

<p>1 Tuesday, 11 April 2017 2 (10.30 am) 3 Submissions by MR ZACAROLI (continued) 4 LADY JUSTICE GLOSTER: Yes, Mr Zacaroli. 5 MR ZACAROLI: Picking up from yesterday afternoon, my plan 6 this morning is first of all to make some submissions on 7 the structure on the admitted claims CDD that we looked 8 at already -- 9 LADY JUSTICE GLOSTER: Yes. 10 MR ZACAROLI: -- then turn to the agreed claims CDD more 11 briefly, and then look at the question of waiver of 12 interest as a matter of construction under all three 13 forms of agreement, the CRA and both forms of CDD. 14 So to recap briefly, our core argument on the 15 currency conversion claims and the admitted claims CDD 16 is as follows; that the CDD expresses an unambiguous 17 intention to restrict the creditor to claiming a single 18 fixed sum in sterling and waives all other claims. From 19 that moment onwards, the creditor is agreeing that it is 20 a sterling creditor and nothing else. 21 The agreement expressly envisages the possibility 22 that there are possible claims out there that the 23 parties have not contemplated and releases those claims. 24 It includes the waiver of claims under the creditor 25 agreement or not that squarely covers any residual right</p> <p style="text-align: center;">Page 1</p>	<p>1 claims, including claims not in existence, including 2 proprietary claims against the creditor. There's no 3 suggestion that that can be limited in some way to 4 claims of a provable nature. 5 Now that last point is important we say because it 6 stems from a key purpose of the agreement, that of 7 producing finality in the relationship between the 8 creditor and the company. 9 For this purpose, it is necessary to look at some of 10 the background. I'm going to show you a document which 11 is probably at the core of submissions both by us and by 12 the SCG for the purpose of the agreement, and that is 13 the fourth progress report of the administrators. It is 14 to be found in the supplemental bundle for part B at 15 tab 22. (Pause). 16 I am going to take the court through it and then 17 make some submissions that we say are in our favour on 18 this. You'll see first of all it is dated 19 14 October 2010, so this is at the beginning of the 20 promulgation of Project Canada; that is the CDD project. 21 First of all, page 3 under the important notice, 22 you'll see that: 23 "Creditors are warned that the report provides data 24 relating to estimated future recoveries of costs 25 creditor ...(Reading to the words)... exist regarding</p> <p style="text-align: center;">Page 3</p>
<p>1 (inaudible due to coughing). Thus the essential 2 prerequisite of a currency conversion claim is simply 3 missing because the creditor is thereafter a sterling 4 creditor. 5 Just to draw together the five points which show 6 that the intended width of the release went beyond the 7 release of just provable claims. 8 LADY JUSTICE GLOSTER: Yes. 9 MR ZACAROLI: I think we've seen all these. There are 10 five -- 11 LADY JUSTICE GLOSTER: We've seen them all in the release 12 clause. 13 MR ZACAROLI: We've been through them, but just to draw them 14 together. The first is that the release extends to 15 claims existing now or in the future. 16 LADY JUSTICE GLOSTER: Yes. 17 MR ZACAROLI: Secondly, it includes the release of 18 proprietary claims which wouldn't be provable on any 19 basis. Third, it releases all claims to interest, and 20 when one sees the first variant CDD which expressly 21 preserves statutory interest we say that can only mean 22 waiving any non-provable claim to interest. 23 Fourthly, paragraph 2.4 precludes making any claim 24 in an insolvency administration or otherwise, and 25 fifthly the release is mutual. LBIE also releases all</p> <p style="text-align: center;">Page 2</p>	<p>1 the ultimate value realisable." 2 The next paragraph cautions creditors from using the 3 data to estimate the value of their claims. 4 Moving on to page 9, the larger page 9, still the 5 internal bundle reference, the heading is "Objective and 6 progress". The second bullet point notes: 7 "The framework has been developed for a consensual 8 approach for the expedited ...(Reading to the words)... 9 of client assets." 10 And the final bullet point on the page: 11 "It remains premature for the ...(Reading to the 12 words)... unsecured creditors claim or an indicative 13 dividend range." 14 Nothing I need to show you then until we get to 15 section 6 on page 29 headed "Unsecured creditors". 16 Under the box at the top left of the page headed 17 "Highlights" -- 18 LADY JUSTICE GLOSTER: Yes. 19 MR ZACAROLI: -- the first bullet point: 20 "A key objective in the period has been to begin 21 ...(Reading to the words)... unsecured creditors' 22 claims." 23 That's what has given rise to this, as it were, 24 process. 25 Over the page on page 30 on the left-hand side,</p> <p style="text-align: center;">Page 4</p>

<p>1 under the heading "Claims submission": 2 "Under UK insolvency legislation, a creditor wishing 3 to claim against an insolvent estate must submit 4 a compliant POD [that's proof of debt]. Until they do 5 that, their claim cannot be agreed and admitted 6 ...(Reading to the words)... Accordingly creditors are 7 encouraged to submit POD at their earliest possible 8 convenience ..." 9 LADY JUSTICE GLOSTER: What are we picking up here other 10 than factual matrix stuff? 11 MR ZACAROLI: Nothing. I am just taking you through this 12 fairly to show you what's in this report. There will be 13 points made for and against me on these aspects, I'm 14 just showing you what is there so you can see it -- 15 LORD JUSTICE PATTEN: But why is any of this admissible? 16 MR ZACAROLI: Admissible? 17 LORD JUSTICE PATTEN: Yes. What we are being asked to 18 receive this as -- for what purpose -- this goes to 19 construction or what? 20 MR ZACAROLI: To construction, yes. This is a document put 21 out by the administrators explaining the process by 22 which they were trying to agree claims with creditors -- 23 LORD JUSTICE PATTEN: Before they had formulated the terms 24 of the agreement? 25 MR ZACAROLI: Correct.</p> <p style="text-align: center;">Page 5</p>	<p>1 point: 2 "The consensual approach is designed to accelerate 3 the agreement of unsecured claims with a view ultimately 4 to expediting distribution of payments." 5 The fourth bullet point: 6 "The appeal court judgment [and that's on the client 7 money] impacts the administrators' ability to formally 8 admit claims for dividend. The immediate focus is 9 therefore on agreeing balances provable." 10 And then the last bullet point in the box: 11 "Alternatively, creditors can elect to have their 12 claims reviewed in detail, albeit this will take 13 significant time to conclude and in exceptional cases 14 may require court adjudication." 15 Then picking up the right-hand column under the 16 heading "Consensual approach", halfway down: 17 "The administrators' experience suggests that 18 resolution of LBIE's unsecured creditor claims outside 19 of the consensual approach is likely to take many years 20 to conclude, requiring significant time and resources 21 for both the creditors and the insolvent estate. 22 Litigation may be necessary. To avoid this protracted 23 agreement process, the administrators announced to 24 creditors that they were considering the establishment 25 of a more expedient claims determination mechanism "the</p> <p style="text-align: center;">Page 7</p>
<p>1 LORD JUSTICE PATTEN: So this is to identify the object of 2 the agreement, is it? 3 MR ZACAROLI: Yes. 4 LORD JUSTICE PATTEN: Right. 5 MR ZACAROLI: We accept it is relevant, and most of the 6 points on this document will be made against me, 7 I think. I want to show you it one go so you see it -- 8 LADY JUSTICE GLOSTER: So you say actually this supports the 9 width of your construction? 10 MR ZACAROLI: The points I draw out of it will show that it 11 supports the width of the construction, because the 12 points I will come to particularly show that one of the 13 objectives was to create finality and certainty as 14 between the estate and each creditor. But as we go 15 through, you'll see points that will be made against me, 16 but I'm trying to show you it in one go. 17 LADY JUSTICE GLOSTER: Yes. 18 MR ZACAROLI: Just picking up on the right-hand column of 19 that page, 30, just below the hole punch or about 20 two-thirds of the way down: 21 "When a dividend is declared, only creditors who 22 have submitted a POD in accordance with the legislation 23 and have limited claim will be eligible to be paid." 24 And then section 6.1 "The consensual approach", 25 under the box headed "Highlights", the first bullet</p> <p style="text-align: center;">Page 6</p>	<p>1 consensual approach" ...(Reading to the words)... with 2 the largest unsecured creditors ..." 3 LADY JUSTICE GLOSTER: What is a street creditor? 4 MR ZACAROLI: That is essentially as opposed to an inside 5 affiliated creditor. 6 LADY JUSTICE GLOSTER: I see. 7 MR ZACAROLI: It is LBIE's dealings with the market, so it 8 is unsecured creditors basically who are not I think 9 other LBIE companies. 10 LADY JUSTICE GLOSTER: Yes. 11 MR ZACAROLI: "Including those with the large unsecured 12 claims and most complex trading positions ...(Reading to 13 the words)... to gauge their response to the initiative. 14 Positive feedback." 15 Overview at the top of page 32: 16 "... claim determination process available to street 17 creditors currently estimated at 3,490 counterparties 18 with claims in excess of £4.8 billion, designed 19 primarily to accelerate the agreement of creditor 20 claims." 21 Then the heading "Benefits" towards the lower half 22 of the left-hand side: 23 "The following benefits are identified: to provide 24 finality and certainty regarding street creditors' 25 financial claims against LBIE. That is it allows</p> <p style="text-align: center;">Page 8</p>

<p>1 creditors to agree at this juncture their total net 2 claim against LBIE without the need for further 3 substantial documentation and interaction in support of 4 their claim or to enter into what would become 5 a protracted claims agreement ..."</p> <p>6 LADY JUSTICE GLOSTER: I think we have got the point. 7 Unless there's a really good nugget, do we have to go 8 through all this?</p> <p>9 MR ZACAROLI: No.</p> <p>10 LADY JUSTICE GLOSTER: Identify the points against you, if 11 you like, just so we get the feel of it.</p> <p>12 LORD JUSTICE BRIGGS: This is precious nearer a Prenn v 13 Simmonds negotiating point or not quite.</p> <p>14 MR ZACAROLI: Well --</p> <p>15 LORD JUSTICE BRIGGS: It is starting to encourage people to 16 enter into these agreements rather than just setting out 17 the background against which the agreements were 18 negotiated. But I gather you both think it is 19 admissible, so I suppose we just have to sort of wallow 20 through it.</p> <p>21 MR ZACAROLI: We don't suggest it is inadmissible, no.</p> <p>22 LADY JUSTICE GLOSTER: It is good background material. They 23 want finality, they want it all to be cheaper, not spend 24 so much money on lawyers. I mean, you can see all that.</p> <p>25 MR ZACAROLI: Yes, that's right.</p> <p style="text-align: center;">Page 9</p>	<p>1 LORD JUSTICE PATTEN: Yes, all right. Anyway, you were 2 going to show us something.</p> <p>3 MR ZACAROLI: Yes. 6.2, and the reason I am showing you 4 this is because of the point made against us is that the 5 purposes of conversion of claims into sterling were for 6 the purposes of submitting a provable claim, and that's 7 clear. I mean, in a sense Rule 2.86 is referred to on 8 page 35. The reason claims needed to be converted into 9 sterling is because the claim was one that would be 10 admitted in the proof process. We accept that, and 11 that's the point that will be made against us, as 12 I anticipate, and is made against us in the skeletons, 13 based upon the material you see at page 35, and I'm 14 going to come to address that point --</p> <p>15 LORD JUSTICE BRIGGS: In a sense, it is obvious merely from 16 reading the English insolvency legislation, which 17 I appreciate some of these people might have had to read 18 for the first time, that the purpose of the exercise in 19 so far as it has a positive purpose for the creditor is 20 to identify a provable claim.</p> <p>21 MR ZACAROLI: Yes.</p> <p>22 LORD JUSTICE BRIGGS: But I imagine you say, "Well, yes, but 23 the quid pro quo is what they give up".</p> <p>24 MR ZACAROLI: Exactly. So we say there are -- leaving that 25 document now, just looking at the CDDs, we say that</p> <p style="text-align: center;">Page 11</p>
<p>1 LADY JUSTICE GLOSTER: What are the bits against you?</p> <p>2 MR ZACAROLI: So if you turn to "Currency matters" in 3 particular -- well, let me pick up on page 34, the last 4 paragraph, which is the first reference to currency 5 matters --</p> <p>6 LORD JUSTICE PATTEN: But I mean when this document was 7 prepared in 2010 -- have I got this right -- that at 8 that point they weren't contemplating it would be 9 a solvent liquidation, a solvent administration?</p> <p>10 MR ZACAROLI: That's correct.</p> <p>11 LORD JUSTICE PATTEN: So in a way, the issue which we're 12 concerned with as a matter of construction wasn't there 13 hovering in the background --</p> <p>14 MR ZACAROLI: That's correct.</p> <p>15 LORD JUSTICE PATTEN: -- as a feature of your clients' 16 thinking or some tentative agreement between them and 17 the street creditors.</p> <p>18 MR ZACAROLI: My Lord, that's correct. It is absolutely 19 right that currency conversion claims were not on the 20 evidence in contemplation, certainly by the 21 administrators and hadn't been raised by any creditor --</p> <p>22 LADY JUSTICE GLOSTER: One can't know, can one?</p> <p>23 MR ZACAROLI: We can't, no, but what we know is it hadn't 24 been raised with the administrators at that stage, and 25 they ...</p> <p style="text-align: center;">Page 10</p>	<p>1 there are two important benefits the creditors receive. 2 The first is the chance to get an early distribution as 3 opposed to having to spend years resolving its claim on 4 an outside consensual basis, saving both time and costs 5 for the creditor. And secondly, it achieves finality, 6 in the sense that it is ensured that no possibility of 7 a further claim against it by LBIE can arise in the 8 future, whether it be a personal or proprietary claim or 9 a claim of any nature, a claim that arises thereafter. 10 No claim can thereafter be made against the creditor.</p> <p>11 LORD JUSTICE BRIGGS: Wouldn't the admission of a proof 12 largely achieve that as a result of insolvency set-off?</p> <p>13 MR ZACAROLI: Not in relation to proprietary claims.</p> <p>14 LORD JUSTICE BRIGGS: No, I am talking about claims by LBIE 15 against the creditor. You are not aware of any --</p> <p>16 MR ZACAROLI: Not in relation to a proprietary claim that 17 LBIE may have against the creditor. There may be 18 proprietary claims of an investment bank against its 19 counterparties, there may be secured claims, for 20 example. Or they could be claims that it is holding 21 property that LBIE makes a claim over; and, in addition, 22 claims that arise in the future.</p> <p>23 LORD JUSTICE BRIGGS: Yes.</p> <p>24 MR ZACAROLI: So we say it would cut across the mutual 25 release if the creditor could assert a later discovered</p> <p style="text-align: center;">Page 12</p>

<p>1 claim against LBIE that was somehow carved out of the 2 release, because it would cut across the fact that 3 release is supposed to be mutual and produce finality on 4 both sides.</p> <p>5 LADY JUSTICE GLOSTER: I can see that. I just can't see why 6 this document helps us with that point.</p> <p>7 MR ZACAROLI: I have moved away from that document, but yes, 8 that's our submission based on the CDD.</p> <p>9 LORD JUSTICE BRIGGS: Can I just check, the first document 10 talked about getting an earlier distribution. Is there 11 any element in this of those who sign getting up 12 an earlier distribution than those who don't, or just 13 speeding up the distribution generally for everybody's 14 benefit?</p> <p>15 MR ZACAROLI: The former. So if you don't sign up as that 16 document showed us, if you don't sign up, you go to the 17 back of the queue, essentially.</p> <p>18 So there is a very real benefit a creditor acquires 19 by agreeing to this process, that is an earlier 20 distribution, than if it didn't sign up.</p> <p>21 Now, the judge in his judgment made six points --</p> <p>22 LORD JUSTICE BRIGGS: Just pausing there. Once 23 a distribution is actually made, only made to those who 24 sign up -- and we now know I think that all unsecured 25 creditors have been paid 100p in the pound.</p> <p style="text-align: center;">Page 13</p>	<p>1 MR ZACAROLI: -- acting by its administrators.</p> <p>2 We say that this is actually both 3 a mischaracterisation of the administrators' duties and 4 also relevant when one is considering the construction 5 of these contracts.</p> <p>6 So far as the administrators' duties are concerned, 7 these are well known. But just to remind my Lords and 8 my Lady, if you turn to the Insolvency Act schedule B1, 9 paragraphs 3 and 4 --</p> <p>10 LADY JUSTICE GLOSTER: Well, he sets them out, doesn't he?</p> <p>11 MR ZACAROLI: Yes, he does indeed. Yes, they are set out in 12 66 and 67, exactly.</p> <p>13 And there's no doubt that the administrator has 14 a power to compromise any claim, paragraph 18 of 15 schedule 1.</p> <p>16 The administrators have a duty to admit only such 17 claims and in such amount as is proper. In exercising 18 that duty to reject or admit claims and exercising the 19 power of compromise, the creditors are essentially on 20 the opposite side of the negotiating table to each 21 individual creditor that they are dealing with. So they 22 are acting on behalf of all of the creditors in dealing 23 with one creditor because they've got a duty to ensure 24 that that creditor's claim is admitted in no more or 25 less than the proper amount. And it's a perfectly</p> <p style="text-align: center;">Page 15</p>
<p>1 MR ZACAROLI: I don't know the answer to that question. 2 I'll find out as to what --</p> <p>3 LORD JUSTICE BRIGGS: Have those who didn't sign up also 4 been paid and were they paid later than those who did 5 sign up?</p> <p>6 MR ZACAROLI: I am assuming that is so from the fact that if 7 you signed up, you got an early distribution. But we 8 will check if we're able to.</p> <p>9 LORD JUSTICE BRIGGS: Thank you.</p> <p>10 MR ZACAROLI: I don't have that information at my 11 fingertips, but we'll see if we can find out.</p> <p>12 LORD JUSTICE BRIGGS: I'm sure the administrators will know.</p> <p>13 MR ZACAROLI: So turning to the judge's judgment on the 14 question of construction of the admitted claims CDDs, 15 and this begins at paragraph 65 of the judgment in 16 bundle B of the core bundle, volume 1, tab 2. (Pause).</p> <p>17 The first point he makes at paragraphs 65 to 68 is 18 that the CDDs do not represent an arm's-length bargain, 19 but a bargain between administrators who are acting in 20 the course of statutory duties and a creditor.</p> <p>21 LADY JUSTICE GLOSTER: But the deeds aren't between the 22 administrators, they are between the company --</p> <p>23 MR ZACAROLI: Yes, that's right. They are, however, 24 I accept, entered into by the company --</p> <p>25 LADY JUSTICE GLOSTER: -- acting via its administrators.</p> <p style="text-align: center;">Page 14</p>	<p>1 proper function of the administrators in doing that to 2 enter into a compromise.</p> <p>3 LADY JUSTICE GLOSTER: I just don't understand the logic of 4 68.</p> <p>5 MR ZACAROLI: Well, with respect, my Lady, we agree.</p> <p>6 LADY JUSTICE GLOSTER: This was a deed between commercial 7 parties and the company.</p> <p>8 MR ZACAROLI: That's what we say.</p> <p>9 LADY JUSTICE GLOSTER: The administrators no doubt had all 10 these duties, but so what?</p> <p>11 MR ZACAROLI: My Lady, we would say precisely, and indeed it 12 is consistent with the statutory regime of the 13 administrators to enter into what is a rough-and-ready 14 compromise with the creditor, and in so doing achieving 15 finality, saving costs for the creditor and for the 16 estate more generally in not having to come back to that 17 creditor ever again within the insolvency process to 18 negotiate anything further.</p> <p>19 The second ground of objection or ground of the 20 judge's conclusion is at paragraph 69. He says that the 21 purpose of the CDDs was to facilitate the payments of 22 dividends and the release of a currency conversion claim 23 was irrelevant to that purpose.</p> <p>24 We say the purpose is broader than that, it is to 25 reach finality between the estate and the creditor. Yet</p> <p style="text-align: center;">Page 16</p>

1 it is true that the outcome of the CDD for the
 2 creditor's perspective was a claim that would be proved
 3 in the estate. But the purpose was broader and the
 4 broader purpose of saving time and costs and achieving
 5 finality between the creditor and the estate are wholly
 6 consistent with an unlimited release of all claims
 7 either way. In particular, a limited release which
 8 allowed the creditor to come back in the future and make
 9 further claims against the company would frustrate that
 10 purpose because it would mean greater costs would have
 11 to be expended in the future in dealing with that
 12 creditor again.

13 So of course the earlier distributions to which the
 14 creditors would become entitled were in respect of their
 15 proved claims, but that does not affect the fact that
 16 the trade-off for that earlier payment and for the
 17 benefit of a release of claims against it was finality
 18 and certainty provided by a full and final release of
 19 any and all claims by it against LBIE.

20 LORD JUSTICE PATTEN: But I mean, what the judge is doing
 21 here is setting out what he thinks are the relevant
 22 aspects of the agreement looked at in context, having
 23 regard to the purpose, et cetera, et cetera. But it
 24 does throw into fairly sharp relief, it seems to me --
 25 without wishing to retrace our steps -- what the proper

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1 approach to construction is where you're dealing with
 2 a professionally drafted agreement, all parties being
 3 obviously legally advised, and which has been put
 4 together as a matter of some care.

5 It is all very looking at this, but you've got to
 6 start with words of the contract. Now if the words of
 7 the contract are as you submit they are, in other words
 8 it is clear from the wording looking at their normal
 9 ordinary meaning that all -- I am paraphrasing here --
 10 that all other claims are excluded, released, then
 11 looking at the most recent decision of the Supreme Court
 12 on this issue, one might conclude that the language was
 13 the most important indicator as to what was intended.

14 MR ZACAROLI: Yes, I fully adopt that. I am dealing here
 15 with the arguments against us, based upon the judge's
 16 conclusion against us.

17 LORD JUSTICE PATTEN: I know, but there's got to be
 18 a gateway, hasn't there? I mean, nobody's -- perhaps we
 19 are going to hear an argument that the language is
 20 ambiguous -- but it's not obviously ambiguous, and it
 21 might be said that you don't get to sort of redraft the
 22 thing by reference to context unless it's clear that
 23 something's gone wrong or that it produces a result that
 24 can't have been intended.

