD 308). He said (at (876-77):

> "*So it emerges from these authorities that the retention of moneys known to have been paid under a mistake of law, although it is a course permitted to an ordinary litigant, is not regarded by the courts as a 'high-minded thing' to do, but rather as a 'shabby thing' or a 'dirty trick' and hence is a course which the court will not allow one of its own officers, such as a trustee in bankruptcy, to take.*"

193. The scope of the principle was considered by David Richards J in *Re T & N Ltd* [2004] Pens LR 351. There are three points which are of particular relevance to the present case.

194. First, the learned Judge stated that the principle required "*dishonourable behaviour of a threat of dishonourable behaviour on the part of the court officer, by taking unfair advantage of someone*" (at [17]).

195. Second, the learned Judge found that there is "*nothing dishonourable in the administrators taking lawful steps to prevent a possible liability arising in the future, in order to protect the position of existing creditors*" and nor would this constitute taking unfair advantage of someone (at [17]).

196. Third, the learned Judge noted that "*it would appear from the authorities that the principle may be confined to cases where the assets available for distribution are increased as a result of a mistake of law or fact or where advantage is taken of payments made by a third person without giving credit for them, i.e. an unjust enrichment of the company*" (at [18]).

197. Thus, the principle is only engaged by actual or anticipated conduct characterised as dishonourable, shabby, or contrary to natural justice. To set the bar lower would be to create uncertainty, risking interfering with legal rights the Court is otherwise bound to give effect to.

Paragraph 74 of Schedule B1: legal principles

198. Paragraph 74 of Schedule B1 permits the Court to grant relief if an administrator "*is acting or has acted so as unfairly to harm the interests of the applicant (whether in common with some or all other members or creditors)*".

199. The test to be applied when considering a claim by a creditor under paragraph 74 has already been the subject of consideration by the Court in the LBIE administration: see *Four Private Investment Funds v Lomas* [2009] BCC 632.

200. Blackburne J first considered the requirement for the applicant to establish "*harm*". He found that this required the application to demonstrate that the action complained of is or will be causative of harm to its interests (at [34]):

> "*First, the action complained of must be shown to have caused the complainant to suffer harm to his interests or, in the case of a proposed action of the administrator, would cause the complainant to suffer harm. In short, the applicant must show that the action complained of is or will be causative of harm to its interests.*"

201. The learned Judge then considered the requirement that the harm must be "*unfair*". He found that, in circumstances where the administrators were acting within their statutory obligations under Schedule B1 IA 1986, it was "*exceedingly difficult*" to see how the requirement for unfairness could be satisfied by the applicant (at [37]-[39]):

> "*The second aspect of the statutory requirement is that the harm must be "unfair"; harm alone is not enough. What is the ingredient implied by the need to show unfairness?*
>
> *… By Sch.B1 para.3(1) the administrator is obliged to perform his functions with the object of achieving the purpose of the administration. In the present case that is to achieve a better result for LBIE's creditors as a whole than would be likely if LBIE were wound up without first being in administration. By para.3(2) the administrator is obliged to perform his functions in the interests of the company's creditors as a whole. By para.4 he must perform his functions as quickly and efficiently as is reasonably practicable. By para.59(1) he may do anything necessary or expedient for the management of the affairs, business and property of the company. By para.68(1) he must manage the affairs, business and property of the company in accordance with any proposals approved by the creditors under para.53, subject to any directions which the court may give under para.68(2).*

> *Where, as here, where there is no suggestion that the administrators are acting other than in accordance with their obligations under Sch.B1 and the order made on October 7 it is exceedingly difficult to see how the unwillingness of the administrators to devote more time and resources than they have already to answering questions put to them by a particular group of creditors (as I shall assume the applicants to be) directed to eliciting information about assets which the creditors claim are theirs can be said to be unfair even if it can be said to be causative or likely to be causative of harm. If, as they assert and their evidence strongly suggests, the administrators are seeking in good faith to carry out their functions in the interests of LBIE's creditors and asset claimants (as I shall for want of a better expression describe former clients such as the applicants) as a whole and are endeavouring to avoid being deflected from this course by devoting what they fairly regard as a disproportionate amount of time and resources to dealing with requests for information from a particular group of former clients, such as the applicants, I feel quite unable to conclude that any case of unfair harm is established within the meaning of para.74(1). The material for contending that it is simply not to hand.*"

202. In *BLV Realty Organisation Ltd* [2009] EWHC 2994 (Ch), Norris J considered the test to be applied under paragraph 74. Two observations of the Judge are of particular relevance to this case.

203. First, the Judge found that the obligation of an administrator to perform his functions in the interests of "*the creditors as a whole*" does not mean that the obligation falls to be performed in an identical way in relation to each and every constituent of the class (at [20]).

204. Second, the Judge found that unequal or differential treatment is not necessarily unfair treatment. Where the decision is a commercial one for an administrator and there is a rational explanation for the approach taken by the administrator, then any harm caused by differential treatment is not unfair as required by paragraph 74 (at [22]). This conclusion is consistent with the established principle that the Court will only interfere with commercial decisions of an administrator where the applicant can demonstrate "*plainly wrongful*" conduct by the administrator: see *Four Private Investment Funds v Lomas*, at [48]; see also *Re CE King Ltd* [2000] 2 BCLC 297.

205. The requirement of the applicant to demonstrate unfair harm was also considered by Norris J in *Re Coniston Hotel (Kent) LLP (in liquidation)* [2013] EWHC 93 (Ch). The learned Judge concluded that the provision would ordinarily require the applicant to

establish unequal or differential treatment which disadvantaged the applicant and which could not be justified by reference to the interests of the creditors as a whole or the achievement of the objective of administration (at [36]):

> "*Paragraph 74 does not exist to enable individually disgruntled creditors to pursue administrators for compensation. Its focus is "unfair harm": and that, I think, will ordinarily mean 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.*"

206. Thus, it can be seen that the burden placed upon an applicant under paragraph 74 is a heavy one. In *Re St George's Property Services (London) Ltd* [2012] Bus LR 594, Mummery LJ described the test of unfair harm as a "*high test*" (at [29]). To set the bar lower would lead to the undesirable result of the Court second guessing commercial decisions of its officeholders.

Ex parte James and paragraph 74: analysis

207. The SCG's case based on *ex parte James* and paragraph 74 does not, when viewed against the principles established in the authorities and the SAF for Issue 36A, stand up to scrutiny. In particular, none of the facts relied upon by the SCG come anywhere close to discharging the very heavy burden to establish such a case.

208. First, it is difficult to see how the Administrators' actions in holding a creditor to a bargain freely entered into and for proper consideration could be regarded by anyone as dishonourable or contrary to natural justice or as unfairly harming the creditor. Any creditor bound by the releases in the CDDs or in the CRA cannot have had any expectation that its rights were other than as objectively agreed and that those rights would be enforced. That expectation necessarily flows from the terms of the agreement.

209. Second, that conclusion is reinforced by the following aspects of the CDDs and the CRA:

(1) The CDDs are bilateral contracts, and the CRA a contract to which the signatories acceded by individual deeds.

(2) Every creditor who entered into a CDD made the following contractual representations:

(a) at clause 8.2 (first sentence), that it had made "*its own independent decision as to whether the CDD was appropriate or proper based upon its own judgement and upon advise from its independent advisers, as it had deemed necessary*";

(b) at clause 8.2 (second sentence), that it had not relied on any "*communication or announcement*" by LBIE or the Administrators "*as a recommendation or inducement to entered into this Deed*"; and

(c) at clause 12, that the CDD represented "*the whole agreement*" and that "*it has not been induced to enter this Deed by any representation, warranty, or undertaking not expressly incorporated into it*."

In light of these representations, a creditor seeking to restrain the enforcement of a release in its CDD cannot rely on the fact that another creditor has agreed different rights (for example, by the inclusion of a carve-out of a Currency Conversion Claim) as a basis upon which to invoke the rule in *Ex parte James* or the jurisdiction found at paragraph 74.

(3) Similarly, the Important Notice in the CRA Eligible Offerees document provided:

"*Each recipient of this document is advised to read and consider carefully the text of the Agreement and to make its own independent decision in relation to the Agreement*."

(4) Correspondingly, the CRA included in clauses 76 and 86 like representations to those in the CDDs set out above.

210. The conclusion is also reinforced by the fact that many of the creditors who entered into the CRA or a form of CDD were sophisticated entities, with access to legal advice. This is patently not a case where the Administrators can be characterised as having taken advantage of vulnerable creditors by 'tricking' them into a release of claims (for the purpose of *ex parte James*) or acting in a way which is 'plainly wrongful' (for the purpose of paragraph 74).

211. Third, it is wrong to suggest (as the SCG does) that the enforcement of the releases would be unfair because it would constitute differential treatment between creditors, given that some creditors did, but others did not, enter into particular forms of release. The essential assertion that different CDDs saying different things unfairly discriminate as between creditors is unsustainable. It is not unfair to treat creditors who have agreed different rights differently, especially so if they have represented their cognisance of the agreement entered into. On the contrary, it would be clearly differential treatment to hold *some* creditors to the bargain freely made by them, but to allow others to escape from their bargain.