25 MR ZACAROLI: Well, my Lord, I would adopt that as

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1 a proposition. I'm concerned to deal with the
 2 counter-proposition that one is always dealing -- even
 3 under the Supreme Court case from two weeks ago -- one
 4 is dealing with a spectrum.

5 LORD JUSTICE PATTEN: Well, of course. Of course.

6 MR ZACAROLI: And we are, we would say, at the right end of
 7 the spectrum where the words are of paramount
 8 importance. But even at that spectrum, I wouldn't rule
 9 out completely the argument that you need to look at
 10 those words in their context. We accept you do need to
 11 look at all words in context. However, at this end of
 12 the spectrum, we say there is no reason in that context
 13 to depart from the clear meaning --

14 LORD JUSTICE BRIGGS: Quite often, you only spot
 15 an ambiguity by reading words in context. If you just
 16 read them, they appear perfectly plain, then you read
 17 them in your context and you think, "Maybe it's not
 18 quite as clear as I thought". So, yes --

19 MR ZACAROLI: That's my concern, is to deal with that point.

20 LORD JUSTICE BRIGGS: Yes.

21 MR ZACAROLI: And what we say is -- my final point on this
 22 aspect of the judge's judgment, the second reason he
 23 gives, is that none of what he expresses there is
 24 sufficient to create the sort of ambiguity which means
 25 you would depart from the clear words in this contract.

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1 Because the mere fact that the product, intended
 2 product, so far as creditor was concerned included
 3 a claim that could be proved against the company is
 4 simply not enough by itself to displace the clear
 5 conclusion from the words that it is a full and final
 6 release of all claims both ways, whether those claims
 7 are provable or not.

8 The third reason the judge gave is at paragraph 70,
 9 and it's not entirely clear what the point here is,
 10 although I think he's relying on the fact that we accept
 11 that even under the earlier CDDs, statutory interest is
 12 preserved, at least it's not released -- something made
 13 clear for the avoidance of doubt, as the language says,
 14 in the subsequent CDDs.

15 So the point appears to be that since we accept that
 16 that right to statutory interest is not waived, then
 17 that somehow helps the construction that currency
 18 conversion claims are not waived. We say that's wrong
 19 because there is a fundamental difference between the
 20 two. Statutory interest is what you get from the
 21 statutory scheme when you prove your debt, and the
 22 purpose of the CDD was to produce a provable claim which
 23 you would then submit into the insolvency process. And
 24 that's clear from the definition of "admitted claim" in
 25 the CDD itself.

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<p>1 A currency conversion claim is the opposite. It's 2 not a consequence of the right to prove, but is just 3 that left behind under your underlying contract when all 4 that you're entitled to through the proof process has 5 been received by you. It is those contractual rights 6 which are expressly released. 7 The judge's fourth point, paragraph 71, is that the 8 administrators, in accordance with their duties, the 9 judge says, explained what was going on in these CDDs in 10 the progress reports but made no mention of the fact 11 that they might lose something that later came to be 12 called a currency conversion claim. We say this is 13 irrelevant. 14 First of all, there is a very clear and deliberate 15 intention in these CDDs to denominate the amount that's 16 now owed to the creditor in sterling. That's 17 a deliberate choice. A choice to become a sterling 18 creditor is a deliberate and obviously stated one. 19 But it is also irrelevant, because the consequence 20 that agreeing to become solely a sterling creditor and 21 waiving everything else meant that you then couldn't go 22 back for any shortfall in your dollar entitlement later. 23 That was simply not in contemplation, it was simply 24 an un contemplated claim. And what the agreement 25 undoubtedly does is waive un contemplated claims as</p> <p style="text-align: center;">Page 21</p>	<p>1 MR ZACAROLI: Yes. So there are two possibilities: one, 2 a creditor did realise there was a thing called 3 a currency conversion claim and (inaudible) turned out 4 to be called to be that; and two, it didn't. If it 5 didn't know, then all the submissions I have just made 6 stand. If it did know, that creditor knows there may be 7 a claim within this category that it is expressly 8 releasing. 9 LORD JUSTICE BRIGGS: One might ask: why is the burden on 10 the administrators? If a creditor thinks they are not 11 being properly dealt with by English insolvency law such 12 that they might have some further claim that proof is 13 not going to settle, that in a sense is a matter for 14 them to think about, isn't it? 15 MR ZACAROLI: My Lord, it is, and I gratefully adopt that. 16 Its not the administrators' role to paternalistically 17 identify what possible claims may exist in favour of 18 creditors. 19 The fifth point the judge relies upon is the fact 20 that the conversion into sterling of foreign currency 21 claims is a mandatory rule, it's done pursuant to 22 Rule 2.86, and this was explained to creditors. 23 LADY JUSTICE GLOSTER: Yes, but so what? 24 MR ZACAROLI: My Lady, yes. It is irrelevant, we say. What 25 that does is establish the reason why the underlying</p> <p style="text-align: center;">Page 23</p>
<p>1 a class. All that is, this is one of those claims that 2 fall in that class as subsequently discovered. But it's 3 an absolutely clear and deliberate intention to exclude 4 it as part of a class of un contemplated claims which may 5 arise hereafter. 6 It's wrong, we say, and the judge's point here 7 strays into construing the CDD by reference to 8 hindsight -- 9 LORD JUSTICE BRIGGS: Yes. 10 MR ZACAROLI: -- i.e. what would the parties have done if 11 they had thought about this claim at the time? We say 12 that's one thing you cannot do. That's a breach of the 13 cardinal rule that you can only construe a contract by 14 reference to the facts that existed at the date of the 15 contract. In a sense, you could ask that of any general 16 release. You could say, "Well, what about if they had 17 thought about claim X, Y or Z that later turned out to 18 be -- 19 LADY JUSTICE GLOSTER: Who knows what people who were buying 20 up LBIE debt thought about the possibility of all types 21 of claims, not just (inaudible). 22 MR ZACAROLI: No. 23 LADY JUSTICE GLOSTER: We know that nobody raised it with 24 the administrator, but to go and ask every single 25 lawyer.</p> <p style="text-align: center;">Page 22</p>	<p>1 claims were converted into sterling. But that is the 2 starting point of this CDD because it identifies that 3 sum as the sterling sum, it having already been 4 converted from whatever currency it had. What matters 5 is what the CDD then does with that claim. The answer 6 is very clear: it identifies it as the sole claim of the 7 creditor and everything else is waived. 8 In other words, whilst Rule 2.86 converts claims for 9 a limited purpose as the Court of Appeal found in 10 Waterfall I for the limited purposes of proving, and 11 that's why a currency conversion claim can exist at all, 12 the CDD does the opposite. The creditor agrees in the 13 CDD to be a sterling creditor and to waive absolutely 14 everything else irrevocably, not for limited purposes. 15 The wording of clause 2 is extremely clear on this, 16 it's an irrevocable release, not just for limited 17 purposes. 18 The sixth point is at paragraphs -- 19 LORD JUSTICE BRIGGS: Is there a sixth point? 20 MR ZACAROLI: There is, but it is much later. That's why 21 I am pausing. It is paragraphs 166 to 168 in a section 22 where he is dealing specifically with the effect the 23 admitted claims CDDs on currency conversion claims. 24 Because in this section he goes back to the factors that 25 he's just identified in the paragraphs I've just been</p> <p style="text-align: center;">Page 24</p>

1 showing you and then identifies a further one at
 2 paragraphs 166 to 168 and says it will result in
 3 discrimination between creditors.
 4 The first point we make is this isn't discrimination
 5 at all. A creditor who signs up to a CDD elects to be
 6 a sterling creditor. It is a choice the creditor makes.
 7 Those creditors that have done that necessarily lose the
 8 ability to complain thereafter that they didn't receive
 9 the full amount of dollars they were previously entitled
 10 to.
 11 LADY JUSTICE GLOSTER: I mean, they could have just proved
 12 for their debts without entering into a CDD or a --
 13 MR ZACAROLI: Yes.
 14 LADY JUSTICE GLOSTER: -- or a CRA at all, couldn't they?
 15 MR ZACAROLI: My Lady, they could.
 16 LADY JUSTICE GLOSTER: And then there wouldn't be any
 17 release at all.
 18 MR ZACAROLI: Yes --
 19 LADY JUSTICE GLOSTER: Unless it is just by proving -- are
 20 you saying that just by proving at all because they have
 21 to prove in sterling they are releasing their --
 22 MR ZACAROLI: No, no, I can't say that because the Court of
 23 Appeal says the opposite.
 24 LADY JUSTICE GLOSTER: Yes, okay.
 25 MR ZACAROLI: No. What would be said against us is that

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1 there are other forms of CDD, the agreed claim CDDs,
 2 where most of the CDDs denominated the agreed claim
 3 amount in another currency.
 4 So what is said is it is happenstance that some
 5 creditors signed up to an agreed claim CDD and the
 6 happenstance is they may have had a client money
 7 entitlement, therefore that is the CDD they entered
 8 into. Whereas if they had no client money claim, they
 9 entered into this form of CDD where the claim was
 10 denominated in sterling.
 11 Now, it is true to an extent that there is that
 12 difference between creditors, but we say the act of
 13 signing up to an agreement which denominates your claim
 14 in sterling is a deliberate act by the creditor. It's
 15 not an accident. They are knowingly agreeing to be
 16 a sterling creditor.
 17 Now, what they are perhaps -- it depends on the
 18 facts -- not knowingly doing is thereby foregoing the
 19 opportunity that they would have had if they'd agreed
 20 that their sum was payable in dollars, as originally
 21 denominated, to come back for more in the event that the
 22 proof process doesn't satisfy their dollar entitlement.
 23 To that extent, there is an element of an unintended
 24 consequence, although there we say it's not
 25 an unintended consequence because that was simply one of

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1 the claims that was unknown at the time it was released.
 2 So first of all, it is not happenstance. Creditors
 3 know when they sign up that they are agreeing to
 4 a sterling payment. It's not an accident, it's not
 5 a trick performed on them. And secondly, everyone is
 6 treated the same. They are all agreeing to waive any
 7 claims that are unknown.
 8 In a sense, the complaint about unequal treatment
 9 would always apply to a general release where a claim
 10 subsequently arose in favour of, let's say, a creditor
 11 or a whole class of creditors. For example, if the
 12 valuation mechanism under the ISDA Master Agreement
 13 subsequently turned out to produce a wholly different
 14 result than had perceived at the outset, and no doubt
 15 creditors asked to sign a CDD later on would have had
 16 that taken into account, whereas the earlier ones would
 17 not. In that sense, that's a different treatment. But
 18 that's just because the earlier ones agreed to waive any
 19 claim unknown at the time they enter into the
 20 agreement --
 21 LADY JUSTICE GLOSTER: If you sign up to those words, you
 22 sign up to those words.
 23 MR ZACAROLI: So the judge's conclusion on construction is
 24 at paragraph 169 and the core point of his conclusion --
 25 LORD JUSTICE PATTEN: 160?

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1 MR ZACAROLI: 169.
 2 LORD JUSTICE PATTEN: Yes.
 3 LADY JUSTICE GLOSTER: Where does he actually deal with the
 4 words?
 5 MR ZACAROLI: This the closest it gets to the words.
 6 LORD JUSTICE PATTEN: He doesn't anywhere in the relevant
 7 part actually grapple with the language he's got to
 8 construe, does he?
 9 MR ZACAROLI: With respect to the judge, this is the
 10 paragraph he gets closest to it. Without respect to the
 11 judge, we would say he doesn't do it adequately here.
 12 LORD JUSTICE PATTEN: No.
 13 MR ZACAROLI: This is the only paragraph you'll see,
 14 I believe, which is addressing how you're to read the
 15 words. And what he says, and it's about two-thirds of
 16 the way through -- well, it is probably worth reminding
 17 ourselves of the paragraph as a whole because he refers
 18 to the contextual considerations, and in particular the
 19 mandatory application of Rule 2.86:
 20 "The proper approach to construction is to have
 21 regard to the process ...(Reading to the words)...
 22 submitted proof in their underlying currency that is
 23 converted."
 24 Then the important sentence is:
 25 "The admitted claim stated in the CDD to be

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<p>1 an admitted amount equal to the agreed claim amount 2 which is a sterling figure is properly to be read as 3 a reference to the creditor's agreed claim converted 4 into sterling under Rule 2.86." 5 Now, we say it doesn't grapple with the language 6 sufficiently because all that does is describe the 7 process by which the sterling amount was arrived at 8 prior to entry into the CDD. But having been through 9 that process, the CDD on its face and properly read 10 clearly identifies that as the sole remaining claim. 11 So actually to succeed, the SCG would have to 12 rewrite the contract, so where it says "X pounds" it 13 actually means "Y dollars", and that is one thing which 14 is beyond the bounds of permissible construction. 15 LADY JUSTICE GLOSTER: So what clause of the CDD is he 16 actually looking at here? 17 MR ZACAROLI: I believe he's looking at the definition of 18 "admitted claims amount". 19 LORD JUSTICE BRIGGS: Yes. 20 MR ZACAROLI: Let's turn it up. 21 LADY JUSTICE GLOSTER: On page 4 in tab 7. 22 LORD JUSTICE BRIGGS: It's the agreed claim -- 23 MR ZACAROLI: Sorry, page 2 in tab 7. "The agreed claim 24 amount", that's the phrase. 25 LADY JUSTICE GLOSTER: Sorry, tab 7, the CDD?</p> <p style="text-align: center;">Page 29</p>	<p>1 I am trying not to use -- well, I am using the phrase 2 "currency conversion claim" liberally. But when we use 3 that phrase, all we're talking about is the remission to 4 a contractual right to be paid in dollars. 5 LADY JUSTICE GLOSTER: Yes. So he says basically, and it's 6 a simple point, "Agreed claim amount includes any claim 7 in dollars for the same sum". 8 MR ZACAROLI: Essentially he's saying that you've got to 9 read that as if it was the original dollar amount 10 converted into sterling. 11 LADY JUSTICE GLOSTER: Yes. 12 LORD JUSTICE PATTEN: But the definition of "admitted claim" 13 is simply that the £18 million-odd is an unsecured claim 14 which qualifies the dividends, et cetera, et cetera. 15 MR ZACAROLI: Yes. 16 LORD JUSTICE PATTEN: Its genesis is irrelevant on one view. 17 MR ZACAROLI: Yes. 18 LORD JUSTICE PATTEN: That is the claim, that's your case. 19 MR ZACAROLI: Yes. 20 LORD JUSTICE PATTEN: And we're not helped -- it is 21 irrelevant to look at -- 22 LORD JUSTICE BRIGGS: I suppose you would say -- 23 LORD JUSTICE PATTEN: -- where it started from. 24 LORD JUSTICE BRIGGS: -- perhaps ironically the judge's 25 conclusion conflicts with his original statement of what</p> <p style="text-align: center;">Page 31</p>
<p>1 MR ZACAROLI: Yes, tab 7, the CDD. Page 2 is the definition 2 of first of all "admitted claim" and then "agreed claim 3 amount". 4 LADY JUSTICE GLOSTER: I was looking at the bundle number. 5 MR ZACAROLI: I'm sorry. 6 LADY JUSTICE GLOSTER: So internal page 2 is the 7 definition -- 8 MR ZACAROLI: Yes. 9 LADY JUSTICE GLOSTER: -- of admitted claim and agreed claim 10 amount. 11 MR ZACAROLI: So what he appears to be saying is "agreed 12 claim amount" where it says "£18 million-odd", that's to 13 be read as a reference to the creditor's agreed claim 14 converted into sterling under Rule 2.86. So assuming 15 this was a dollar claim, what he's saying I think is 16 that's to be read as a dollar claim that's been 17 converted into sterling pursuant to Rule 2.86. 18 We say it doesn't go far enough, it just explains 19 how you got here. But it doesn't entitle you to rewrite 20 £18 million as X million dollars or Y million dollars. 21 LADY JUSTICE GLOSTER: So he's trying to explain why he has 22 included the currency conversion claims in the 23 definition of "admitted claims", is that right? 24 MR ZACAROLI: He's trying to explain why the original 25 underlying dollar entitlement is within that phrase.</p> <p style="text-align: center;">Page 30</p>	<p>1 the purpose of the CDD was anyway; namely to identify 2 an amount you have and proof. 3 MR ZACAROLI: Yes, because to do that, it has to be a claim 4 in sterling, yes. 5 LORD JUSTICE PATTEN: But where does he construe clause 2? 6 (Pause). 7 MR ZACAROLI: I don't believe he does -- he doesn't really 8 focus on clause 2, I think. It's impossible to construe 9 clause 2 in any sense other than the width of release 10 that he clearly states. 11 LORD JUSTICE BRIGGS: But he probably doesn't have to on his 12 analysis, does he? Because he says therefore the 13 currency conversion claim escapes the torrential 14 negative drafting of clause 2 for the same reason that 15 the statutory interest claim does, because they are both 16 claims which arise out of the agreement as to what is 17 owing. 18 MR ZACAROLI: Yes. Assume against me that you can read 19 "agreed claim amount" as essentially referring to 20 a foreign currency amount -- 21 LORD JUSTICE BRIGGS: Yes. 22 MR ZACAROLI: -- then the one thing we know is excluded from 23 the release is the agreed claim amount. 24 LORD JUSTICE BRIGGS: Yes. 25 MR ZACAROLI: So that's why he doesn't need to construe the</p> <p style="text-align: center;">Page 32</p>

<p>1 width of the release. 2 LADY JUSTICE GLOSTER: No, it's the admitted claim that's 3 excluded from the release, not the agreed claim amount. 4 If you look at 2.3 -- 5 MR ZACAROLI: Yes, fixed at the agreed claim amount. You 6 have to read it together with -- 7 LADY JUSTICE GLOSTER: Yes, absolutely. But what we've got 8 to decide is whether the currency conversion claim is 9 part of the admitted claim. 10 MR ZACAROLI: Yes. 11 LADY JUSTICE GLOSTER: That's the question of construction, 12 isn't it? 13 MR ZACAROLI: That's correct, yes, and he gets there by the 14 route I've shown you in the paragraph 169. He doesn't 15 need to get there as my Lord Lord Justice Briggs points 16 out by construing -- limiting the width of the release 17 one sees in clause 2. 18 LORD JUSTICE BRIGGS: No. 19 And you can see the germ of that in that paragraph 20 earlier on which you showed us, where he equated 21 interest and currency conversion. 22 MR ZACAROLI: Yes. I'm not entirely sure what one gets from 23 that, but it may be -- 24 LORD JUSTICE BRIGGS: Well, you don't realise until you get 25 to the end, and then maybe you do.</p> <p style="text-align: center;">Page 33</p>	<p>1 claims CDDs, the agreed claim amount was stated in some 2 other foreign currency. So our case on this relates to 3 a much smaller proportion of them, and we're only 4 dealing with those where it says the agreed claim amount 5 is sterling. And where it does, we say the same points 6 arise really with no material distinction between this 7 and the admitted claims CDD. 8 But to show you how it worked, because there are 9 some important differences in the mechanism of these 10 agreements, starting at internal page 2 of the document, 11 tab 4. 12 LADY JUSTICE GLOSTER: Tab? 13 MR ZACAROLI: 4. 14 The recital B is very similar to the one we've 15 already seen in the admitted claims CDD. "Admitted 16 claim" has a similar definition to the one which is 17 available for proof in the -- qualifies for dividends 18 from the estate. "Agreed claim", which here is expanded 19 to include any client money claim as well as 20 an unsecured claim. "Agreed claim amount" here is in 21 pounds sterling. 22 On internal page 4, there's a definition of "client 23 money claim". At internal page 5, you'll see 24 an addition to what we've seen before, there's 25 a definition of "exchange rate".</p> <p style="text-align: center;">Page 35</p>
<p>1 MR ZACAROLI: So, my Lords, that is our case on construction 2 of the admitted claims CDD. 3 Turning to the agreed claims CDD which you can find 4 in tab 4, and our case on this is -- 5 LORD JUSTICE PATTEN: Sorry to interrupt. One can't get 6 very much out of this by a subsequent -- I agree you 7 can't construe this by looking at the way the subsequent 8 agreements were drafted. But it is interesting, isn't 9 it, because I think on the judge's logic, you wouldn't, 10 would you, have had to put in the saving provision that 11 was eventually put into the other agreement? 12 MR ZACAROLI: True, yes, that would be true. But I endorse 13 your first comment, which is you can't really look to 14 what was subsequently done to construe -- 15 LORD JUSTICE BRIGGS: Any more than you needed to put the 16 interest-saving clause in. 17 MR ZACAROLI: We agree with that point, yes. For what it is 18 worth, that clause begins with the words, "For the 19 avoidance of doubt", but I don't think you can rely on 20 that either way for the earlier CDDs. 21 LORD JUSTICE PATTEN: Yes. 22 MR ZACAROLI: So the agreed claims CDD, and reminding the 23 court that our case on this relates only to those CDDs 24 where the agreed claim amount is expressed in sterling, 25 which this one happens to be, but the majority of agreed</p> <p style="text-align: center;">Page 34</p>	<p>1 And then clause 2, although the wording is slightly 2 different, we say has materially the same effect as 3 clause 2 in the admitted claims CDD. You'll see it is 4 a very broadly worded "release of all claims". The 5 opening words reinforce the point that the agreed claim 6 amount is now the creditor's entire claim against the 7 company. 8 Paragraph 3 is now more complicated because it deals 9 with the possibility that there is a client money claim 10 and the possibility there is not. And if there is not, 11 that's paragraph 3.2, so where it has either assigned it 12 or waived it, the client money claim, then: 13 "Then the agreed claim at the agreed claim amount 14 converted to the extent not already nominated in pounds 15 sterling at the exchange rate shall be accepted as 16 an admitted claim." 17 So the agreement contains within it the mechanism 18 for converting foreign currency claims that might have 19 been payable as client money claims into sterling for 20 the purposes of admission for proof. 21 I'm not going to repeat the argument, we make the 22 same point as a matter of construction in relation to 23 that document as to the admitted claims CDD. 24 LORD JUSTICE BRIGGS: So the waiver is in relation to the 25 agreed claim rather than the admitted claim?</p> <p style="text-align: center;">Page 36</p>

<p>1 MR ZACAROLI: That's correct. 2 LORD JUSTICE BRIGGS: Yes. 3 MR ZACAROLI: Yes. 4 LORD JUSTICE BRIGGS: So if had been denominated in dollars 5 would let in -- or you're not saying it doesn't let in 6 a currency conversion claim? 7 MR ZACAROLI: Yes. 8 LORD JUSTICE BRIGGS: Yes. 9 MR ZACAROLI: So can I then turn to the next topic under 10 this head, which is "Non-provable claims to interest", 11 and the effect of these documents on those claims. 12 Assuming that such a claim exists, which of course is 13 a matter for the decision of this court, but assuming 14 there is a non-provable claim to interest can I start 15 then in chronological order -- 16 LADY JUSTICE GLOSTER: Sorry, I know it's not a legitimate 17 guide to construction but I just want to look at how 18 they exclude the currency conversion claim. 19 MR ZACAROLI: Tab 9 -- sorry in what? Sorry in ...? 20 LADY JUSTICE GLOSTER: In tab 9 -- 21 MR ZACAROLI: In tab 9. 22 LADY JUSTICE GLOSTER: -- in the CDDs where they exclude it 23 from the release. 24 MR ZACAROLI: Yes, it is paragraph 2.3 on internal page 7. 25 LADY JUSTICE GLOSTER: Yes.</p> <p style="text-align: center;">Page 37</p>	<p>1 concluded these claims were released by the terms of the 2 CRA and the CDDs, so he concluded that all those 3 agreements did indeed waive any non-provable claim to 4 interest and so we are the respondent on this point -- 5 LADY JUSTICE GLOSTER: Yes. 6 MR ZACAROLI: -- except for interest on the currency 7 conversion claim, which is the slight corner I need to 8 deal with as an appellant. 9 The CRA can be found at -- 10 LORD JUSTICE PATTEN: This was excluded by his complete code 11 finding? 12 MR ZACAROLI: That's correct. So he didn't think there was 13 such a claim anyway but if there was -- 14 LORD JUSTICE PATTEN: Exactly. I'm just trying to make sure 15 I've got all the pieces. 16 MR ZACAROLI: Yes. 17 LORD JUSTICE PATTEN: So this is, as he said, of only 18 academic interest -- 19 MR ZACAROLI: Yes. 20 LORD JUSTICE PATTEN: -- as far as he was concerned. 21 MR ZACAROLI: Yes. Bundle 3 of part B, tab 11, the last tab 22 in the bundle, is the claims resolution agreement. 23 LORD JUSTICE BRIGGS: Sorry, where are you? 24 MR ZACAROLI: Bundle B3. 25 LORD JUSTICE BRIGGS: B3?</p> <p style="text-align: center;">Page 39</p>
<p>1 LORD JUSTICE PATTEN: And it is 2.1.3, where you have to put 2 a proviso in. 3 MR ZACAROLI: Yes, yes. My Lord, yes. (Pause). 4 LADY JUSTICE GLOSTER: Yes. Thank you. 5 MR ZACAROLI: Now, the question of the release of 6 non-provable claims to interest is only dealt with in 7 passing by the judge in the principal judgment in part B 8 and was revisited by him in the supplemental judgment, 9 so it's in the supplemental judgment you'll find his 10 decision on this. 11 LADY JUSTICE GLOSTER: Is that in B supplemental bundle? 12 MR ZACAROLI: Yes, that's back in A2. 13 LADY JUSTICE GLOSTER: A2. Oh, it is the supplemental 14 judgment in -- 15 MR ZACAROLI: It dealt with both parts. 16 LADY JUSTICE GLOSTER: Yes. 17 MR ZACAROLI: A2, tab 1, paragraphs 55 to 60. 18 Rather than jumping around between the judgments, 19 I propose to show you the provisions in their context. 20 LORD JUSTICE PATTEN: Sorry, which paragraphs did you say? 21 MR ZACAROLI: Sorry, 55 to 60 of the judgment at tab 1. 22 LORD JUSTICE PATTEN: It's supplemental issue 4, isn't it? 23 MR ZACAROLI: That's right, yes. Can we begin by looking at 24 the claims resolution agreement for this aspect. 25 I should remind the court that of course the judge</p> <p style="text-align: center;">Page 38</p>	<p>1 MR ZACAROLI: B3, yes, tab 11. 2 LORD JUSTICE BRIGGS: Yes. 3 MR ZACAROLI: A number of other arguments were addressed to 4 the judge on the construction of the CRA which are not 5 raised on the appeal at all, so I'm going to deal with 6 this relatively shortly to identify those provisions. 7 To show how it works, I'm going to show you the two 8 interest provisions that matter, but I think one does 9 need to see it in context. 10 It's a very long document. It is modelled on the 11 way in which a document for a scheme of arrangement 12 would have been prepared, with a letter and 13 an explanatory statement, et cetera. But the agreement 14 itself starts at page 107 of the bundle. 15 Turning to page 115, which is the first page of the 16 operative parts of the agreement -- or actually 17 recitals. Under recital B you will see that: 18 "The accompanying signatories have entered into this 19 agreement to release, modify and agree all claims 20 relating to trust assets and financial contracts to 21 determine the asset claims ..." 22 And then (iv) in B: 23 "... to determine, quantify and crystallise the 24 value of unsecured claims, and 25 "(v) determine the net financial liability of all</p> <p style="text-align: center;">Page 40</p>

<p>1 signatories and net financial claim (inaudible)." 2 I will come on to those definitions in a moment. 3 Then under part 1 "General provisions", page 117, 4 clause 4.1 deals with the releases in relation to trust 5 assets claims. So with effect from a succession date, 6 each signatory's asset claims to trust assets against 7 the released parties, and the released parties are 8 essentially LBIE itself and all other signatories. So 9 the idea was to preclude creditors making claims against 10 each other on the basis that "You've got my asset". 11 They are all modified and amended. 12 Then 4.2 "Claims released by signatories" they 13 shall: 14 "... waive and release the following claims against 15 the released parties: all claims for and in respect of 16 ...(Reading to the words)... any asset, claims for 17 consequential or economic loss." 18 And then 4.2.3: 19 "All claims apart from, for the avoidance of doubt, 20 modified claims [which are the ones we see in relation 21 to trust assets] in relation to any financial contract." 22 The definition of "Financial contract" is at 23 page 245 and it's essentially: 24 "... any bilateral or multilateral contract entered 25 into before the administration date relating to one or</p> <p style="text-align: center;">Page 41</p>	<p>1 The net contractual position -- which you'll see is 2 one of the things the creditor gets out of this 3 agreement and as a replacement for its released claims, 4 is dealt with at part 7 -- starting at the bottom of 5 page 142. 6 So the first thing that happens in relation to the 7 open contracts, clause 9.1, is that they are terminated 8 in accordance with this agreement. 19.3: 9 "Each open contract not terminated pursuant to 10 clause 19.2 shall be deemed to be terminated on the 11 relevant open contract termination date." (Pause). 12 In essence, that's a date that's related to the date 13 on which a signatory signs up to this agreement. It's 14 the last business day of the month in which its relevant 15 accession date falls, so contracts terminated. 16 Then clause 20. 20.1: 17 "The close-out amount in respect of each financial 18 contract shall be determined by the relevant determining 19 party in accordance with the applicable financial 20 contract valuation methodology. For the avoidance of 21 doubt, the overriding valuation provisions form part of 22 each financial contract valuation methodology." 23 You see a waterfall of possible valuation 24 methodologies later on, but the overriding valuation 25 provisions appear in 20.4. There are various matters</p> <p style="text-align: center;">Page 43</p>
<p>1 more transactions or positions of a financial nature." 2 So it is a very broad nature definition, intended to 3 catch all things like ISDA Master Agreements, prime 4 brokerage agreements, et cetera. 5 So that's the claims released. 6 Clause 4.4 then provides for new claims. So 7 "modified claims" relates to the trust assets, and we 8 needn't concern ourselves with that for the moment. We 9 turn to 4.2.2 "Released claims" -- so these are ones 10 released by 4.2 and 4.4.2 -- those claims are exchanged 11 for the following: 12 "The right to have their net contractual position, 13 allocations, distributions and appropriations determined 14 on the basis set out in this agreement. The right to 15 claim as a new obligation of the company their net 16 financial claim, if any, and an ascertained claim such 17 amount as determined under this agreement." 18 An "ascertained claim" is defined at page 235 as: 19 "An ascertained unsecured claim in the winding-up of 20 the company or any distribution of the company's assets 21 generally to its unsecured creditors." (Pause). 22 LADY JUSTICE GLOSTER: But it's not envisaged by this stage 23 there will be a surplus, is it? 24 MR ZACAROLI: No, this is at a very early stage in the 25 process.</p> <p style="text-align: center;">Page 42</p>	<p>1 that needn't concern us for present purposes, but 20.4.7 2 "Accrual of interest": 3 "In determining the close-out amount in respect of 4 a financial contract, no interest shall accrue on any 5 unpaid liability of the company from the administration 6 date, save to the extent that such interest would accrue 7 under Rule 2.88 of the Insolvency Rules." 8 That's an overriding provision that applies to all 9 valuations. 10 LORD JUSTICE BRIGGS: Sorry, where is that? 11 MR ZACAROLI: 20.4.7, page 144. 12 LORD JUSTICE BRIGGS: I've got it, yes. 13 MR ZACAROLI: It is expressly dealing with administration 14 that would accrue after the administration date and 15 excludes it, save and to the extent that it would be 16 payable under Rule 2.88. It couldn't be clearer, we 17 say: it precludes any possibility of a claim for 18 non-provable interest in relation to that same period. 19 There are then various provisions dealing with which 20 valuation methodology applies and how it applies. 21 I don't think that needs concern us for present 22 purposes. 23 Paragraph 24 on page 153, this is all about 24 determining the net contractual position. And 24.1: 25 "All close-out amounts shall be denominated in</p> <p style="text-align: center;">Page 44</p>

<p>1 US dollars. To the extent that a close-out amount is 2 denominated in a currency other than US dollars, the 3 company shall convert such close-out amount into 4 US dollars using the spot rate as at the relevant FX 5 conversion time." 6 So the number that comes out of the CRA is always in 7 dollars. 8 24.2 -- 9 LADY JUSTICE GLOSTER: Sorry, here you're as respondent 10 because the judge found in your favour on these 11 provisions? 12 MR ZACAROLI: My Lady, yes. At 24.2 -- 13 LADY JUSTICE GLOSTER: Sorry, based on 24.7, effectively? 14 MR ZACAROLI: Yes, and another clause we'll come to. There 15 are two clauses that deal with interest, that's the 16 first. The second one is just coming up. 17 LORD JUSTICE PATTEN: Is it anticipated, given you're 18 respondent on this -- what's the order of speeches going 19 to be? Are you going to have another go at this after 20 Mr Dicker, or is this your moment in the -- 21 MR ZACAROLI: I propose to deal with this fully on the basis 22 we've agreed we will deal with it that way, so I'll have 23 a right of reply only. 24 LORD JUSTICE PATTEN: Right. 25 LADY JUSTICE GLOSTER: If he brings up anything new?</p> <p style="text-align: center;">Page 45</p>	<p>1 cannot include interest post- the date of 2 administration -- 3 LORD JUSTICE BRIGGS: Although because it's a claim in 4 dollars it could include a currency conversion claim? 5 MR ZACAROLI: That's right. We don't run -- 6 LORD JUSTICE BRIGGS: You don't challenge that? 7 MR ZACAROLI: No, we don't. We don't suggest that this 8 precludes currency conversion claims, and so there were 9 arguments advanced -- 10 LORD JUSTICE BRIGGS: We're not here dealing with interest 11 on currency conversion claims, are we, we're dealing 12 with interest on non-provable claims generally? 13 MR ZACAROLI: I am just dealing with interest generally. 14 Any interest accruing after the date of administration 15 we say is precluded, other than statutory interest, by 16 reason of this agreement. 17 LORD JUSTICE BRIGGS: Yes. 18 LADY JUSTICE GLOSTER: When the judge made his declaration, 19 he wasn't addressing the CDD -- the CDD that permitted 20 or carved out interest was only carving out statutory 21 interest -- 22 MR ZACAROLI: Yes. 23 LADY JUSTICE GLOSTER: -- and so it wasn't expressly carving 24 out dollar interest or foreign currency? 25 MR ZACAROLI: Correct. It wasn't expressly carving out</p> <p style="text-align: center;">Page 47</p>
<p>1 MR ZACAROLI: Yes, I am accepting that. I am dealing with 2 the argument in full. It is a short argument actually 3 when you see the clauses I say it's very obvious that it 4 had this effect. 5 LORD JUSTICE PATTEN: Right, okay. 6 MR ZACAROLI: 24.2 just identifies how you get net 7 contractual positions. 8 And 24.2.1, if there's only one financial contract 9 it's the close-out under that contract, but under 24.2.2 10 if there is more than one contract then it is the 11 aggregate of the close-out amounts. (Pause). 12 So 25.1, "Net financial claim": 13 "A net contractual position in respect of 14 a signatory expressed as a positive number will 15 represent an amount due and owing by the company to that 16 signatory which shall constitute an ascertained 17 unsecured claim of the signatory in the winding-up of 18 the company or any distribution to unsecured creditors 19 defined as the 'net financial claim'. For the avoidance 20 of doubt, no interest shall accrue on any net financial 21 claim save to the extent provided in Rule 2.88 ..." 22 LADY JUSTICE GLOSTER: So that's the other provision? 23 MR ZACAROLI: That's the other provision. 24 So, in short, there's a release of all claims by the 25 creditor in exchange for a net financial claim which</p> <p style="text-align: center;">Page 46</p>	<p>1 non-provable interest, yes. 2 LADY JUSTICE GLOSTER: Yes. 3 MR ZACAROLI: So those are the relevant parts of the CRA. 4 We say it's very clearly precluding any claim for 5 interest accruing after the date of administration, 6 other than statutory interest, and the judge was right 7 for the reasons he gave. 8 Turning to the CDDs, I have already shown you the 9 wording, we suggest the argument is simple again, 10 looking at the admitted claims CDD in bundle B2 at 11 tab 7, internal page 6, paragraph 2.3, the fourth line. 12 It includes "all Claims [capitalised 'Claims'] for 13 interest". 14 LORD JUSTICE PATTEN: Sorry, which -- 15 MR ZACAROLI: Clause 2.3, tab 7, the fourth line -- 16 LORD JUSTICE PATTEN: Oh, sorry. 17 MR ZACAROLI: -- in parentheses. 18 LORD JUSTICE PATTEN: Sorry, the first line, yes. 19 MR ZACAROLI: Just a point of detail from yesterday, there 20 is in fact -- this is dealing with a point in 2.4 -- 21 a definition of "claim" as a verb, it's the same as 22 "claim" the noun, and you'll see at the end of the 23 definition of "Claim". 24 LORD JUSTICE BRIGGS: Yes, but we know they splashed the 25 capital C slightly irregularly here and there.</p> <p style="text-align: center;">Page 48</p>

<p>1 MR ZACAROLI: They did but the phrase "to claim' and 2 'Claim' [capitalised] shall be construed in accordance 3 with the definition of 'Claim'." 4 LORD JUSTICE BRIGGS: Yes. 5 MR ZACAROLI: The same wording appears in the agreed claim 6 CDD, we've seen it already. We say when you get to the 7 what was already implicit but then is expressly included 8 in the one at tab 8, when it preserves claims to 9 statutory interest, it is clear as it can be that, by 10 preserving interest under rules 2.88(7) to (9) but 11 excluding interest otherwise, the agreement is 12 undoubtedly releasing any claim to interest at all other 13 than statutory interest. 14 LADY JUSTICE GLOSTER: Is that a convenient moment? 15 MR ZACAROLI: It is, yes. 16 LADY JUSTICE GLOSTER: We will take ten minutes. 17 (11.42 am) 18 (A short break) 19 (11.57 am) 20 MR ZACAROLI: The last construction question I need to deal 21 with is the question of the release of a non-provable 22 claim to interest on a currency conversion claim. 23 LADY JUSTICE GLOSTER: So item 4 -- 24 MR ZACAROLI: Yes. 25 LADY JUSTICE GLOSTER: -- tab 6, supplemental issue 5?</p> <p style="text-align: center;">Page 49</p>	<p>1 We submit the judge was wrong in paragraph 67 2 because he misunderstood the essential nature of 3 a currency conversion claim which, as I've submitted on 4 various occasions, is simply part of the underlying 5 foreign currency debt which is not discharged from 6 payments from the estate. 7 Interest on a currency conversion claim is actually, 8 therefore, merely a part of the contractual interest due 9 on that underlying foreign currency debt. The waiver of 10 interest in the CDDs waives any interest accruing on 11 that underlying debt, apart from pursuant to statute. 12 A fortiori, the waiver must include interest on that 13 part of the underlying debt which has not been 14 discharged by the payments of proof in sterling. 15 LORD JUSTICE BRIGGS: And this is really just a sort of 16 subset of your main submission -- 17 MR ZACAROLI: It is. 18 LORD JUSTICE BRIGGS: -- as to why the judge is wrong on the 19 main point on item 1. You say you can't put interest 20 and currency conversion claims together. On the 21 contrary, they are completely different. 22 MR ZACAROLI: Yes. 23 LORD JUSTICE BRIGGS: Yes. 24 MR ZACAROLI: That deals with my submissions on 25 construction. I am turning now to the application of</p> <p style="text-align: center;">Page 51</p>
<p>1 MR ZACAROLI: Yes. This is one where we are partially the 2 appellant and partially the respondent. 3 LADY JUSTICE GLOSTER: Yes. 4 MR ZACAROLI: Supplemental judgment in bundle A, volume 2, 5 at tab 1 deals with this at paragraph 62 and following. 6 LORD JUSTICE PATTEN: Sorry, say it again? 7 MR ZACAROLI: So it's the supplemental issues judgment, 8 which is in bundle A, part 2 at tab 1, paragraph 62 and 9 following. 10 LORD JUSTICE PATTEN: Right, thank you. 11 MR ZACAROLI: The judge's reasoning is quite short. He 12 deals with the CRA first of all at paragraphs 64 to 66 13 and sets out the provisions that I've shown the court 14 this morning about interest at 64 and 65. At 66, he 15 says: 16 "The effect of these provisions is the entire amount 17 are not determined as due under a financial contract is 18 calculated on the basis that it will not attract 19 interest save in accordance with ...(Reading to the 20 words)... to be claimed on a currency conversion 21 amount." 22 We say he was right to do that. 23 The following paragraph he then deals with the CDDs, 24 and perhaps you could read paragraph 67 to yourselves. 25 (Pause).</p> <p style="text-align: center;">Page 50</p>	<p>1 the principle in Ex parte James and/or paragraph 74 of 2 schedule B1. 3 The learned judge -- 4 LADY JUSTICE GLOSTER: You'd better show me section 74, 5 schedule B1, please. 6 MR ZACAROLI: Yes. 7 LADY JUSTICE GLOSTER: Do we have it in the bundle of 8 authorities? (Pause). 9 MR ZACAROLI: Tab 190 of bundle 4. 10 LADY JUSTICE GLOSTER: Thank you. (Pause). 11 LORD JUSTICE PATTEN: 74, isn't it? 12 MR ZACAROLI: It is 74, correct: 13 "A creditor or a member of a company in 14 administration may apply to the court claiming that the 15 administrator is acting or has acted so as unfairly to 16 harm the interests of the applicant, whether alone or in 17 common with some or all other members or creditors, or 18 the administrator proposes to act in a way which would 19 unfairly harm the interests of the applicant, whether 20 alone or in common with some or all other members or 21 creditors." 22 And it is (b) that we're particularly concerned 23 with, because the complaint is that the enforcement of 24 the releases, it is that action that would result in 25 unfair harm to the creditors.</p> <p style="text-align: center;">Page 52</p>