212. Fourth, it is irrelevant that the Administrators may not have had in mind the possibility that a creditor with an entitlement to be paid in a foreign currency might be entitled to claim their currency shortfall in the event of a surplus after payment of all proved debts and Statutory Interest. Nor is it relevant whether the Administrators or the particular creditor had in mind, when entering into the relevant agreement, that there might be a surplus after payment of proved debts and Statutory Interest. These are precisely the kinds of consideration that the parties agreed would not affect the validity of the release, by their agreement that the release covered all claims whether in contemplation of any of the parties or not.

213. Fifth, the release of potential claims by the creditor is but one part of the overall bargain between the creditor and LBIE, by which a fixed sum was agreed upon for the creditors' claim and all claims (both ways) between LBIE and the creditor were compromised. There can be no justification for relieving the creditor of part only of the overall bargain made, yet it can hardly be said that it would accord with natural justice to require the bargain as a whole to be undone, thus destroying the savings in time and costs which the CRA/CDD process was designed to achieve.

214. Sixth, the SCG's contention that the execution of agreements with such releases was inconsistent with, or did not further, or was not necessary for, the achievement of the purpose of the administration is wrong.

215. The estate as a whole benefitted from a process which ensured binding compromises were reached with as many creditors as possible, as it reduced costs, avoided litigation, and resulted in a speedier resolution of issues in a highly complex and expensive administration.

216. It was, moreover, a proper exercise of the Administrators' functions to ensure that the compromise reached with creditors was a full and final settlement of all possible claims by the creditors, and not merely a compromise that affected only the creditors' right to prove in a distributing administration or liquidation.

(1) The Administrators' duties are owed to the estate as a whole and all of its creditors, including those with subordinated claims. All stakeholders stood to gain from the Administrators being able to resolve *all* issues between LBIE and particular creditors.

(2) In any event, the procedure within which a distribution would be made to unsecured creditors was not known for certain. As the terms of the CDDs envisaged, it was possible that distributions would be made for example via a scheme of arrangement: it was entirely proper for the Administrators to ensure that the compromise led to certainty as to the quantum of the creditor's claim in whichever circumstances distributions were ultimately to be made.

(3) In addition:

(a) In relation to the CRA, it was essential that the compromise of claims was effective to enable any net sum owing *by* the creditor to be offset against proprietary claims, for which purpose the settlement had to be in full and final for all purposes, not merely for the purposes of proof; and

(b) In relation to the Agreed Claims CDD, it was unknown whether the claim would rank as a Client Money Claim or an unsecured claim against the administration estate, and it was therefore necessary that the compromise was full and final for both purposes.

217. The SCG's argument is not advanced in this respect by pointing to the fact that the Administrators already owed duties to return trust assets and to admit or reject provable claims. The Administrators also owed duties to exercise their functions in the best interests of all creditors, and the interests of creditors as a whole were advanced by the Administrators taking action to try to reach final agreement with creditors as cheaply and quickly as they reasonably could.

218. Seventh, the SCG is wrong to suggest that enforcement of the releases would be unjustified because it would create a windfall benefit for subordinated creditors and shareholders. True it is that a consequence of the limitation on particular creditors' claims is that there will be a greater return for others. But that is always a necessary consequence of any release of claims. The identity of those who benefit will depend upon the financial circumstances of the estate. It might be other unsecured creditors, or it might be others with lower ranking claims. At the time of the agreements, and even now, it could not be known that there will in fact be a surplus (after payment of proved debts and Statutory Interest) in an amount sufficient to satisfy all non-provable claims. The effect of the release of some non-provable claims may, therefore, be limited to improving the lot of other creditors with non-provable claims.

219. Accordingly, the Court is invited to reject the position adopted by the SCG in respect of Issue 36A.

PART 6: ISSUE 9

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

220. Wentworth does not understand Issue 9 to be in contention.

221. Wentworth contends that a creditor's accession to the CRA results in the termination of open contracts and thus causes the occurrence of the contingency which makes the debt an actual one. Accordingly, Wentworth contends that the question as to when interest begins to run on the Net Financial Claim is dependent on the answer that the Court provides, generally, to Issue 7 in Part A.

222. The SCG has not suggested that a creditor's accession to the CRA makes any difference to the answers to Issues 7 and 8: see paragraph 9(1) of the SCG's reply position paper.

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