<p>1 LADY JUSTICE GLOSTER: Maybe you'll come to this, but is 2 this absolutely in all squares with the principle in 3 Ex parte James, or is it arguably smaller or greater 4 than that principle? 5 MR ZACAROLI: Well, my basic submission will be -- and I'm 6 going to focus on Ex parte James first -- 7 LADY JUSTICE GLOSTER: Yes. 8 MR ZACAROLI: -- and when I've dealt with that, my 9 submission will be it's inconceivable that -- if we're 10 wrong about that, we needn't go any further, because the 11 release won't enforce. But if we're right about the 12 application of the principle in Ex parte James, we say 13 it is inconceivable that there could be some wider or 14 different principle in paragraph 74 which somehow trumps 15 us or them in those circumstances. 16 LADY JUSTICE GLOSTER: Yes. 17 MR ZACAROLI: I am going to deal with that pretty shortly. 18 There is only little learning on paragraph 74 -- 19 LADY JUSTICE GLOSTER: Is it there in a liquidation as well? 20 MR ZACAROLI: It's not in a liquidation, no. 21 LADY JUSTICE GLOSTER: Why not? 22 MR ZACAROLI: Well, one answer may be because it is dealing 23 with -- administrations are dealing with things that are 24 potentially very different from liquidations, namely 25 trading, and administrators will be taking all sorts of</p> <p style="text-align: center;">Page 53</p>	<p>1 aggrieved by an act or a decision of the liquidator, 2 that person can apply to the court to confirm, reverse 3 or vary. But the jurisprudence there is usually limited 4 to or limits the application of that subsection to where 5 no reasonable liquidator could have acted in the way it 6 was. It's dealing with a different point. 7 So as say, I'm going to focus on Ex parte James, and 8 this will require a trawl through some of the 9 authorities. They are not long, luckily, but it will 10 require me to take you through some of the authorities 11 on the principle. But before we get to that, the 12 judgment dealt with this at paragraph -- 13 LORD JUSTICE BRIGGS: You are not submitting that the 14 statutory code has displaced Ex parte James in relation 15 to administration? 16 MR ZACAROLI: No, we're not. 17 We're dealing with the part B judgment again, 18 paragraphs 171 to 184. Just to take the court through 19 that quickly, the learned judge referred first of all to 20 Ex parte James itself at paragraph 175, to a Court of 21 Appeal case called Re Wigzell in paragraph 177 -- I will 22 take you to these cases in due course. Then at 23 paragraph 178 he relies on a decision of Walton J In re 24 Clark from 1975, noting that the judge in that case used 25 the word "unfair" to describe the principle or the</p> <p style="text-align: center;">Page 55</p>
<p>1 steps in relation to the conduct of trading which 2 a liquidator could not do. And in so doing, it might be 3 said to deal with some creditors more fairly than 4 others. So one can envisage the circumstances in which 5 an administrator might be required to act going far 6 beyond those a liquidator would and therefore engaging 7 this principle. 8 Now to the extent that's right, we would say that 9 rather shows that in this context, paragraph 74 should 10 give no added ingredient or added impetus to any claim 11 that the releases should not be enforced. Because what 12 the administrators are doing in this case is what they 13 would be doing as liquidators; they are distributing. 14 And in the course of distributing, they are reaching 15 compromises with creditors for the purposes of 16 distribution. It's not concerned with that aspect of 17 an administration which goes beyond the liquidation. 18 LORD JUSTICE BRIGGS: Nonetheless, it is expressed in purely 19 general terms. 20 MR ZACAROLI: It is expressed in general terms, yes. 21 There is a provision in liquidation, I don't think 22 it's in the bundles, but a general provision in 23 section 168(5) -- 24 LORD JUSTICE BRIGGS: About making applications, isn't it? 25 MR ZACAROLI: -- about making applications. If a person's</p> <p style="text-align: center;">Page 54</p>	<p>1 operation of the principle. So for example, 2 paragraph 180, where David Richards J says: 3 "It might be said that Walton J used the word 4 'unfair' as synonymous with 'dishonourable' or even 5 'dishonest', but I doubt it." 6 He then notes that at paragraph 181, Re Clark was 7 cited to the Court of Appeal in the subsequent case of 8 TH Knitwear but not referred to. He cites what Slade LJ 9 says about the principle there, and I will take you to 10 that in a moment. 11 Then he cites a passage from the decision In re 12 Nortel in the Supreme Court at paragraph 182. And in 13 reliance on those authorities at 183, he says: 14 "I take it that unfairness is a sufficient ground 15 for the application of the principle in Ex parte James 16 if the court thinks that in all the circumstances it is 17 right to apply the principle." 18 He says that's not a surprising development: 19 "Whilst in some of the earlier cases the judges 20 refer to the difficulty in applying the principle in 21 Ex parte James ...(Reading to the words)... just like 22 what constitutes dishonourable conduct, depend upon the 23 circumstances of the case." 24 And then at 184, he applies that concept of 25 unfairness to the facts of this case.</p> <p style="text-align: center;">Page 56</p>

1 LORD JUSTICE PATTEN: Do you criticise the judge's
 2 formulation of the principle in 183?
 3 MR ZACAROLI: We do, yes, we do.
 4 LORD JUSTICE PATTEN: You say that's a misdirection?
 5 MR ZACAROLI: It's a misdirection based upon two cases, Re
 6 Clark and Re Nortel, which when one looks at them
 7 properly in no way are intended to redefine, modify or
 8 relax the principle.
 9 So our first point is there was a misdirection.
 10 Then secondly, we say when the principle properly
 11 understood is sought to be applied to this case, it does
 12 not or ought not to lead to the conclusion that the
 13 administrator should be precluded from enforcing these
 14 contracts.
 15 Just to highlight a point I made a moment ago which
 16 is important, we say, when one comes to applying the
 17 principle in this case, it is not suggested by the judge
 18 that the entry into these contracts engaged the
 19 principle, either principle, so paragraph 74 or
 20 Ex parte James. It is only their proposed decision to
 21 enforce these contracts --
 22 LORD JUSTICE BRIGGS: That's why I asked whether they were
 23 executed contracts, because they don't need any
 24 enforcement if they're executed contracts. They've had
 25 their effect, they had their effect the day they were

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1 signed. So the real issue is whether the right should
 2 be reinstated in some way.
 3 MR ZACAROLI: Yes. In a sense, the administrators should be
 4 directed to ignore --
 5 LORD JUSTICE BRIGGS: Well, I'm not sure "ignore" is the
 6 right word.
 7 MR ZACAROLI: Unwind.
 8 LORD JUSTICE BRIGGS: I'm not even sure "unwind" is the
 9 correct word. To recreate the rights which were
 10 abandoned by those perfectly fair contracts --
 11 MR ZACAROLI: Yes.
 12 LORD JUSTICE BRIGGS: -- assuming there's nothing wrong with
 13 the making of them.
 14 MR ZACAROLI: Yes. We say on any view it does not operate
 15 to that extent in this case.
 16 So dealing with the misdirection point, if I may,
 17 and that's where we need to look through some of the
 18 cases, I've already identified that he seems to regard
 19 "unfairness" as the touchstone of the principle based
 20 upon Re Clark and Re Nortel.
 21 We say the principle is actually -- and it's a very
 22 difficult one to define, but it means -- it has been
 23 applied in cases and been described in cases as
 24 something more serious than that. It's
 25 about dishonourable conduct, shabby conduct, conduct

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1 which is something which is against natural justice --
 2 and I will show you the cases in which those sorts of
 3 phrases have been used.
 4 It's also a very dangerous principle because it is
 5 so difficult to define. It has been confined to the
 6 real edges of jurisprudence in practice, and we say this
 7 case would be a very substantial departure from the way
 8 it has been applied in cases to date.
 9 So to go back to the beginning but only very
 10 briefly --
 11 LADY JUSTICE GLOSTER: Sorry. Just when the judge is
 12 referring in 183 to "unfairness as a substantive legal
 13 concept is now well embedded in our law", what is he
 14 referring to there?
 15 LORD JUSTICE BRIGGS: I think possibly a lecture which he
 16 has given on the subject.
 17 MR ZACAROLI: He doesn't --
 18 LADY JUSTICE GLOSTER: Is it to do with the concept of
 19 unfairness in contractual relations?
 20 MR ZACAROLI: I think so. We can go back to the transcript,
 21 because he doesn't explain in the judgment, there was
 22 some discussion during the course of the hearing. As
 23 I recall, he made some reference to unfairness in the
 24 employment context.
 25 LORD JUSTICE PATTEN: Well, it's a concept, I think, that's

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1 been introduced in the law more by statute than under
 2 the common law or even in equity --
 3 MR ZACAROLI: Yes.
 4 LORD JUSTICE PATTEN: -- because you get in the Unfair
 5 Contract Terms Act, for example, and you get it here
 6 under 74 or --
 7 MR ZACAROLI: Which is the one that he does identify.
 8 LORD JUSTICE BRIGGS: And section 459 or 9, whatever it is
 9 now.
 10 MR ZACAROLI: Yes.
 11 LADY JUSTICE GLOSTER: But there's a lot on 459, or whatever
 12 it is now, about what is unfairly prejudicial --
 13 MR ZACAROLI: Yes.
 14 LADY JUSTICE GLOSTER: -- in the context of a company.
 15 MR ZACAROLI: Yes, as defined by statute.
 16 LORD JUSTICE BRIGGS: And paragraph 74 looks as if it is
 17 an administration version of that jurisdiction.
 18 MR ZACAROLI: Yes, that's been said, and there's one
 19 reference to pick up from Lord Hoffmann in
 20 O'Neill v Phillips about how you need to be careful with
 21 that sort of concept. It's not a free-standing concept
 22 as to what the judge thinks fair and independent. It
 23 has to be embedded in --
 24 LADY JUSTICE GLOSTER: It all gets a bit subjective.
 25 MR ZACAROLI: Yes.

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<p>1 LORD JUSTICE PATTEN: It can't be a single yardstick of 2 universal application. What is fair or unfair depends 3 on the context in which the question comes to be asked. 4 Because under what used to be 459, it's what -- as my 5 Lord has said, it is well established that certain 6 aren't unfair in that context. 7 MR ZACAROLI: Yes. The law has developed a number of 8 principles to define the parameters of unfairness in 9 that statutory context, as it will have done no doubt in 10 many other areas -- 11 LORD JUSTICE PATTEN: But are you saying that unfairness 12 isn't the touchstone here? 13 MR ZACAROLI: Yes, we are. It is not as broad and relaxed 14 as unfairness. It's more restricted than that. 15 LORD JUSTICE PATTEN: Yes. 16 MR ZACAROLI: The principle gets its name from the case of 17 Ex parte James, which is at volume 1, tab 30 -- 18 LORD JUSTICE BRIGGS: Did you say 30? 19 MR ZACAROLI: I wrongly stated 30. It is tab 20. 20 The case involved essentially a mistaken payment 21 received by the estate, and the mistake was one of law 22 not fact. And at this time in our law, we did not 23 recognise a claim in unjust enrichment for payments made 24 by mistake of law. 25 The court held that the court that jurisdiction to</p> <p style="text-align: center;">Page 61</p>	<p>1 parties. The trustee sought to recover from the bank 2 the sums that were paid into it after the date of the 3 receiving order. The Court of Appeal allowed that claim 4 to be made and did not preclude it on the basis of 5 Ex parte James. Nothing in the principle precluded 6 that. 7 Now, the judgments deal with the principle primarily 8 in the judgment of Lord Sterndale MR and then 9 Scrutton LJ. So far as Sterndale LJ is concerned, if 10 you turn to page 851, he starts referring to the 11 principle about the sixth line of 851: 12 "The court will not allow a trustee in bankruptcy 13 who is its officer to do and certainly will not make 14 an order that he shall do something which in its opinion 15 is dishonourable and not high-minded." 16 He then -- this is an aside -- notes that: 17 "Lord Esher in ex parte Simmons ...(Reading to the 18 words)... eagerly desires to adopt it. I have not 19 thought it relevant to consider whether I adopt it with 20 eagerness or not." 21 As he says a few lines down: 22 "When he has proved a legal or equitable title and 23 this principle comes in ...(Reading to the words)... to 24 enable him to enforce that title." 25 Over the page at 852, he notes at line 4 that</p> <p style="text-align: center;">Page 63</p>
<p>1 relieve against a mistake of law and to order the money 2 to be repaid by the trustee to the execution creditor. 3 That's in the headnote. Then at page 614 in the 4 judgment of James LJ, beginning in the first break: 5 "With regard to the other point, the money was 6 voluntarily paid to the trustee under a mistake of law 7 not fact. I think the principle that money paid under 8 a mistake of law cannot be recovered must not be pressed 9 too far and there are several cases in which the Court 10 of Chancery has held itself not bound strictly by it. 11 I am of the opinion that a trustee of bankruptcy is 12 an officer of this court ...(Reading to the words)... in 13 my opinion, the court of bankruptcy ought to be as 14 honest as other people." 15 So that's the origins of the principle. We accept 16 it has not over the years been confined to cases of 17 mistaken payment, but that's its origins. 18 The next case is Re Wigzell, ex parte Hart. This is 19 at the same bundle, tab 32. Now, the principle was not 20 in fact applied in this case, the court held it wasn't 21 applicable. 22 The circumstances were there was a receiving order. 23 There was a stay of its advertisement pending appeal. 24 In the meantime, the bankrupt made payments into his 25 bank account but drew out a greater sum to pay to third</p> <p style="text-align: center;">Page 62</p>	<p>1 Salter J in the judgment below, who seems to be of one 2 extremely good sound sense and sound law, says this: 3 "Legal rights can be determined with precision by 4 authority, but questions of ethical propriety have 5 always been and will always be the subject difference 6 amongst honest men. I do not know that I go quite as 7 far as the learned judge in saying that legal rights can 8 always be determined or perceived by authority. There 9 are no doubt rules to which it can resort." 10 Then he says: 11 "But once you enter on the field in which there is 12 no standard to be applied except that which each person 13 thinks is the one of honesty and right, the difficulty 14 of course becomes enormously increased." 15 He repeats Salter J's words: 16 "Questions of ethical propriety ...(Reading to the 17 words)... honest differences amongst honest men." 18 Turning to the judgment of Scrutton LJ at page 858, 19 starting at the paragraph break just below halfway down 20 the page: 21 "Now, the decisions of this court have established 22 that though in law ...(Reading to the words)... yet he 23 may be restrained from enforcing his claim to it or 24 retaining it if ..." 25 And a series of phrases, none of which are very</p> <p style="text-align: center;">Page 64</p>

1 definite, have been used:
 2 "... it were not honourable, if it were not
 3 high-minded, it would be contrary to natural justice.
 4 If it would be shabby ...(Reading to the words)... would
 5 be inconsistent with natural justice and that which
 6 an honest man would do."
 7 He then says:
 8 "I desire to say very respectfully that it seems to
 9 me when we have gotten into this atmosphere, we have
 10 reached a region of uncertainty."
 11 Over the next page notes the difficulties in courts
 12 being courts of morality as opposed to courts of law.
 13 However, he accepts just before the paragraph break:
 14 "... there are the decisions and that this court
 15 accepting the principles laid down will endeavour to
 16 apply the principle."
 17 Then just so you can see how the principle had
 18 developed in the intervening periods since
 19 Ex parte James, 859 to 861, he describes some of the
 20 prior cases. Can my Lords read from the bottom of 859
 21 to --
 22 LADY JUSTICE GLOSTER: Yes.
 23 MR ZACAROLI: -- the end of the first paragraph on 861,
 24 which deals with the question of an appeal.
 25 LADY JUSTICE GLOSTER: Yes. (Pause).

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1 LORD JUSTICE PATTEN: So where are we reading from?
 2 MR ZACAROLI: To the end of the first paragraph on page 861.
 3 (Pause).
 4 So In re Tyler, for example, the principle was
 5 applied beyond the mistaken payment case to a case where
 6 the trustee had stood by and allowed a third party to
 7 pay premiums on an insurance policy, and then purport to
 8 snaffle the proceeds of insurance when the claim fell in
 9 without recompensing the person who had made the
 10 premiums which he had allowed to be made.
 11 LORD JUSTICE PATTEN: But these are all cases, aren't they,
 12 where the issue is whether the money in question should
 13 form part of the bankrupt's estate?
 14 MR ZACAROLI: Yes.
 15 LORD JUSTICE PATTEN: That's the context, isn't it?
 16 MR ZACAROLI: They are essentially cases where the estate
 17 has been enriched in some way by an asset.
 18 LORD JUSTICE PATTEN: Yes.
 19 MR ZACAROLI: Yes.
 20 LORD JUSTICE PATTEN: Which if it were the bankrupt, for
 21 example in James itself, the bankrupt could have held on
 22 to the money?
 23 MR ZACAROLI: Yes.
 24 LORD JUSTICE PATTEN: There would be no way that the payer
 25 of the money could have got it back --

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1 MR ZACAROLI: That's correct.
 2 LORD JUSTICE PATTEN: -- by resort to some of the arguments
 3 about fairness or anything of that kind.
 4 MR ZACAROLI: Yes. The next case is Re Clark, and this is
 5 the one the learned judge particularly relied on. It's
 6 tab 43 of bundle 1.
 7 The facts of this case were that Texaco made
 8 deliveries of petrol to the bankrupt after the date of
 9 a receiving order on what were called cash on delivery
 10 terms, i.e. cash here meant by cheque. So it did it on
 11 such terms but was paid a cheque. It acted in ignorance
 12 of the receiving order because of a printing dispute at
 13 The Gazette. So Texaco was acting innocent in a sense.
 14 It was providing cash on delivery terms for petrol and
 15 getting paid. The trustee sought to recover those
 16 payments that had been made to Texaco after the date of
 17 the receiving order.
 18 Now, at the time it's important to note that if the
 19 payments were set aside, Texaco would have no provable
 20 claim at all, because the transaction was an entirely
 21 post-receiving order transaction, so the claim would not
 22 have been provable, and that was an important element in
 23 the judge's decision in the case. The judge held that
 24 the principle in Ex parte James applied to preclude
 25 recovery being made against the trustee.

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1 The judge begins to deal with the principle in
 2 Ex parte James at page 563 between letters D and E, if
 3 you have letters. At the end of the line, halfway down
 4 the page, he says:
 5 "This position [that is that there was no provision
 6 to protect the creditor, at least Texaco in these
 7 circumstances] was accepted by Ms Graham ...(Reading to
 8 the words)... important question which I have to answer
 9 is ought the doctrine laid down in Ex parte James, the
 10 rule, to be applied."
 11 He then says:
 12 "Stating the matter in very broad terms indeed for
 13 the moment and deliberately using for the purpose
 14 unemotive language, the rule provides that where it
 15 would be unfair for a trustee to take full advantage of
 16 his legal rights as such, the court would not afford him
 17 to do so, and indeed will order him to return the money
 18 which it may have collected. For the rule to operate,
 19 it is clear that certain conditions must be present.
 20 "First, there must be some form of enrichment of the
 21 assets of the bankrupt by the person seeking to have the
 22 rule applied [taking this from a speech of Lord Keith in
 23 Government of India v Taylor]."
 24 And then the second condition over the page:
 25 "It is I think clear that except in the most unusual

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<p>1 cases, the claimant must not be in a position to submit 2 an ordinary proof of debt ..." 3 Towards the end of that paragraph: 4 "The rule is not to be used merely to confer 5 a preference on an otherwise unsecured creditor 6 ...(Reading to the words)... who would otherwise be 7 without any. 8 "The third condition, the third and crucial test for 9 the application of the rule is, I think, capable of 10 being stated as simply as follows. In all the 11 circumstances of the case, an honest man who would be 12 personally affected by the result would nevertheless be 13 bound to admit, 'It is not fair that I should keep the 14 money, my claim has no merits.' 15 And finally for completeness, the fourth condition: 16 "When the rule does apply, it applies only to the 17 extent necessary to nullify the enrichment of the 18 estate." 19 The importance of the first condition, enrichment of 20 the estate, is emphasised by his reference to Re 21 Scranton's Trustee v Pearse on page 566, two-thirds of 22 the way down the page: 23 "A trustee sued to recover betting losses of the 24 bankrupt which the latter had discharged by cheque from 25 the defendant bookmaker. The judge, Asprey J, thought</p> <p style="text-align: center;">Page 69</p>	<p>1 from Texaco?" 2 Now three points to make about this case. 3 The first is there's no suggestion that Walton J was 4 attempting or purporting to redefine or relax the 5 principle in any way. He was purporting to apply the 6 principle as he understood it in the cases. He was 7 deliberately using unemotive language, as he said at the 8 beginning, not to water down the test, but just by way 9 of description. 10 Secondly, his concept of unfairness only arises in 11 his view if the four preconditions for the operation of 12 the rule are present. So you can't look at it just as 13 unfairness as a free-standing concept, it is necessarily 14 tied to the four conditions that he identified. 15 The third point to note is the facts are pretty 16 extreme and an awful long way from ours. It is a case 17 where a creditor was induced by -- it was no one's 18 fault, or maybe the printers' dispute, he was innocently 19 induced to provide services to the estate, provide 20 property to the estate, namely by way of petrol, but 21 wasn't -- otherwise wouldn't have been paid for it. 22 LORD JUSTICE PATTEN: But are you suggesting that it's only 23 capable of application where there's been some payment 24 into the estate which would otherwise be irrecoverable 25 or couldn't be recovered by way of a dividend or</p> <p style="text-align: center;">Page 71</p>
<p>1 the rule should apply. The Court of Appeal disagreed, 2 holding that such a case ...(Reading to the words)... 3 properly arose at all." 4 Then as the judge says in this case, Walton J: 5 "Moreover, as it seems to me as there had been no 6 enrichment ...(Reading to the words)... the very 7 reverse, the doctrine would not apply on that ground 8 alone." 9 Then at page 567, he cites a decision of Templeman J 10 In re Wyvern Developments towards the top of the page. 11 That was a case where the Official Receiver had made 12 a promise to certain creditors that something would be 13 done and the rule was applied by way of support to hold 14 the Official Receiver to that promise that had been 15 made. The judge at letter D: 16 "Once again, it would simply not be fair to allow 17 the Official Receiver to back out of his promise in all 18 the circumstances of that this case." 19 Then he concludes: 20 "Having dealt with all the cases on Ex parte James 21 ...(Reading to the words)... analysis to be cases in 22 which the rule was or was not as such applied, I turn to 23 the facts of this particular case. The questions I feel 24 that ought to be posed are simply is it fair that the 25 trustee should recover the amount of these two cheques</p> <p style="text-align: center;">Page 70</p>	<p>1 something of that kind? 2 MR ZACAROLI: I can't say it's that limited, because as 3 we'll see from a later case the concept of it only 4 applies if those four conditions are present is somewhat 5 watered down later. So in fact Walton J's four 6 conditions are later doubted as being always necessary. 7 It is more fluid than that. 8 The point I am making here is that his use of 9 language about it being unfair -- 10 LORD JUSTICE PATTEN: Yes. 11 MR ZACAROLI: -- is in the context of him thinking there are 12 four preconditions. 13 The next case is TH Knitwear. That's in volume 1 at 14 tab 49. This case involved an attempt to extend the 15 principle so as to be applied in the case of a voluntary 16 liquidation, and the Court of Appeal refused to do that. 17 It immediately creates that anomaly that we were here 18 concerned with a voluntary liquidation, the principle 19 could not apply at all, nor could paragraph 74. But it 20 can apply in a case where the office holder is 21 an officer of the court, such as a liquidator or 22 an administrator. 23 The Court of Appeal nevertheless went on to consider 24 what the principle was and whether it would have been 25 appropriate to apply it had it been extended to</p> <p style="text-align: center;">Page 72</p>

<p>1 voluntary liquidations. Slade LJ's judgment on the 2 topic begins at page 287, two-thirds of the way down the 3 page under heading "The principle in Ex parte James". 4 First of all, he refers to Re Wigzell, which we've 5 seen, and then he's dealing at the top of the next page 6 with there being a common element; namely the person to 7 whom it was applied was an officer of the court, the 8 principle point being dealt with. 9 Then page 289, he agrees with Harman J in a case 10 called John Bateson & Co. He said, without deciding the 11 point, it seemed to have no application in a voluntary 12 winding up: 13 "I would so hold the entire basis of the principle 14 ...(Reading to the words)... However, where it is 15 invoked it is likely save in the most obvious cases to 16 introduce a less welcome element of uncertainty [citing 17 Salter LJ's comments in Re Wigzell]." 18 He then says: 19 "The principle is itself anomalous ...(Reading to 20 the words)... to personal representatives of anyone 21 other than an officer of the court." 22 And then at the bottom of the page, he first of all 23 refers to the decision In re Temple Fire and Accident 24 Assurance Co, and then he goes: 25 "In case this view be wrong, however, I should add</p> <p style="text-align: center;">Page 73</p>	<p>1 LORD JUSTICE BRIGGS: Yes. T&N. 2 MR ZACAROLI: This is T&N, a case in the T&N line, 2004, 3 a decision of David Richards J. 4 LADY JUSTICE GLOSTER: Is it 73B or 74? 5 MR ZACAROLI: It is 73B. 6 LADY JUSTICE GLOSTER: Yes. 7 LORD JUSTICE BRIGGS: Yes, it is in mine. 8 MR ZACAROLI: "The question arose in circumstances where, as 9 pointed out at paragraph 2 of the judgment, the question 10 was whether the associated companies, or the company in 11 administration, should cease to participate in a pension 12 scheme. Such a withdrawal would be a significant and 13 direct benefit to the creditors of the associated 14 ...(Reading to the words)... to make very substantial 15 payments to the pension's trustee." 16 So that was dichotomy; benefit to creditors but 17 a detriment to the trustee because the liability would 18 not then arise. 19 The judge dealt with question of Ex parte James at 20 paragraphs 16 to 18: 21 "Concerns as to dishonourable conduct stems from the 22 principle ...(Reading to the words)... The nature of the 23 principle and its difficulty were summarised by Salter J 24 in Re Wigzell and approved by the Court of Appeal in the 25 same case."</p> <p style="text-align: center;">Page 75</p>
<p>1 that despite Mr Mummery's attractive presentation 2 ...(Reading to the words)... I am not sure the principle 3 is confined quite as narrowly as this [refers to 4 Re Tyler]. 5 "However, on the authorities, I agree with Mr Price 6 for the contributories that for the principle to apply 7 there must be dishonourable ...(Reading to the words)... 8 relevant court officer by taking unfair advantage of 9 someone." 10 And he cites Scrutton LJ, the passage I've shown 11 you, about it being conduct that is not high-minded, 12 dishonourable, shabby, or dirty trick, and on the facts 13 they wouldn't have applied the principle had it been 14 applicable at all. 15 Now, Re Clark, as the judge in our case noted, was 16 cited to the Court of Appeal -- you see it in the list 17 of cases cited in argument -- but not referred to by the 18 court. It's impossible to suggest, we submit, that the 19 Court of Appeal in TH Knitwear thought the test had been 20 watered down in any way by Re Clark. The Court of 21 Appeal here relies upon earlier cases such as Re Wigzell 22 for the way in which the at the test is put. 23 The next case to look at is one which I hope has 24 been inserted in the court's bundles at volume 2, 25 tab 73B.</p> <p style="text-align: center;">Page 74</p>	<p>1 Paragraph 17: 2 "For the principle to apply, there must be 3 dishonourable behaviour or a threat of dishonourable 4 behaviour on the part of a court officer by taking 5 unfair advantage of someone." 6 They cited the passage of Lord Slade's judgment in 7 TH Knitwear, and he found that simply didn't arise on 8 the facts of the case before him. Then paragraph 18, he 9 adds: 10 "I should add that it would appear from the 11 authorities the principle may be confined to cases where 12 the assets available for distribution are increased as 13 a result of a mistake of law or fact or where advantage 14 is taken of payments made by a third person without 15 giving credit for them, i.e. an unjust enrichment of the 16 company. Unjust enrichment also underpins the reliance 17 on the principle in Ex Parte James for an award of 18 interest in ...(Reading to the words)... There does not 19 appear to be any case in which the principle has been 20 held applicable to the exercise of rights analogous to 21 those relevant to this case." 22 Just two more cases. The next one is tab 76 of 23 bundle 3, Re Collins & Aikman Europe SA. 24 LORD JUSTICE BRIGGS: I'm so, sorry, which is this? 25 MR ZACAROLI: It is tab 76 of volume 3, Re Collins & Aikman.</p> <p style="text-align: center;">Page 76</p>

<p>1 LORD JUSTICE BRIGGS: I've got it, thank you. 2 MR ZACAROLI: This involved a cross-border issue where the 3 administrators, as you'll see at the bottom of page 861, 4 had given oral assurances to creditors that if there 5 were no secondary proceedings in the relevant foreign 6 jurisdiction, then their respective financial positions 7 as creditors under the relevant local law would so far 8 as possible be respected in the English administration. 9 So that was the assurance given. The holding in 10 paragraph 1, Lindsay LJ said: 11 "The rule in Ex parte James permitted an officer of 12 the court in appropriate circumstances ...(Reading to 13 the words)... honour a promise made that procured 14 a better realisation of assets." 15 So it is the reverse of our case, where someone is 16 trying to enforce a promise. He deals with the rule at 17 paragraphs 15 to 17, and in particular I refer the court 18 to this, because in paragraph 15 he notes just after the 19 quotation from McPherson about it being an elusive and 20 difficult principle: 21 "An attempt was made by Walton J to set out four 22 conditions which in his view had to be present were the 23 rule to be permitted to operate. Later authorities have 24 done nothing to encourage so prescriptive an approach." 25 So the suggestion that there are always four</p> <p style="text-align: center;">Page 77</p>	<p>1 Lord Neuberger here to redefine, relax or modify the 2 rule in any way. It's a passing reference to the rule 3 which in the next paragraph he concludes: 4 "None of these cases ...(Reading to the words)... 5 the contention that an administrator can be ordered to 6 change the ranking of a particular debt simply because 7 the statutory ranking appears unattractive." 8 So there was no conceivable way in which the rule 9 was applicable in that case. Nothing that was said 10 there can possibly be taken as having being an intended 11 reformulation of the rule. 12 So having trawled through those authorities, we 13 submit the judge's description or defining of the rule 14 in the judgment below as being based upon unfairness in 15 some broad concept is simply wrong. It is and always 16 has been a rule applied much more carefully than that 17 and in much rarer circumstances. 18 As we'll go on to submit, it's never been used in 19 any case that we've found so as to permit creditors to 20 escape from a freely bargained contract entered into 21 with the office holder which is unimpeachable on legal 22 or equitable grounds, let alone one where it is accepted 23 that the rule does not preclude the entry into that 24 agreement in the first place but just some later 25 reliance on it by the administrators.</p> <p style="text-align: center;">Page 79</p>
<p>1 preconditions looks to be not such a firm requirement. 2 Then he refers to TH Knitwear, which I've shown you, 3 a passage from Williams and Mortimer, and then, at 17, 4 he refers to Wyvern Developments. I've already shown 5 how that was referred to earlier. He relies on that to 6 say in this case the administrators' promise should be 7 honoured under the principle. 8 Finally, Re Nortel in the Supreme Court. There are 9 just two paragraphs in the judgment which deal with the 10 question. They are at paragraphs 122 and 123 -- 11 LORD JUSTICE PATTEN: Where's the -- 12 MR ZACAROLI: I'm sorry. Tab 96 of bundle 3. 13 LORD JUSTICE BRIGGS: Paragraphs? 14 MR ZACAROLI: 122 and 123. Paragraph 122 is cited I think 15 in full in the judgment -- 16 LORD JUSTICE BRIGGS: Yes. 17 MR ZACAROLI: It's correct that at 122 Lord Neuberger refers 18 to the principle in terms that it applied to the effect 19 that where it would be: 20 "... unfair for a trustee in bankruptcy ...(Reading 21 to the words)... the court will order him not to do so." 22 Quoting from Walton J. 23 He also goes on to quote Slade LJ in TH Knitwear, 24 and also quotes Re Wigzell. 25 We say there's manifestly no attempt being made by</p> <p style="text-align: center;">Page 78</p>	<p>1 LADY JUSTICE GLOSTER: Is it accepted by Mr Dicker that in 2 circumstances where it would be unfair for the 3 administrators to enforce, it would also be unfair on 4 the other side of the coin for the creditor to enforce? 5 MR ZACAROLI: I'm not aware of that being accepted. 6 LADY JUSTICE GLOSTER: No. 7 MR ZACAROLI: I don't think that's been raised as such, but 8 it's one of the points we'll make -- 9 LADY JUSTICE GLOSTER: So the position is you can't enforce 10 it but they can? 11 MR ZACAROLI: That appears to be -- 12 LADY JUSTICE GLOSTER: Sorry, you can't. 13 MR ZACAROLI: Well, the administrators. That appears to be 14 the position as a result of the judge's judgment, yes, 15 which we say is one of the reasons why it can't be 16 applied in this way. 17 I'm going to turn to the judge's reasoning in 18 paragraph 184 in a moment, but first of all just six 19 points by way of -- 20 LORD JUSTICE PATTEN: Sorry. I think this is a point that 21 Lord Justice Briggs put to you earlier, but what are we 22 looking at here in terms of relief? You, the 23 administrators, the court what? Would direct the 24 administrators to allow the relevant creditors to 25 continue to assert, for example, the currency conversion</p> <p style="text-align: center;">Page 80</p>

1 claims, notwithstanding that they'd gone, they'd been
 2 released? Is that how it would work? I'm just not
 3 clear what would be required to put this right.
 4 MR ZACAROLI: Yes.
 5 LORD JUSTICE PATTEN: As my Lady has said, one view would be
 6 that the agreement should be, so to speak, set aside.
 7 But that's not realistic, I would have thought.
 8 MR ZACAROLI: No. So if we start with what the judge
 9 declared, it's tab 3 of bundle B, volume 1.
 10 LORD JUSTICE PATTEN: Yes. Directed not to enforce such
 11 releases.
 12 MR ZACAROLI: That's right. Now, I think it's fair to say
 13 no one had spotted the logical flaw in that which my
 14 Lord Lord Justice Briggs has identified today, but
 15 I would adopt that; that it is not possible simply to
 16 direct them not to enforce them when it has happened.
 17 So it would have to be framed in some other way, which
 18 is that the -- well, the contract would be unwound.
 19 LORD JUSTICE PATTEN: Or the administrators would have to be
 20 directed to meet claims that they in fact --
 21 MR ZACAROLI: Yes.
 22 LORD JUSTICE PATTEN: -- didn't have.
 23 LORD JUSTICE BRIGGS: Yes.
 24 MR ZACAROLI: Yes. If there's a way round it in practical
 25 terms, that would be it.

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1 LORD JUSTICE PATTEN: Yes.
 2 MR ZACAROLI: They would have to be permitting claims to be
 3 made which had in fact been released.
 4 LORD JUSTICE PATTEN: Yes.
 5 LORD JUSTICE BRIGGS: Nortel is quite an interesting analogy
 6 though, because it would be to give to a claim which has
 7 gone some priority in the process.
 8 MR ZACAROLI: Yes.
 9 LORD JUSTICE BRIGGS: In this case, it would come in at the
 10 non-provable debt level, I think, mainly.
 11 MR ZACAROLI: Yes, yes.
 12 LORD JUSTICE PATTEN: So it would deprive the shareholders,
 13 potentially anyway, of an asset that they had --
 14 MR ZACAROLI: Yes.
 15 LORD JUSTICE BRIGGS: All the subordinate creditors, or
 16 indeed if there's a shortfall --
 17 MR ZACAROLI: Exactly.
 18 LORD JUSTICE BRIGGS: -- the other non-provable claimants.
 19 MR ZACAROLI: Precisely, my Lord. It would be allowing
 20 a claim to be made against the estate to the prejudice
 21 of anybody else who has a claim in the estate.
 22 LORD JUSTICE PATTEN: Or was further down the line.
 23 LORD JUSTICE BRIGGS: Or in the same if there's a shortfall.
 24 MR ZACAROLI: Yes.
 25 LORD JUSTICE BRIGGS: And there could be a shortfall at the

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1 non-provable debts level, couldn't there, in this
 2 context?
 3 MR ZACAROLI: Yes --
 4 LORD JUSTICE BRIGGS: Yes.
 5 MR ZACAROLI: -- but of course in any other case there could
 6 obviously be such a shortfall.
 7 So I was going to make six points to start with
 8 before looking at the judge's factors contained in
 9 paragraph 184 for reaching the opposite conclusion.
 10 The first is we are operating on the assumption that
 11 there is no civil law remedy for avoiding these
 12 agreements. There's no claim for undue influence,
 13 mistake, misrepresentation or rectification.
 14 Now, the SCG have reserved the right that in some
 15 subsequent proceedings on a case-by-case basis, because
 16 particular facts are raised by other creditors that we
 17 don't know about, that could be the case. But we have
 18 to operate --
 19 LADY JUSTICE GLOSTER: Mis-rep claims or something?
 20 MR ZACAROLI: Exactly, but we have to assume for the moment
 21 that no such claims exist because, if they do, they
 22 provide their own reason for undoing the agreement.
 23 So we're operating in a world where there is no
 24 civil law remedy to undo these agreements. They are
 25 agreements freely entered into, fully enforceable as

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1 a matter of law and equity.
 2 Secondly, a point I just want to repeat is that the
 3 judge did not find that entry into the agreements
 4 contravened the principle. So there's no contravention
 5 of the principle by agreeing a mutual release of all and
 6 any claims both ways between the company and the
 7 creditors, including the release of non-provable claims.
 8 Third -- and, again, this is repetition to an extent
 9 but I will be short -- as to the complaint that the
 10 release of the currency conversion claims was
 11 an unintended consequence, we make two points. It is
 12 superficially attractive but fundamentally the wrong way
 13 of looking at it. The first point is the creditor's
 14 decision to limit its claim to a sterling sum and waive
 15 everything else was clearly a deliberate and intentional
 16 step made by it. Secondly, the most that can be said is
 17 that it was not appreciated by that creditor that by
 18 waiving any right to be paid in an underlying foreign
 19 currency the creditor was giving up anything of value,
 20 and we make that assumption that a creditor didn't know
 21 about the currency conversion claims. If they did know
 22 about it, it is important worse (inaudible).
 23 But that is still not an unintended consequence
 24 because the clear intention of the agreement was that
 25 there may be claims no one had thought about, claims

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1 that might arise as a result of a change in law in the
2 future, but those would be released. It's the very
3 essence of an agreement to release claims known and
4 unknown, including those not contemplated as a matter of
5 law yet, that the effect of the release may be to
6 release something you haven't thought about. It's
7 an obvious point. But that is not an inadvertent
8 consequence, it's the obvious and necessary consequence
9 of what you've agreed to.

10 The fourth point, following on from the above, we do
11 ask rhetorically if it was not dishonourable to enter
12 into a full and final release of all claims on
13 a reciprocal basis so as to achieve finality, if that
14 wasn't dishonourable, how could it be said to be
15 dishonourable that you then later enforce the contract?
16 We say cannot be said that it can be somehow okay to
17 enter into but not okay to stick by it.

18 The fifth point is that there's nothing
19 inconsistent, in our view, with the legitimate
20 expectation of creditors in holding them to the release.
21 On the contrary, the legitimate expectation of
22 a contracting party is that the contract will be
23 enforced in accordance with its terms. So to apply
24 Ex parte James so as to preclude a contract being given
25 full effect to would be to import an unwelcome air of

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1 uncertainty into the context of contractual relations.
2 It's indeed inconsistent with the legitimate expectation
3 that the contracts will be enforced and honoured.

4 That's particularly important where there's
5 an active trade in Lehman debt, where you're dealing
6 with third parties that will buy not only these debts
7 but other debts on the strength of what's contained in
8 written documents between the company and its creditors.

9 Insofar as the cases have touched upon the question
10 of honouring contracts, it's noteworthy that they go the
11 opposite way. So in Wyvern Developments -- not
12 contracts but promises -- oral promises should be
13 enforced pursuant to the principle, not the opposite.

14 The sixth point is that to preclude enforcement of
15 or to allow a claim to be made contrary to the terms of
16 the agreements in this one respect would result in, in
17 effect, insistence of performance of a different
18 contract to the one that was agreed between the parties.
19 That is unfair to the estate and others interested in
20 it, as we've just mentioned. If a claim subsequently
21 emerged against creditors -- so, for example, if the
22 Supreme Court decided that the one-way bet about
23 currency conversion claims was unfair and that actually
24 claims exist both ways -- not likely, I suspect, but
25 it's not inconceivable -- the claim by the company

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1 against the creditor would be released but not the
2 inward claim.

3 LORD JUSTICE BRIGGS: Is someone actually submitting it's
4 a two-way bet?

5 MR ZACAROLI: I don't think so. That's why it is probably
6 unlikely, but it is the Supreme Court.

7 So turning then to the judge's reasoning, which is
8 in paragraph 184 of the judgment, his first point --
9 well, to be fair, he says in the second sentence that:
10 "All of the background circumstances I have taken
11 into account in construing the agreements are relevant
12 in this context."

13 I've dealt with a lot of these in the context of
14 construction, so I can perhaps be quite short. But the
15 first factor is he says:
16 "These are not ordinary bilateral contracts but made
17 by administrators acting in the course of their
18 statutory duty to act in the interests of all
19 creditors."

20 I have addressed this substantively in the context
21 of the argument on construction. One of the statutory
22 purposes is distribution of the estate in as timely and
23 efficient a manner as possible, and compromising claims
24 on a rough-and-ready basis is entirely part of that
25 function. A full and final release is, indeed,

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1 consistent with the purposes of the administrators and
2 the duties of the administrators.

3 The second factor is that the release of currency
4 conversion claims was irrelevant for the purposes for
5 which the CDDs were entered into. Again, I've dealt
6 with the factor insofar as it relates to construction.
7 A similar answer applies here. The purpose of the CDDs
8 is too narrowly stated, we say, by the judge, for the
9 reasons I've already given. It's an irrelevant question
10 to ask: did the purpose include release of currency
11 conversion claims? The purpose basically was to enable
12 creditors who signed up to avoid years of delay and
13 expense in establishing claims, to get a quid pro quo
14 was full and final release both ways, and then it is
15 an irrelevant question because the intention of the CDDs
16 was to release all unknown claims.

17 I have probably made the submissions on that,
18 I think, in relation to construction. All the points
19 I've made there apply mutatis mutandis here to the same
20 point.

21 Again, the third point he makes is that the release
22 of the currency conversion claims was an unintended
23 effect of the CDDs. That, we say, is a fallacy
24 resulting from seeking to identify the intention behind
25 the CDDs with the perspective of hindsight, and I have

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1 made my submissions in response to that.
 2 Fourthly, he said that if the administrators had
 3 known they had this effect they would have drawn it to
 4 the creditors' attention. This again, we say, is
 5 an irrelevant factor because it assumes hindsight. The
 6 same could be said of any claim unknown at the time
 7 which later emerges, and you can never, we say, either
 8 construe an agreement or consider whether it is fair or
 9 not to enforce it by reference to the emergence of
 10 claims that undoubtedly fall within the scope of the
 11 release on some later date and ask, "Well, if we'd known
 12 about at the time, what we would have done in relation
 13 to them?" That is never a question one can ask and it
 14 has no impact on the fairness or dishonourability of
 15 enforcing contracts.
 16 The fifth point the judge made, in paragraph 184,
 17 was that it would create significant and unintended
 18 discrimination between creditors, including those who
 19 entered into CDDs earlier rather than later.
 20 This, we say, should also be an irrelevant factor.
 21 No creditor was forced to enter into a CDD. Creditors
 22 who signed up first get the advantage of an early
 23 distribution as against those who don't. They obviously
 24 take the inherent risk that in waiving unknown claims,
 25 if someone entered into an agreement later some claim

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1 might then have arisen and then be dealt with in that
 2 later person's CDD, but that doesn't create
 3 discrimination. All creditors are being treated
 4 equally. They are being asked to waive anything which
 5 is at the time they enter into the CDD unknown to them,
 6 unknown to the parties.
 7 LORD JUSTICE BRIGGS: The odd one, but the judge doesn't
 8 mention it, is the happenstance that some have signed
 9 them denominated in sterling and some have signed them
 10 denominated in dollars, as I understand it for reasons
 11 wholly unconnected with currency conversion claims, and
 12 it is only the sterling ones who get clobbered by the
 13 consequences.
 14 MR ZACAROLI: That is entirely true that you could have
 15 entered into an agreed claims CDD as opposed to
 16 an admitted claims CDD. In relation to the admitted
 17 claims CDD, they are all in sterling.
 18 LORD JUSTICE BRIGGS: Yes.
 19 MR ZACAROLI: That's not true any longer once admitted
 20 claims CDDs come along. In a sense, the reason why you
 21 agree to an agreed claims CDD in a foreign currency or
 22 a sterling admitted claims CDD, the difference is to do
 23 with conversion, in the sense that you want to retain
 24 the underlying currency in relation to the agreed claim
 25 CDDs because of the possibility of there being a claim

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1 against the client money trust. So that's the only
 2 reason that claims were denominated in their underlying
 3 currency because of the continued possibility that there
 4 might be a claim against the client money trust. The
 5 client money trust, my Lord will perhaps remember, was
 6 held in dollars.
 7 LORD JUSTICE BRIGGS: Yes.
 8 MR ZACAROLI: But it is not happenstance if you agree to
 9 a CDD which includes the agreed claim amount in
 10 sterling, you are agreeing that you are going to be
 11 a sterling creditor. That's all you have after that:
 12 rights as a sterling creditor.
 13 We say that in fact equal treatment here requires
 14 creditors who have entered into an agreement to be held
 15 to it.
 16 LADY JUSTICE GLOSTER: Is that a convenient moment?
 17 MR ZACAROLI: It is my Lady, yes.
 18 LADY JUSTICE GLOSTER: Thank you very much. 2 o'clock.
 19 (1.02 pm)
 20 (The short adjournment)
 21 (2.00 pm)
 22 LADY JUSTICE GLOSTER: Yes, Mr Zacaroli.
 23 MR ZACAROLI: I've said all I meant to say about release of
 24 currency conversion claims and Ex parte James. The only
 25 other matter to deal with is the release of non-provable

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1 claims to interest, because the judge held with us that
 2 he would not have precluded -- if he'd found differently
 3 as a matter of construction, he wouldn't have -- sorry.
 4 He found for us on construction in relation to
 5 interest and did not find that they would be precluded
 6 from enforcing by reason of Ex parte James. So we won
 7 on that point below, save for the non-provable claim to
 8 interest on a currency conversion claim.
 9 LADY JUSTICE GLOSTER: Is this item 4?
 10 MR ZACAROLI: It is, that's right. Items 3 and 4 insofar as
 11 Ex parte James is relevant to those.
 12 LADY JUSTICE GLOSTER: Yes. That's where he was with you on
 13 the construction --
 14 MR ZACAROLI: With us on construction, also with us on
 15 Ex parte James not having precluded enforcement of the
 16 release of interest.
 17 LADY JUSTICE GLOSTER: Yes.
 18 MR ZACAROLI: Except for interest --
 19 LADY JUSTICE GLOSTER: In relation to the CDD?
 20 MR ZACAROLI: And the CRA. In relation to interest on the
 21 currency conversion claim, he was with us insofar as the
 22 CRA precluded it, he was against us on the CDDs.
 23 I don't propose to say anything more about that. The
 24 arguments fall as we've already discussed.
 25 The only point to mention then is that so far as the

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<p>1 general question of release of non-provable claims to 2 interest is concerned and the application of 3 Ex parte James, everything that I've said so far in 4 relation to currency conversion claims applies equally 5 to interest, and the judge was right therefore not to 6 have precluded enforcement of those releases. 7 The only additional point is that insofar as the 8 court concludes that there is some question of 9 discrimination or an issue of discrimination in relation 10 to the operation of currency conversion claim releases 11 and for that reason Ex parte James is engaged, we say it 12 shouldn't, but if it did come to that conclusion. 13 Interest is different because there's no question of 14 discrimination so far as the operation of the release of 15 interest is concerned. Anyone who signed up to a CRA or 16 any form of CDD released all claims to interest other 17 than statutory interest. So it's the same across the 18 board. 19 LADY JUSTICE GLOSTER: Yes. 20 MR ZACAROLI: That leaves then just paragraph 74 of 21 schedule B1, and as I said at the outset, if you're 22 against us on Ex parte James, we needn't bother with 23 this. If you're with us on Ex parte James, we say no 24 additional factor or feature arises in paragraph 74 25 which should lead to any different conclusion in its</p> <p style="text-align: center;">Page 93</p>	<p>1 identified in the skeleton. 2 Then we've cited three other cases; Four Private 3 Investment Funds v Lomas, BLV Realty and Re Coniston 4 Hotel (Kent). If I may, I'm going to take you to just 5 one of those, and that's the Four Private Investment 6 Funds case. You'll find that in bundle 3 of the 7 authorities at tab 82. 8 The context was very different from the 9 circumstances we're here concerned with, although it did 10 involve the LBIE administration. The context was the 11 order in which the administrators should be dealing with 12 claims by creditors for the return of assets, and they 13 came up with a proposal, a plan, which prioritised 14 certain types of claims over others. There was 15 a challenge to that, in particular on the basis of 16 paragraph 74 of schedule B1. Blackburn J deals with 17 this question at paragraphs 34 to 39 on page 644. Can 18 I ask my Lords and my Lady to read those paragraphs, 34 19 through to 39. 20 LADY JUSTICE GLOSTER: Certainly. (Pause). 21 MR ZACAROLI: So acknowledging that the judge is dealing 22 with very different circumstances to ours, we 23 nonetheless say there are two useful points to get out 24 of this passage. The first is, as he says at 25 paragraph 34:</p> <p style="text-align: center;">Page 95</p>
<p>1 operation. But just a couple of references to the 2 cases, if I may. 3 We deal with this in our skeleton in bundle B, core 4 bundle volume 1, tab 8. Paragraphs 64 to 68 is where we 5 deal with the legal test. 6 LORD JUSTICE BRIGGS: Yes. 7 MR ZACAROLI: There is very little learning on paragraph 74 8 and no learning in any circumstance that's akin to our 9 case. So you won't find any real assistance in the 10 authorities in relation to cases that have any bearing 11 on this case. 12 LORD JUSTICE BRIGGS: Yes. 13 MR ZACAROLI: The first point to note is the point we make 14 in paragraph 64, picking up on my Lord 15 Lord Justice Briggs's point about the concepts of unfair 16 harm being borrowed from what used to be section 459 of 17 the Companies Act. 18 We point out that paragraph in Lord Hoffmann's 19 judgment in O'Neill v Phillips. There's a prior 20 sentence which if I can just read out -- for my Lords' 21 note, the case is at tab 57, which is bundle 2. The 22 sentence before that we've cited in paragraph 64 says: 23 "But this does not mean that the court can do 24 whatever the individual judge happens to think fair ..." 25 And then it goes on to the concept as we've</p> <p style="text-align: center;">Page 94</p>	<p>1 "The first thing you need is to show that the 2 conduct is causative of harm to creditors' interests. 3 We would say that holding a creditor to a contract 4 freely made by it which is not impeachable in law or 5 equity can hardly be described as harm. It is giving 6 the creditor precisely that which it agreed to get." 7 The second point is that when one considers the 8 concept of unfairness as Blackburn J says at 9 paragraphs 38 and 39, if what is being done by the 10 administrators is in accordance with their statutory 11 functions, then it's very different to see how that 12 could ever be described as unfair, even if it created 13 some sort of harm. We would rely upon that here and say 14 it was perfectly within the administrators' statutory 15 functions to enter into full and final releases with 16 creditors as part of a rough-and-ready approach to 17 distribution in speeding up that distribution process. 18 So those are the only two submissions that I would 19 make directed specifically at paragraph 74. Otherwise, 20 everything I've said in relation to Ex parte James, 21 I would rely upon as a matter of general discretion of 22 the court to exercise its discretion under paragraph 74. 23 I wouldn't wish to add anything to what I've said 24 already. 25 So unless I can assist further, those are my</p> <p style="text-align: center;">Page 96</p>

<p>1 submissions on part B.</p> <p>2 LADY JUSTICE GLOSTER: Thank you very much.</p> <p>3 MR ZACAROLI: There was one question asked of me in relation</p> <p>4 to whether it was right that creditors came up the queue</p> <p>5 if they signed a CDD.</p> <p>6 LORD JUSTICE BRIGGS: Yes.</p> <p>7 MR ZACAROLI: If I may, I'm going to ask Mr Bayfield to deal</p> <p>8 with that.</p> <p>9 LORD JUSTICE BRIGGS: I imagine he would be better placed to</p> <p>10 take instructions.</p> <p>11 MR ZACAROLI: Yes, I may ask him to deal with that.</p> <p>12 LADY JUSTICE GLOSTER: Yes, Mr Bayfield.</p> <p>13 Submissions by MR BAYFIELD</p> <p>14 MR BAYFIELD: My Lady, the short answer to the question is</p> <p>15 they were prioritised, and therefore in relation to the</p> <p>16 first three dividends as a general rule, it was those</p> <p>17 that had entered into admitted claims CDDs that received</p> <p>18 those dividends when they were first declared.</p> <p>19 I can give you a slightly longer answer with</p> <p>20 reference to the statement of agreed facts if that would</p> <p>21 be helpful, but that's the short answer to the point.</p> <p>22 LADY JUSTICE GLOSTER: Just give us the paragraph numbers,</p> <p>23 don't --</p> <p>24 MR BAYFIELD: So chronologically, if one takes the statement</p> <p>25 of agreed facts which is at tab 6 of the supplementary</p> <p style="text-align: center;">Page 97</p>	<p>1 quite as clearly as it might to the fact that up until</p> <p>2 that stage, there had been a limited number of instances</p> <p>3 where unsecured claims had been admitted by bespoke</p> <p>4 contracts --</p> <p>5 LADY JUSTICE GLOSTER: Yes.</p> <p>6 MR BAYFIELD: -- i.e. where CDDs had not been used.</p> <p>7 LADY JUSTICE GLOSTER: Thank you. You haven't got any</p> <p>8 position on this part of the case?</p> <p>9 MR BAYFIELD: My Lady, no.</p> <p>10 LADY JUSTICE GLOSTER: Thank you very much. That's very</p> <p>11 helpful.</p> <p style="text-align: center;">Submissions by MR DICKER</p> <p>12 LADY JUSTICE GLOSTER: Yes, Mr Dicker.</p> <p>13 MR DICKER: The appeal on the main judgment on part B is</p> <p>14 concerned with the effect of CDDs on currency conversion</p> <p>15 claims. I was proposing to deal with those first and</p> <p>16 then turn and deal with the supplemental issues, which</p> <p>17 as your Lordships know were dealt with by the learned</p> <p>18 judge much more shortly.</p> <p>19 So far as Wentworth's appeal is concerned, the court</p> <p>20 is now concerned solely with the effect of admitted</p> <p>21 claims CDDs and with certain agreed claims CDDs,</p> <p>22 Wentworth having decided not to pursue any of the other</p> <p>23 arguments it made below.</p> <p>24 Now, it is important to understand the common</p> <p>25</p> <p style="text-align: center;">Page 99</p>
<p>1 bundle.</p> <p>2 LADY JUSTICE GLOSTER: Yes, we needn't go there.</p> <p>3 MR BAYFIELD: One starts at paragraphs 8 to 13, which deals</p> <p>4 with the chronology in relation to the CDDs and the</p> <p>5 dividends.</p> <p>6 One can then go to paragraph 56 which deals with</p> <p>7 what creditors were told in relation to the delay that</p> <p>8 would be faced by them if they didn't sign a CDD. Then</p> <p>9 if one looks at the SAF at tab 7 which relates to the</p> <p>10 Ex parte James argument --</p> <p>11 LORD JUSTICE PATTEN: Sorry. We're at tab 7, are we?</p> <p>12 MR BAYFIELD: Sorry. The paragraph numbers I've given you</p> <p>13 already relate to the statement of agreed facts at</p> <p>14 tab 6.</p> <p>15 LORD JUSTICE PATTEN: Oh, right.</p> <p>16 LORD JUSTICE BRIGGS: Yes.</p> <p>17 MR BAYFIELD: But the last bit of the jigsaw, one needs to</p> <p>18 look at the statement of agreed facts at tab 7 for.</p> <p>19 LORD JUSTICE BRIGGS: Yes.</p> <p>20 MR BAYFIELD: It's the final section of that which deals</p> <p>21 with the position from late 2013 onwards.</p> <p>22 LORD JUSTICE BRIGGS: Paragraph?</p> <p>23 MR BAYFIELD: 23 to 26, when admittance letters were entered</p> <p>24 into instead of CDDs for those not prepared to enter</p> <p>25 into CDDs. The final paragraph, 26, refers albeit not</p> <p style="text-align: center;">Page 98</p>	<p>1 feature of such agreements is that they are CDDs in</p> <p>2 which the agreed claim amount happens to be expressed in</p> <p>3 sterling. Wentworth's argument is that in such cases,</p> <p>4 the creditor has agreed that his claim is limited to</p> <p>5 a specific sterling sum and that as a result, he's</p> <p>6 necessarily released any currency conversion claim he</p> <p>7 might otherwise have had. To use the expression I think</p> <p>8 my learned friend used was the creditor has elected to</p> <p>9 be a sterling creditor or to have a sterling claim.</p> <p>10 The judge as you know rejected this contention as</p> <p>11 a matter of construction, and we say he was correct to</p> <p>12 do so, essentially for the reasons he gave.</p> <p>13 Can I start by telling you where I will end up,</p> <p>14 although it may take me a little while to get there. It</p> <p>15 is important to understand that the issue in this case</p> <p>16 is not about the scope of the releases. We accept those</p> <p>17 are widely drafted.</p> <p>18 LADY JUSTICE GLOSTER: Yes.</p> <p>19 MR DICKER: The issue depends on --</p> <p>20 LADY JUSTICE GLOSTER: Is whether you are within.</p> <p>21 MR DICKER: -- the correct construction of what was</p> <p>22 preserved -- absolutely -- namely the admitted claim and</p> <p>23 the agreed claim amount.</p> <p>24 Now, it is correct that in some of the CDDs, the</p> <p>25 agreed claim amount is an amount which is expressed in</p> <p style="text-align: center;">Page 100</p>

1 sterling. However, construed in context, we say it is
 2 perfectly clear that this is simply recording the amount
 3 of the creditor's claim which has been agreed and which
 4 is to be admitted to proof after converting it into
 5 sterling, pursuant to Rule 2.86.
 6 LADY JUSTICE GLOSTER: Which one should we be working on?
 7 Item 6? -- sorry, tab 6 or is it tab 7?
 8 MR DICKER: The two you were shown were tab 7 for the
 9 admitted claims CDD, tab 4 for the agreed claim CDDs,
 10 both without reservation language.
 11 I'm also going to show you some CRA CDDs because
 12 Wentworth's argument also applies at least as a matter
 13 of logic to those, although my learned friend didn't
 14 deal with them, no doubt because in that context, as you
 15 will see in other contexts, the consequences are absurd.
 16 So we say the judge encapsulated the right answer in
 17 paragraph 169 of his judgment, where he said:
 18 "When you see a sterling sum, you have to understand
 19 that as meaning in shorthand for X pounds in sterling
 20 being the agreed amount of the creditor's entitlement to
 21 payment in the foreign currency as converted into
 22 sterling, pursuant to Rule 2.86 for the purposes of
 23 proof."
 24 Now, we know from the judgment of this court in
 25 Waterfall I --

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1 LADY JUSTICE GLOSTER: Sorry, are you in 169?
 2 MR DICKER: Yes, unless my reference is ... (Pause).
 3 LORD JUSTICE BRIGGS: Yes, you are. The last five lines.
 4 MR DICKER: Yes. Now we know from the judgment of this
 5 court in Waterfall I that the process of converting
 6 a foreign currency claim into sterling under Rule 2.86
 7 does not result in the creditor losing his right to be
 8 paid the balance of his claim in the event of a surplus.
 9 We say simply recording that this has been done as part
 10 of the proof process in a CDD would not have a different
 11 effect. Put another way, the conversion into sterling
 12 pursuant to Rule 2.86, which is recorded in the CDD, has
 13 exactly the same effect as any conversion under that
 14 rule, no more and no less.
 15 As I say, that's where in summary I will end up. As
 16 I said, it will take me a little while to get there.
 17 There is, attractively as my learned friend presented
 18 the background, inevitably another way of looking at
 19 this. As I said to the judge below, if you bear with
 20 me, I will set out the background which we say leads to
 21 the conclusion for which we contend.
 22 Now the short context --
 23 LADY JUSTICE GLOSTER: I think I would like some help with
 24 the words as well to understand your submission.
 25 MR DICKER: I will come back to that.

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1 LADY JUSTICE GLOSTER: Because that's where I think one has
 2 to start, perhaps, as the question of construction.
 3 MR DICKER: There's always a question about where it's
 4 easiest to start. In this case --
 5 LADY JUSTICE GLOSTER: Right. Take your own course
 6 obviously.
 7 MR DICKER: The context is the administrators were seeking
 8 to make distributions to unsecured creditors in
 9 accordance with the requirements of the Insolvency Rules
 10 and to do so in a way that was quick, efficient and
 11 fair. We deal with the background in section B of our
 12 main skeleton argument, and obviously you've also seen
 13 the statement of agreed facts.
 14 Just to deal briefly with the admissibility of the
 15 background material, as you know, there's no issue as to
 16 its admissibility. We say it's admissible for two
 17 reasons.
 18 Firstly, because you can't construe what the
 19 agreement means and decide whether or not it's
 20 ambiguous, or if it is ambiguous, what meaning should be
 21 given to it without having the relevant context.
 22 Secondly, the background is also relevant to show
 23 the genesis or general purpose of the documents.
 24 So starting with the background. The starting point
 25 concerns the statutory regime for distributions.

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1 Administrators can only make distributions in accordance
 2 with paragraph 65 of schedule B1 with the permission of
 3 the court and in accordance with the rules.
 4 Permission was obtained from Briggs J (as he then
 5 was) in an order of 2 December 2009. Just to show you
 6 that order, if you go to supplemental bundle B, tab 1,
 7 page 2, you'll see paragraphs 1 and 2 of the order. At
 8 paragraph 1:
 9 "The joint administrators be at liberty to give
 10 a notice pursuant to Rule 2.95(1) of the
 11 Insolvency Rules in the form as set out in the schedule.
 12 "2. Pursuant to paragraph 65(3) of schedule B1, the
 13 joint administrators be permitted to make a distribution
 14 to LBIE's unsecured creditors."
 15 And page 3 sets out the notice to creditors, and
 16 you'll see from the first paragraph:
 17 "Notice is hereby given pursuant to Rule 2.95 of the
 18 Insolvency Rules 1986. ...(Reading to the words)... to
 19 the preferential creditors, if any, and to the unsecured
 20 non-preferential creditors of LBIE."
 21 So that's what triggered this process, and it's also
 22 the order pursuant to which everything that followed
 23 essentially was done. The effect of the order was to
 24 bring into operation chapter 10 of the Insolvency Rules,
 25 which comprise rules 2.68 to 2.105. Again, just to show

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<p>1 you a rule which I think you may have seen once before, 2 but just in case, Rule 2.68(1) you'll find in 3 authorities 4, tab 167, 2.68(1): 4 "This chapter applies where the administrator makes 5 or proposes to make a distribution to any class of 6 creditors. 7 "(2) The administrator shall give notice to the 8 ...(Reading to the words)... in accordance with 9 Rule 2.95." 10 Those rules as you know are essentially the rules 11 equivalent to the rules in liquidation for making 12 a distribution. They include Rule 2.88, which we have 13 spent so much time debating. They also include 14 Rule 2.86, which deals with debts in a foreign currency. 15 As you know, it requires such debts to be converted into 16 sterling for the purposes of proof at the official 17 exchange rate prevailing on the date when the company 18 went into administration. 19 Now, Rule 2.86 is mandatory, so the regime which the 20 administrators had asked the court to bring into effect 21 necessarily required any claims to be converted into 22 sterling for the purposes of proof before any 23 distributions could be made. 24 The other two general points are these. Firstly 25 it's important, we say, to understand the nature of the</p> <p style="text-align: center;">Page 105</p>	<p>1 ensure the company's property is collected in and is 2 applied in satisfaction of its liabilities pari passu 3 among its proper creditors." 4 One of the cases referred to, Tanning Research 5 Laboratories v O'Brien deals with this in slightly 6 greater length, and we have it in tab 52. I think it is 7 worth quickly looking at that. It is the same bundle, 8 bundle 2, tab 52. It's a decision of the High Court of 9 Australia. The relevant passage you'll find starts at 10 the bottom of 338. 11 I think it is probably sufficient for these purposes 12 just to read the bottom of 338 to the start of the 13 citation from Viscount Simonds in Government of 14 India v Taylor. (Pause). 15 LADY JUSTICE GLOSTER: I know this is all factual 16 background, but where is it going to inform the court 17 who has to carry out the exercise of construction? 18 MR DICKER: Well, what you see when you go through the 19 process is what happened -- all of this was in the 20 context of making a distribution in accordance with 21 chapter 10, albeit on a quicker and more efficient 22 basis. 23 LADY JUSTICE GLOSTER: Yes. 24 MR DICKER: If one looks at how the process works, we say 25 it's perfectly clear that when the claims were converted</p> <p style="text-align: center;">Page 107</p>
<p>1 administrators' duties in this respect. It's a point 2 I'll come back to in the context of Ex parte James, but 3 it is also relevant as part of the context in which the 4 creditors would have approached what was happening. 5 The administrators were obviously under a duty to 6 distribute LBIE's assets in accordance with the 7 statutory scheme, and indeed are potentially liable for 8 breach of duty if they don't. 9 The duty in fact goes further than that. 10 Administrators, like liquidators, act in what's been 11 held to be a quasi-judicial capacity, according to 12 standards no less than the standards of a court or judge 13 when adjudicating on a proof. 14 Can I just show you two references in relation to 15 that. The first is a case called Menastaff Finance 16 Ltd(?) which you'll find in bundle 2, tab 70. (Pause). 17 It's a decision of Etherton J (as he then was) in 18 a case called Re Menastar Finance Ltd, and the relevant 19 paragraph is paragraph 44 on page 411. 20 "The power of a liquidator is in this respect no 21 different from that of the court itself since the 22 liquidator in deciding whether to accept or reject 23 a creditor's proof in whole or in part is acting in 24 a quasi judicial capacity [reference to Tanning Research 25 Laboratories v O'Brien]. The statutory duty is to</p> <p style="text-align: center;">Page 106</p>	<p>1 into sterling, they were recorded in the CDDs in 2 sterling, having been converted effectively under and 3 because of Rule 2.86, which was mandatory. 4 We say that just as in the case of a creditor who 5 submitted a proof in the ordinary way and had his claim 6 converted into sterling would not lose a currency 7 conversion claim, so also we say that is the effect of 8 the agreement. This is simply a quicker and more 9 efficient way of making a distribution, such 10 distribution also requiring a mandatory conversion of 11 foreign currency claims into sterling for the purposes 12 of proof. 13 Just as conversion in an ordinary case wouldn't 14 extinguish a currency conversion claim, so also we say 15 a conversion which is pursuant to the same rule, which 16 is recorded in the CDD as having happened, doesn't have 17 any larger effect. 18 LADY JUSTICE GLOSTER: So what was the CDD doing that wasn't 19 going to happen anyway? 20 MR DICKER: What it was doing -- my learned friend refers -- 21 LADY JUSTICE GLOSTER: Obviously the general releases, but 22 what was it doing? 23 MR DICKER: The way of looking at it -- my learned friend 24 repeatedly referred to the need for finality. 25 LADY JUSTICE GLOSTER: Yes.</p> <p style="text-align: center;">Page 108</p>

<p>1 MR DICKER: And that was plainly part of this process. The 2 easiest way to illustrate what the administrators were 3 seeking is perhaps by the following illustration. 4 Imagine a creditor who has ten claims, numbers 1 through 5 to 10. He chooses to prove for whatever reason only in 6 relation to claim 1. This document would preclude him 7 from making any claim subsequently in relation to 8 claims 2 through to 10. It would also preclude him from 9 subsequently supplementing or amending his proof in 10 relation to claim 1 so as potentially to upset the 11 calculations which the administrators have made as to 12 how much they can distribute. 13 What it was not intended to do, and we say this is 14 perfectly clear when one has seen how they were 15 developed and operated, what it was not intended to do 16 was effectively ensure that a creditor who chose to 17 prove in relation to a claim and whose claim could have 18 been agreed without any dispute or compromise with the 19 administrators at all. The creditor submits a claim for 20 US\$1 million, the administrator says, "I agree you have 21 a claim for US\$1 million", they record it in sterling 22 equivalent in a CDD because that's what the rules 23 require. This process did not require, did not justify 24 and we say did not involve that creditor losing his 25 currency conversion claim.</p> <p style="text-align: center;">Page 109</p>	<p>1 claim to which clause 2 would apply and would exclude? 2 MR DICKER: The answer to that is it is, unless it's what is 3 preserved. My Lord, I take your Lordship's point. If 4 you focus on the scale of the releases and you regard 5 that as the area of debate, then we will lose. 6 LORD JUSTICE PATTEN: Yes. No, I appreciate that, but I am 7 just -- but your argument, if I've understood it 8 correctly, is you don't have to be bothered about that 9 point because you construe the admitted claims doing 10 nothing more than stating what the effect of Rule 2.86 11 is. 12 MR DICKER: Can I ask you just for the moment to imagine 13 that instead of the sterling sum, one had a clause which 14 effectively provided a US dollar sum and then said, 15 "Convert which" -- once converted into sterling at the 16 official exchange rate pursuant to Rule 2.88(6) is -- 17 and then it gives the sterling equivalent. 18 LORD JUSTICE PATTEN: Yes. 19 MR DICKER: We say that if potentially that is what's 20 preserved, then the scope of the releases are 21 irrelevant. We say when you look at how this works and 22 how it worked in practice, that is all that's going on 23 here. When you come -- one of the points the judge 24 referred to, which I will come back to, concerned the 25 way in which the claims portal worked -- this was the</p> <p style="text-align: center;">Page 111</p>
<p>1 The finality required by the liquidators simply 2 didn't necessitate it and indeed more strongly, as 3 I will submit in due course, it wouldn't have justified 4 it. 5 LORD JUSTICE PATTEN: But if the definitions of "admitted 6 claim" and "agreed claim amount" are simply 7 a contractual way or a contractual alternative simply 8 proving for X dollars converted into sterling, then 9 isn't clause 2 relevant in those circumstances? Because 10 you're then dealing with a situation where there are 11 other claims floating about which clause 2 may have some 12 application. 13 MR DICKER: And we say those are the claims -- to use the 14 example I gave, claims 2 to 10 do get released. So to 15 that extent -- 16 LORD JUSTICE PATTEN: Okay, yes. But what about the 17 currency conversion claim? Because if this is doing no 18 more or less than what would be the position as if you 19 put a proof in for your indebtedness which was 20 compulsorily changed into sterling, leaving you with at 21 least potentially \$1 residue -- it depends obviously how 22 the exchange rate goes, but potentially at least 23 a shortfall -- why isn't that a future claim? Or 24 working on that construction, the agreement and that 25 hypothesis, why isn't that a shortfall to which a future</p> <p style="text-align: center;">Page 110</p>	<p>1 online process for proving claims. 2 LADY JUSTICE GLOSTER: Yes. 3 MR DICKER: What he says is: based on the statement of 4 agreed facts, based on the underlying evidence, what 5 happened was that a creditor was required to submit 6 a proof of debt. He would do it in his underlying 7 foreign currency. The administrator would look at it 8 and the administrator would make an offer in the 9 creditor's underlying foreign currency. And if that was 10 acceptable and agreed, the parties then would record 11 that in a CDD. But we are focusing at the moment 12 essentially just on admitted claims CDDs, but because 13 that sum was going to be admitted immediately for proof, 14 it had to be converted into sterling pursuant to 15 Rule 2.86. 16 Now you can see this clearly from the way in which 17 the CDDs were developed. My learned friend dealt with 18 agreed claims CDDs very shortly indeed, potentially just 19 saying the answer is the same in relation to them. 20 They in fact came first in time, provided part of 21 the background to anyone entering into an admitted 22 claims CDD. And if you look at how the agreed claims 23 CDDs work, you can see this essentially operating on its 24 face. 25 I'm conscious not to, as it were, anticipate much of</p> <p style="text-align: center;">Page 112</p>

1 the argument in advance. The only point I'm seeking to
 2 make at the moment is we're essentially in a regime
 3 brought about by a court order, permitting the
 4 administrators to make a distribution in accordance with
 5 chapter 10, and their duties so far as adjudication of
 6 claims are concerned require them to adjudicate claims
 7 in a quasi-judicial manner, certainly not to act in some
 8 adversarial way or to try and procure some collateral
 9 advantage for the company, still less subordinated
 10 creditors or shareholders.
 11 LADY JUSTICE GLOSTER: Can I just understand this. In the
 12 one at tab 7, which is the CDD admitted claim, there is
 13 a reference to one creditor agreement, which is an ISDA
 14 Master Agreement, and presumably there are a number of
 15 different transactions under that master agreement.
 16 MR DICKER: There may or may not be. No doubt with some
 17 creditors, there were --
 18 LADY JUSTICE GLOSTER: There was only one.
 19 MR DICKER: -- with others, there may not have been.
 20 LADY JUSTICE GLOSTER: So would there have been open
 21 contracts at the time the CDD was entered into, in other
 22 words that would be closed out under the CDD? I thought
 23 Mr Zacaroli took us to a provision where they were, and
 24 I imagine --
 25 MR DICKER: That depends on the circumstances.

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1 LADY JUSTICE GLOSTER: Right.
 2 MR DICKER: Presumably most creditors by the time one had
 3 got to the stage of the CDDs had closed out their
 4 transactions.
 5 LADY JUSTICE GLOSTER: Well, it depends on whether they're
 6 in the money or not. They might have just wanted to let
 7 things --
 8 MR DICKER: If they weren't, then different issues may have
 9 arisen. (Pause).
 10 LADY JUSTICE GLOSTER: I'm just trying to understand what
 11 actually happens to a creditor when he decides to enter
 12 into a CDD as part of the factual matrix.
 13 MR DICKER: We'll see this in due course. But the short
 14 point is what the administrators wanted to do was
 15 essentially to get away from dealing with creditors'
 16 claims on a purely bilateral basis. In other words,
 17 you'd have a creditor who would submit a claim, and
 18 they'd say, "My valuation approach for my claim is as
 19 follows", and the administrator would have to deal with
 20 that. Another creditor would come up with a different
 21 approach and the administrators would have to deal with
 22 that. The administrators said, "What we propose to do
 23 is to use our in-house valuation methodology" --
 24 LADY JUSTICE GLOSTER: Yes.
 25 MR DICKER: -- "and we will apply to everyone".

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1 LADY JUSTICE GLOSTER: Irrespective of what valuation
 2 mechanism was chosen under the ISDA particulars master
 3 agreement?
 4 MR DICKER: Yes.
 5 LORD JUSTICE PATTEN: Can I just put to you, Mr Dicker,
 6 while it's in my mind --
 7 MR DICKER: Of course.
 8 LORD JUSTICE PATTEN: -- as much as in yours what I was
 9 trying to explain to you not terribly well, I think.
 10 If you go to clause 2 of the CDD -- I am working on
 11 the tab 7 version -- and look at clause 2.3, the release
 12 which you accepted is very widely drawn -- I'm sorry,
 13 I hope I've got the right -- tell me if I've got the
 14 wrong one, but that's the one I've been marking up.
 15 MR DICKER: No, you have --
 16 LORD JUSTICE PATTEN: The release in 2.3 which we all accept
 17 is very widely drawn is subject to the saving provisions
 18 right at the start, the "What is preserved". What's
 19 preserved is solely the admitted claim. So on your
 20 argument, as I understand it, we've got to find in the
 21 admitted claim, the definition of the admitted claim,
 22 everything you need for your currency conversion claim.
 23 MR DICKER: Correct.
 24 LORD JUSTICE PATTEN: Now if you go to the definition of the
 25 admitted claim, that's an unsecured claim of the

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1 creditor which qualifies for dividends.
 2 I agree with you that for the purposes of argument
 3 it doesn't matter that -- it is expressed in sterling
 4 and one can say, "Right, well that's the 2.86 equivalent
 5 of what your dollar claim was". But it is important in
 6 this sense that it's only -- the only part of your claim
 7 that qualifies for dividends is the part that's
 8 converted into sterling. Because by definition, the
 9 currency conversion claim is a claim if it arises at all
 10 that has to be dealt with as a post-administration,
 11 post-liquidation claim that comes in in the event of a
 12 surplus. It doesn't qualify for dividends.
 13 At the moment, I don't really understand why it
 14 therefore isn't excluded by the application of the
 15 defined term "admitted claim".
 16 MR DICKER: Essentially our answer to that is the claim
 17 qualifies for dividends. But for the purposes of
 18 dividends, it will only receive dividends on the
 19 sterling equivalent. Effectively it's not the entirety
 20 of what the creditor may be entitled to.
 21 LORD JUSTICE PATTEN: But it doesn't -- this is the point.
 22 On one view, it doesn't -- do you see what I mean? It
 23 depends how you look at it.
 24 MR DICKER: It absolutely depends how you look at it. My
 25 Lord, I entirely understand where your Lordship is

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1 coming from, and in a sense it's not dissimilar from the
 2 issues which arose before the judge at first instance.
 3 LORD JUSTICE PATTEN: Yes.
 4 MR DICKER: What we do say is when you get to the end of the
 5 story, particularly when you see the absurdities of the
 6 construction for which my learned friend contends --
 7 LORD JUSTICE PATTEN: Yes.
 8 MR DICKER: -- the judge was satisfied there was a different
 9 result, and we say your Lordship should as well.
 10 LORD JUSTICE PATTEN: But in terms of the language of the
 11 contract, it's that definition, isn't it, which is
 12 critical to this? Because it's that and only that which
 13 is saved from the general release of all claims.
 14 MR DICKER: We say one needs to essentially read the two
 15 parts together. So one is talking about an admitted
 16 claim in the agreed claim amount.
 17 LORD JUSTICE PATTEN: Of course, yes.
 18 MR DICKER: Subject to that, yes.
 19 LADY JUSTICE GLOSTER: So you would say, would you, that it
 20 is an unsecured claim of a creditor of the company? As
 21 it happens, it qualifies for dividends pursuant to the
 22 Insolvency Rules, but that's not an exclusive
 23 restrictive sub-clause of the unsecured claim.
 24 MR DICKER: Correct.
 25 LADY JUSTICE GLOSTER: It also, you say, qualifies for

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1 a claim in the surplus?
 2 MR DICKER: Correct.
 3 LADY JUSTICE GLOSTER: But it is the same unsecured claim.
 4 MR DICKER: Provided of course that it's a currency
 5 conversion claim arising in respect of the one claim
 6 which the creditor has essentially chosen to prove for,
 7 which has been accepted and admitted by the
 8 administrators. And one can --
 9 LADY JUSTICE GLOSTER: Therefore the analysis is very
 10 dependent on it being a claim in debt, not a claim in
 11 damages, isn't it?
 12 MR DICKER: And it is --
 13 LADY JUSTICE GLOSTER: I know you've all told me that it is
 14 a claim in debt, not one in damages.
 15 MR DICKER: I think to be fair, it's the judgment of this
 16 court in more than one --
 17 LADY JUSTICE GLOSTER: Yes, absolutely.
 18 LORD JUSTICE BRIGGS: So bearing in mind, just looking at
 19 the tab 7 piece which was made on February 2012, by
 20 February 2012, the conversion rate between pounds and
 21 dollars would have moved somewhat from where it was on
 22 the cut-off date. So you say that the phrase 18 million
 23 whatever it is on page 4 is the amount described as the
 24 agreed claim amount, I think you're saying means the
 25 underlying debt claim which we have as at February 2012

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1 which when converted using exchange rates at the cut-off
 2 date produces a figure of 18.070 million.
 3 MR DICKER: Two points. One, it is common ground that that
 4 is in fact what that sum represents.
 5 LORD JUSTICE BRIGGS: Oh, yes, sure.
 6 MR DICKER: And you'll see express recognition and reference
 7 to the official exchange rate in the earlier CDDs,
 8 namely the agreed CDDs.
 9 LORD JUSTICE BRIGGS: Yes. I've just looked at some of
 10 those, yes.
 11 MR DICKER: Can I again --
 12 LORD JUSTICE BRIGGS: I don't want to anticipate --
 13 MR DICKER: No, I'm just conscious -- I am conscious that we
 14 do say your Lordships need to see the background in
 15 a sense before perhaps being able to see the full
 16 context and the reasons why we make the submissions we
 17 do.
 18 LORD JUSTICE BRIGGS: Yes.
 19 MR DICKER: The only thing I would say, and not wishing to
 20 dissuade your Lordships from asking questions is --
 21 LADY JUSTICE GLOSTER: Bear with you.
 22 MR DICKER: -- they will be easier I hope to answer once one
 23 has seen --
 24 LORD JUSTICE PATTEN: I know, but it is quite helpful to
 25 have in mind what the point of construction actually is.

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1 MR DICKER: And that's why I started by saying where I hoped
 2 to get to was the submission I've made --
 3 LORD JUSTICE PATTEN: Yes.
 4 MR DICKER: -- so your Lordship had that in mind.
 5 LORD JUSTICE PATTEN: Yes.
 6 MR DICKER: Can I then just deal briefly with the
 7 communications to creditors.
 8 My learned friend has dealt with this shortly, but
 9 as you know the administrators made a number of progress
 10 reports to creditors explaining what they were doing.
 11 The judge referred to these in his judgment at
 12 paragraphs 41 to 45, and you have copies of the third,
 13 fourth and fifth reports in supplemental B bundle at
 14 tabs 21, 22 and 23.
 15 Again, although I am sure you're aware of this at
 16 this stage, obviously, no one was anticipating
 17 a surplus. As my learned friend indicated, there was
 18 some market speculation during the course of 2012 as to
 19 whether there might be a surplus. But it was only in
 20 the administrators' ninth report published in April 2013
 21 that they provided for the first time a potential
 22 surplus on a high case. In other words, the report set
 23 out potential outcomes low, medium and high, and the
 24 ninth report was the first to show a potential surplus
 25 on a high case.

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<p>1 Just again for your note, you'll see that recorded 2 by the judge in paragraph 53 of his judgment. (Pause). 3 So can I quickly show you a limited number of 4 excerpts from the third, fourth and fifth reports. The 5 third report is in supplemental bundle B, tab 21. I'm 6 just identifying the most important points. Tab 21, 7 page 12 -- 8 LORD JUSTICE PATTEN: I'm sorry -- 9 MR DICKER: I'm sorry. It is supplemental B -- 10 LORD JUSTICE PATTEN: Yes. 11 MR DICKER: -- tab 21, page 12. 12 LORD JUSTICE PATTEN: Yes. 13 MR DICKER: It's the first three bullet points, left-hand 14 column on page 12: 15 "LBIE are now able to agree claims and make 16 distributions to creditors in accordance with the order 17 granted by the High Court on 2 December 2009. A notice 18 of intent of dividend pursuant to Rule 2.9(5) was issued 19 to all known counterparties and potential creditors 20 ...(Reading to the words)... and to ultimately expedite 21 a cash dividend distribution to unsecured creditors." 22 At page 33, there are certain highlights in the box 23 on the left-hand side. On the right-hand side, there's 24 a heading halfway down "Volume of claims". At the 25 bottom, last paragraph:</p> <p style="text-align: center;">Page 121</p>	<p>1 MR DICKER: I'm going to show you -- that's all right. At 2 page 38, just the first paragraph: 3 "A key aspect of the case which will be materially 4 progressed over coming months ...(Reading to the 5 words)... and accelerate the claim admission and asset 6 distribution." 7 Then the third point is the reference to the process 8 being fair, transparent and equitable. If you just go 9 back a page to 37, it's the last paragraph on that page, 10 bottom of the right-hand column: 11 "The administrators are exploring with other 12 affiliate office holders the manner in which claims 13 under the various master agreements are formulated and 14 submitted in order to establish whether a global 15 approach can be adopted for the treatment of creditor 16 claims. ...(Reading to the words)... consistent 17 approach to claim determination and resolution." 18 So that's all I wanted to show from the third. If 19 you then go to the fourth report, which is tab 22, my 20 learned friend showed you certain extracts from this. 21 Just identifying the points we rely on, the first, 22 page 31 -- 23 LADY JUSTICE GLOSTER: We're still on the same document? 24 MR DICKER: We're in the next document, tab 22. 25 LADY JUSTICE GLOSTER: Yes.</p> <p style="text-align: center;">Page 123</p>
<p>1 "The investment and the management valuation and 2 validation processes should enable LBIE to form 3 an initial view on the value of inbound claims. 4 ...(Reading to the words)... claim valuation process 5 which is fair, transparent and recognises market 6 principles sits at the heart of the approach." 7 And then over the page -- 8 LADY JUSTICE GLOSTER: It is interesting to see there that 9 there were a lot of identified counterparties with open 10 positions. 11 MR DICKER: Yes. 12 LADY JUSTICE GLOSTER: 6,300 -- 13 MR DICKER: Out of the 11,000. 14 LADY JUSTICE GLOSTER: Yes. 15 MR DICKER: Yes. And then over the page "Bar date", I think 16 we can ignore the first paragraph. The next paragraph: 17 "To optimise the claim submission and agreement 18 process ...(Reading to the words)... the ability to have 19 a claim determined in the LBIE estate ahead of the 20 unsecured bar date." 21 LADY JUSTICE GLOSTER: This is the answer to the questions 22 I was asking you about what was actually happening. 23 MR DICKER: Right. I am glad it does that. 24 LADY JUSTICE GLOSTER: So one is looking at all the trades 25 and all the -- to get to the valuation.</p> <p style="text-align: center;">Page 122</p>	<p>1 MR DICKER: Page 31, it is in fact the same highlight as my 2 learned friend referred to, top left: 3 "The consensual approach designed to accelerate the 4 agreement of unsecured claims in view ultimately to 5 expediting distribution payments." 6 Then if you go over the page in the top left-hand 7 corner, just below the first paragraph which my learned 8 friend showed you, there's a paragraph: 9 "Under the consensual approach, LBIE will offer to 10 agree each eligible street creditor's claim using LBIE's 11 in-house valuation methodology." 12 And at page 32 as well, in the next paragraph, last 13 sentence, you'll see: 14 "Creditors should note that in offering a LBIE 15 determination, the administrators are seeking to treat 16 creditors consistently, are not simply imposing 17 a discount or haircut to their claims." 18 LADY JUSTICE GLOSTER: So if a creditor didn't want to go 19 along this route, it could simply say, "No, I want to 20 apply my own valuation under the master agreement. I've 21 got the right to determine how the valuation happens at 22 least in the first instance. I am proposing to do that. 23 You can't impose on me your model". 24 MR DICKER: They could, but as the administrators repeatedly 25 emphasised in their progress reports, there was</p> <p style="text-align: center;">Page 124</p>

<p>1 a potential price to be paid. Bear in mind at this 2 stage, everyone thought LBIE was insolvent. 3 LADY JUSTICE GLOSTER: Yes. 4 MR DICKER: If you didn't agree to a CDD, you wouldn't, as 5 Mr Bayfield indicated, participate -- 6 LADY JUSTICE GLOSTER: Get paid in the first round. 7 MR DICKER: -- the first, second or third rounds in the 8 main. If you got paid later, then you would inevitably, 9 if LBIE turned out indeed to be insolvent, not receive 10 any interest on the sum that you eventually received. 11 So from a creditor's perspective, the consequence of 12 that in terms of the time value of money put real 13 pressure on creditors to enter into a CDD to ensure that 14 they would be able to share in early distributions. 15 LADY JUSTICE GLOSTER: Yes. 16 MR DICKER: Now the most important aspect of the fourth 17 report concerned currency conversion matters. If you go 18 on to page 35, section 6.2 is headed "Currency matters 19 and dividend prospects". 20 LORD JUSTICE PATTEN: Which page? 21 MR DICKER: I'm sorry, 35. 22 LORD JUSTICE PATTEN: 35. Yes, thank you. 23 MR DICKER: This page includes the passage which the judge 24 refers to in his judgment at paragraph 74. The passage 25 he refers to essentially starts two-thirds of the way</p> <p style="text-align: center;">Page 125</p>	<p>1 And then two points are made. 2 Just below that, the paragraph beginning, "To assist 3 creditors": 4 "To assist creditors, the claims portal contains 5 relevant exchange rates as at 15 September and 6 automatically converts non-sterling denominations." 7 And then the last sentence on that column: 8 "Although the law also prescribes the creditors' 9 claims are to be converted into sterling, the relative 10 share that an individual creditor will have is 11 unaffected either by which common currency adopted 12 [I will come back to that] or the original currency 13 denomination of the creditor's claim." 14 LADY JUSTICE GLOSTER: I don't understand what that means, 15 "the relative share is unaffected". What does that -- 16 MR DICKER: In other words, the administrators are saying, 17 "All we're doing is what we're doing under Rule 2.86. 18 We're putting everyone on essentially -- treating 19 everyone by reference to their position as at the date 20 of the administration by converting all claims 21 essentially into a common account as Rule 2.86 22 requires". (Pause). 23 LORD JUSTICE PATTEN: But the "relative share" means the 24 share in relation to the pari passu distribution, 25 doesn't it?</p> <p style="text-align: center;">Page 127</p>
<p>1 down the left-hand column and runs through to the end of 2 the right-hand column. My learned friend mentioned this 3 page, he didn't take you through it. But just picking 4 up the relevant points, at the top "Impact on creditor 5 claims": 6 "In the last report to creditors, the administrators 7 explained all unsecured claims would be proved in 8 sterling." 9 Then in the next paragraph, there's a reference to 10 the order of 2 December 2009: 11 "The effect of this order was to convert LBIE's 12 administration into a distributing administration and it 13 secured an efficient means of distributing the assets 14 without requiring another insolvency process. This 15 order also meant that ..." 16 Then the second bullet: 17 "... brought into the effect the provisions of 18 Rule 2.86 of the Insolvency Rules which stipulates ..." 19 Then the effect of the rule is set out: 20 "Accordingly, applying Rule 2.86, the general 21 principles of UK insolvency law, all unsecured creditor 22 claims which include any unsecured claims relating to 23 CRA signatories are to be converted into sterling as at 24 15 September 2008 for the purposes of having a proven 25 claim against LBIE, specifically ..."</p> <p style="text-align: center;">Page 126</p>	<p>1 MR DICKER: It's not perhaps entirely happily worded. 2 I think you can fairly read this as meaning simply, 3 "We're converting all claims pursuant to 2.86 into 4 a common currency of account, and effectively what 5 happens thereafter is not going to affect your relative 6 shares in the sense of how much you receive". 7 LORD JUSTICE PATTEN: I thought it was just -- I agree with 8 you, it's not 100 per cent -- but I thought it was just 9 making a point that the fact they chose to do it all in 10 sterling didn't work to anybody's detriment. 11 MR DICKER: Two points. One, in a sense they had no choice. 12 Rule 2.86 says that. 13 LORD JUSTICE PATTEN: No, I appreciate that. 14 MR DICKER: Two, if that's what they were saying, then on 15 one view at least with hindsight, that would not be 16 accurate. 17 LORD JUSTICE BRIGGS: It's only accurate on the cut-off 18 date. It doesn't matter which currency you use on the 19 cut-off date. 20 MR DICKER: But the point we make here is when you see 21 a conversion into sterling, what the administrators are 22 saying is, "It is being converted into sterling because 23 that's what the rules require us to do". 24 LORD JUSTICE BRIGGS: Yes. 25 MR DICKER: There's no indication that the conversion into</p> <p style="text-align: center;">Page 128</p>

<p>1 sterling was to involve some election by the creditor as 2 if he had a choice to treat himself hereafter as 3 a sterling creditor as opposed to any other creditor, 4 and certainly no suggestion that if he did choose to 5 elect to be a sterling creditor, he would lose any 6 currency conversion claim that he might otherwise have. 7 LADY JUSTICE GLOSTER: It could be said it's in your favour, 8 because if you are crammed down simply to your sterling 9 claim, it clearly is affected by the original currency 10 of your claim. 11 MR DICKER: Yes. 12 LADY JUSTICE GLOSTER: Because let's say the dollar has 13 appreciated vastly, if all you've got is your currency 14 claim, your English currency claim -- probably that's 15 a bad example -- but you're getting more. 16 MR DICKER: Yes. We say essentially one -- 17 LADY JUSTICE GLOSTER: Whereas if you've done it in some 18 other currency which has depreciated, it isn't affected 19 on your construction because you've still got your 20 currency claim which is going to bring you up to the 21 equivalent value of the original claim. 22 MR DICKER: We say we've already got there, because all of 23 this is essentially saying, "This is essentially simply 24 a quicker way of operating the proof process to get to 25 the position of making a distribution".</p> <p style="text-align: center;">Page 129</p>	<p>1 way, such as via bilateral negotiations." 2 LADY JUSTICE GLOSTER: What page was that on? 3 MR DICKER: I'm sorry. Page 29, bottom right-hand column. 4 The second point I wanted from this document is on 5 page 31, left-hand column. And just for the purposes of 6 orientation, halfway down there's a heading "Claims 7 determination deed": 8 "Since the date of the administrators' last progress 9 report, LBIE has also developed a standardised legal 10 agreement for claims determination deed, which is 11 designed to preserve a creditor's potential entitlement 12 to client money, notwithstanding its agreement of 13 a single claim figure in respect of the LBIE estate 14 potentially incorporating both unsecured and client 15 money elements." 16 That's an indication of the drafting of what we've 17 been referring to as the agreed claims CDD. 18 I wonder if just before the short break, there's one 19 further point in relation to the background I just want 20 to deal with. It will take me five or six minutes, if 21 that's all right. 22 I've already referred to the claims portal which the 23 administrators set up. We deal with this in our 24 skeleton argument, paragraphs 19 to 22. The judge 25 summarised the basic approach in his judgment at</p> <p style="text-align: center;">Page 131</p>
<p>1 LADY JUSTICE GLOSTER: Yes. 2 MR DICKER: Other statements by the administrators that it 3 is meant to be fair, transparent, equitable, et cetera, 4 none of those contain any suggestion that creditors will 5 lose whatever it is, 1.5 billion of currency conversion 6 claims. To the converse. Your Ladyship is right, this 7 is another statement although more specific to the same 8 end. 9 LADY JUSTICE GLOSTER: Yes. It supports your case, you say. 10 MR DICKER: Yes. 11 LORD JUSTICE BRIGGS: It brings in mind the famous statement 12 of Harold Wilson in the late 1960s, the famous, "British 13 devaluation doesn't affect the pound in your pocket". 14 In one sense it's true, in another sense it's nonsense. 15 MR DICKER: It's true taken very literally, but in substance 16 not, yes. 17 The fifth report is at tab 23, and there's only two 18 things I want to show you from this, the first on 19 page 29. It's in the bottom right-hand column on 20 page 29. It's the last sentence where it says: 21 "Unless there is a compelling legal or commercial 22 reason to the contrary, it is the administrators' 23 current intention to deal with all street creditors 24 under the consensual approach before deploying resources 25 to agree financial trading creditor claims in any other</p> <p style="text-align: center;">Page 130</p>	<p>1 paragraphs 150 and 169. If I could ask you to take his 2 part B judgment and just look at those two paragraphs. 3 LORD JUSTICE PATTEN: Sorry, which paragraph did you say in 4 the judgment? 5 MR DICKER: It is paragraph 150 -- 6 LORD JUSTICE PATTEN: 150, yes. 7 MR DICKER: -- where the judge says: 8 "On behalf of the SCG, I drew attention to the 9 process which led to the making of an agreed claims CDD. 10 The first creditor was required to submit a proof of 11 debt in LBIE's claims portal complying with the 12 Insolvency Rules. Such proofs were submitted in the 13 underlying contractual currency or currencies. The next 14 stage was the administrators made an offer of a single 15 amount, which if accepted by the creditor became the 16 agreed claim amount. As earlier stated, this offer will 17 be made in the currency of the underlying entitlement, 18 save in those cases where the creditor had claims in 19 more than one currency." 20 And then he comes back in paragraph 169, where he 21 says at line 2: 22 "The correct approach to construction is to have 23 regard to the process by which the agreed claim amount 24 is agreed and converted into sterling. The creditors 25 are required to submit proofs of debt in the currency of</p> <p style="text-align: center;">Page 132</p>

<p>1 their underlying claims. The administrators 2 communicated their determination of the proof in the 3 currency of the underlying claim and the agreed claim 4 amount in the CDD which follows is the foreign currency 5 figure converted into sterling pursuant to Rule 2.86. 6 It cannot be converted otherwise than in accordance with 7 2.86." 8 So the process essentially had three stages. One, 9 creditors submit their claim in the underlying foreign 10 currency. Secondly, the administrators made an offer of 11 a single amount, which if accepted would become the 12 agreed claim amount, and again this offer would also be 13 made in the currency of the underlying entitlement. 14 There's one exception to that which I will come back to, 15 which is an important one. 16 It's where creditors had claims in more than one 17 currency. Where creditors had claims in more than one 18 currency, the figure that the administrator came back 19 with was a figure expressed generally in the currency of 20 the largest claim, or at least in the currency of the 21 claim which the administrator's calculation suggested 22 was the largest. Creditors were given that amount and 23 they were told it was essentially non-negotiable. This 24 is, "You either take it or leave the figure that you've 25 been offered".</p> <p style="text-align: center;">Page 133</p>	<p>1 (3.17 pm) 2 (A short break) 3 (3.27 pm) 4 LADY JUSTICE GLOSTER: We're only going to sit until 4.15 pm 5 this afternoon because some of us have meetings 6 afterwards. 7 MR DICKER: I was going to turn next to the various forms of 8 CDDs developed by the administrators. 9 LADY JUSTICE GLOSTER: Yes. 10 MR DICKER: There are in fact three main types. Firstly, 11 agreed claim CDDs -- 12 LADY JUSTICE GLOSTER: Sorry, say again? 13 MR DICKER: Agreed claims CDDs -- 14 LORD JUSTICE BRIGGS: I wish there was a shorthand for that. 15 The trouble is that agreed and admitted claims produces 16 the same initials. 17 MR DICKER: I am afraid I think those of us down here are 18 now probably so ingrained using this -- 19 LADY JUSTICE GLOSTER: But you've been living with it for 20 years. 21 MR DICKER: Agreed claims CDDs first; secondly, admitted 22 claims CDDs; and thirdly, though you so far haven't 23 heard anything about them, CRA CDDs -- 24 LORD JUSTICE BRIGGS: Oh. 25 LADY JUSTICE GLOSTER: CRA CDDs?</p> <p style="text-align: center;">Page 135</p>
<p>1 If the offer was accepted, the third point, LBIE and 2 creditor entered into a CDD to formalise the agreement 3 and that agreement would record the relevant sum either 4 in a foreign currency in some cases, or in other cases 5 in sterling after conversion under Rule 2.86. Which 6 approach was adopted depended on which form of CDD was 7 used, and I will deal with that in a moment, because in 8 our submission this is important. 9 The process you will see in a little more detail in 10 two places -- it may be easiest if I can just give you 11 the references. The first is in the statement of facts 12 at tab 6. The process is dealt with at paragraphs 50 -- 13 LORD JUSTICE BRIGGS: Is that B2 or B1? Just remind me. 14 MR DICKER: I'm sorry, it is B supplemental. 15 LORD JUSTICE BRIGGS: B supp 6, yes. 16 MR DICKER: It is tab 6, 50 to 61, 63 and 67 to 75. 17 LORD JUSTICE BRIGGS: Yes. 18 MR DICKER: It's also dealt with in a witness statement of 19 Mr Garvey(?) which you will find at tab 10B -- 20 LORD JUSTICE BRIGGS: B supp again? 21 MR DICKER: Yes. B supplemental, tab 10B, and the 22 paragraphs are 18 to 22. I wonder if that might be 23 a convenient moment. 24 LADY JUSTICE GLOSTER: Yes, certainly. We'll just take five 25 minutes.</p> <p style="text-align: center;">Page 134</p>	<p>1 MR DICKER: CDDs, which in turn came in two flavours: a CRA 2 agreed claim CDD and a CRA admitted claims CDD. I will 3 come back to them. 4 Now although I think my learned friend sought to 5 suggest that these documents were heavily negotiated, 6 they were developed as you've seen from the 7 administrators' report by the administrators, and the 8 judge recorded in paragraph 51 that they were generally 9 presented on a take it or leave it basis, though there 10 were in some instances bilateral negotiations of the 11 terms of particular CDDs. 12 LORD JUSTICE BRIGGS: But the forms were discussed in some 13 sort of seminar or forum or committee of creditors, 14 weren't they? 15 MR DICKER: I think the administrators consulted with -- 16 LORD JUSTICE BRIGGS: Yes -- 17 MR DICKER: -- a group of creditors. 18 LORD JUSTICE BRIGGS: Yes. 19 MR DICKER: But again you'll see this more clearly from the 20 statement of facts. These were documents which, having 21 been promulgated by the administrators, were presented 22 to creditors essentially on a take it or leave it basis. 23 Now I want to deal with the agreed and admitted 24 claims CDDs in chronological order, so I want to deal 25 first with agreed claims CDDs.</p> <p style="text-align: center;">Page 136</p>

1 At this stage of the administration, it's important
 2 to bear in mind it was unclear which creditors had
 3 client money claims, unsecured claims or both, which in
 4 turn created uncertainty over the amount of any proof.
 5 To deal with this, agreed claims CDDs adopted
 6 a two-stage process.
 7 Firstly, creditors' unsecured claims were quantified
 8 and agreed in the currency of the underlying entitlement
 9 in accordance with the consensual approach.
 10 Secondly, the claims were then recorded in an agreed
 11 claims CDD as an agreed claims amount, also in the
 12 currency of the underlying entitlement. The only
 13 exception -- again I will come back to this -- is where
 14 the creditor had claims in more than one currency, in
 15 which case the claim was recorded in what the
 16 administrators regarded as the currency of the largest
 17 claim.
 18 LADY JUSTICE GLOSTER: Sorry, they were recorded in the
 19 currency of the underlying contractual entitlement?
 20 MR DICKER: In agreed claims CDDs, yes. So if one goes to
 21 B2 --
 22 LORD JUSTICE PATTEN: B2? Oh, yes. So which one are we
 23 looking at?
 24 MR DICKER: B2, tab 4.
 25 LORD JUSTICE PATTEN: Yes.

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1 MR DICKER: This one happens to be in sterling.
 2 LORD JUSTICE BRIGGS: Does it?
 3 MR DICKER: But the way this worked was --
 4 LORD JUSTICE BRIGGS: In what? In sterling?
 5 MR DICKER: I'm sorry?
 6 LORD JUSTICE BRIGGS: What did you say it happened to be in?
 7 MR DICKER: This one happens to be in sterling. B, tab 4,
 8 the agreed claim amount is shown as a sterling sum.
 9 LORD JUSTICE BRIGGS: I'm in the wrong bundle.
 10 Yes.
 11 MR DICKER: That's obviously because the only ones my
 12 learned friend is interested in are those which recorded
 13 the claim in sterling. Normally the agreed claims CDD
 14 will simply record the agreed claims amount in the
 15 underlying foreign currency. The one situation in which
 16 that wouldn't occur is where as I said the creditor had
 17 claims in more than one foreign currency. The agreed
 18 claim amount would then be recorded in the currency of
 19 the largest claim. If the largest claim happened to be
 20 sterling, it would then be recorded in sterling.
 21 LORD JUSTICE BRIGGS: We can't tell looking at this redacted
 22 CDD whether it was a sterling only claim or a package of
 23 claims in which the largest claim was sterling.
 24 MR DICKER: Correct. We're obviously not concerned with
 25 a creditor whose underlying currency was always

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1 sterling. We're concerned with a creditor who might
 2 have a foreign currency claim, so at least had one or
 3 more claims in a foreign currency.
 4 LADY JUSTICE GLOSTER: So this was a dollar. We can see
 5 that from the exchange rate, can't we, on page 5?
 6 MR DICKER: Yes, you're quite right. This is one which has
 7 been converted.
 8 LORD JUSTICE BRIGGS: Ah.
 9 LADY JUSTICE GLOSTER: So there are two master agreements.
 10 MR DICKER: Well, I'm not sure if the answer I just gave was
 11 right, because this is simply the definition of
 12 "exchange rate" --
 13 LADY JUSTICE GLOSTER: Right.
 14 MR DICKER: -- which I'll come back to. It's simply part of
 15 the standard form.
 16 LORD JUSTICE BRIGGS: Yes. They might have used that.
 17 LADY JUSTICE GLOSTER: I was just looking at:
 18 "... and for the purpose of converting the currency
 19 specified in appendix C ..."
 20 I see, that's all just general guff, is it?
 21 MR DICKER: Yes. So just keeping sight of the shape, and
 22 I don't think there's any dispute about this, we're
 23 dealing with agreed claims CDDs. Generally those were
 24 recorded in the currency of the underlying entitlement.
 25 LADY JUSTICE GLOSTER: When you say "recorded", do you mean

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1 in the books?
 2 MR DICKER: When you get to the agreed claim amount --
 3 LADY JUSTICE GLOSTER: In the actual CDD?
 4 MR DICKER: Yes. The currency of that claim will be the
 5 currency of the underlying claim.
 6 LORD JUSTICE BRIGGS: Is an example of that the one at
 7 bundle 3, tab 4?
 8 MR DICKER: In which tab does your Lordship have in mind?
 9 LORD JUSTICE BRIGGS: This is part B, court bundle 3, tab 4,
 10 where at page 3 you have an agreed claim amount in
 11 dollars. I'm just looking to see if there's a current
 12 exchange rate definition. Yes, there is.
 13 MR DICKER: Yes. I can show you this if necessary from the
 14 statement of facts --
 15 LADY JUSTICE GLOSTER: Yes.
 16 MR DICKER: -- but I think perhaps if you just take it for
 17 the moment. The way agreed claims worked were, we're at
 18 the stage where there's uncertainty about whether the
 19 creditors have client money claims or unsecured claims
 20 or both. The way these worked was the creditor would
 21 submit a claim -- we're obviously only concerned with
 22 creditors who submit at least one claim in a foreign
 23 currency. That claim will be -- I have used the phrase
 24 "recorded" -- but inserted into the agreement as
 25 an agreed claim amount in the relevant underlying

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<p>1 currency, unless the creditor had claims in more than 2 one currency, in which case it would be recorded in the 3 currency of the largest claim as the administrators 4 calculated. And if that largest claim was a sterling 5 claim, he would then find an agreed claim amount in 6 a sterling sum. 7 LADY JUSTICE GLOSTER: So are you saying that all the ones 8 we're looking at, which are just the CDDs in sterling, 9 this point only matters in circumstances where sterling 10 is one of a number of currencies and sterling is the 11 largest? 12 MR DICKER: Yes. One of the points we make is those foreign 13 currency creditors who have a claim simply in US dollars 14 would have had their agreed claim amount recorded in US 15 dollars. A US dollars sum would be inserted against 16 "Agreed claim amount". 17 LADY JUSTICE GLOSTER: In this type of agreed claims CDD? 18 MR DICKER: Correct. 19 LORD JUSTICE BRIGGS: Do you have an example in the bundles? 20 MR DICKER: I will see if I can find -- I'm afraid I haven't 21 done the exercise for this hearing of going back and 22 re-marking all of them. 23 LORD JUSTICE BRIGGS: The trouble for me is looking at the 24 front pages never tell you whether it is an agreed or 25 admitted claim CDD, although you may be able to get it</p> <p style="text-align: center;">Page 141</p>	<p>1 administrator would pick the largest currency -- assume 2 it is US dollars -- 3 LADY JUSTICE GLOSTER: And put that in the CDD? 4 MR DICKER: -- and put that in. 5 LADY JUSTICE GLOSTER: Okay. And do we find this all 6 clearly set out -- 7 MR DICKER: Yes. 8 LADY JUSTICE GLOSTER: -- in the statements we've been taken 9 to? 10 MR DICKER: Yes. 11 LORD JUSTICE BRIGGS: A simple dollar version of an agreed 12 claim CDD I think is at 2B/1. It's got the same stuff 13 about client money claims as your 2B/4, but it has 14 simply got a straight US dollar figure as the agreed 15 claim. I know these have been selected for a quite 16 different purpose, whether they have carve outs for 17 statutory interests and -- 18 MR DICKER: Part of the difficulty is I sought to try and 19 use the versions my learned friend referred you to, 20 which aren't the same as the versions we dealt with 21 below. 22 LADY JUSTICE GLOSTER: What we're going to as a question of 23 construction is the underlying objective facts known to 24 both parties as to why in the agreed claim amount there 25 was a sterling or other currency denomination.</p> <p style="text-align: center;">Page 143</p>
<p>1 from a date, I suppose. 2 MR DICKER: I'm not sure you can, because their use is -- 3 another point I will come to -- in fact overlap. 4 LORD JUSTICE BRIGGS: But what is different between 2B/4 and 5 3B/4 is that 2B/4 has on page 4 all this stuff about 6 client money claims. 7 MR DICKER: Where you do find -- I think that information is 8 in the index at the start of the bundle. 9 LORD JUSTICE BRIGGS: Oh, okay. 10 LADY JUSTICE GLOSTER: Well, I hadn't appreciated, for 11 example, that in the one we're in, which is B2, tab 4, 12 the one I'm in, which is an agreed CDD, it is possible 13 that that isn't an underlying foreign contract at all. 14 It could be one of two things, you're telling me. It 15 can either be a single currency where that currency is 16 sterling, or it will be a multi-currency transaction 17 where sterling is the largest currency of a number of 18 currencies. 19 MR DICKER: Correct. 20 LADY JUSTICE GLOSTER: But what it won't be is a single 21 underlying transaction in dollars. 22 MR DICKER: Correct. Nor will you find this -- and it's 23 a point I will come back to -- if the foreign creditor 24 had foreign currency claims in, say, euro, yen and US 25 dollars, because in that situation again the</p> <p style="text-align: center;">Page 142</p>	<p>1 MR DICKER: And we say that's -- 2 LADY JUSTICE GLOSTER: You say we need to know that. 3 MR DICKER: Yes. 4 LADY JUSTICE GLOSTER: We need to understand why that figure 5 is there. 6 MR DICKER: Can I -- again, I will come to how this operates 7 in a moment. All I'm trying to do at the moment is just 8 outline the essential ingredients of the agreed claim 9 CDD. 10 LADY JUSTICE GLOSTER: Yes. 11 MR DICKER: There is one I haven't yet got to. 12 LADY JUSTICE GLOSTER: Okay. 13 MR DICKER: So one starts with, as I said, an unsecured 14 claim quantified and agreed in the currency of the 15 underlying entitlement inserted as an agreed claim 16 amount, also in the currency of the underlying 17 entitlement, unless there's more than one currency, 18 which is what we've just been discussing. 19 Then in order to deal with the possibility of 20 a client money claim, under this agreement the agreed 21 claim amount was not immediately admitted for dividends. 22 Instead it would only be admitted for dividends after it 23 had been converted into sterling under Rule 2.86 once 24 any client money claim had effectively been resolved. 25 You can see that from clause 3.</p> <p style="text-align: center;">Page 144</p>

<p>1 LADY JUSTICE GLOSTER: What tab of what bundle? 2 MR DICKER: I am looking at tab 4. 3 LADY JUSTICE GLOSTER: In bundle 2? 4 MR DICKER: In bundle 2. It's at the same agreed claims 5 CDD. 3.1: 6 "Save as set out in 3.2 and 3.3, the agreed claim 7 shall not be accepted in whole or in part as an admitted 8 claim ..." 9 Then 3.2: 10 "Where the creditor has either assigned to a nominee 11 or waived any and all client money claims. 12 3.3. Where a no client money confirmation has not 13 been provided to the company in accordance with 3.2.1 14 and ..." 15 Then effectively all issues in relation to the 16 client money claim have been resolved. 17 Then 3.3 at the bottom: 18 "... and in each case such amount being converted to 19 the extent not already denominated in pounds sterling to 20 pounds sterling at the exchange rate." 21 And as you've seen, the definition of "exchange 22 rate" uses the official exchange rate required to be 23 used under Rule 2.86. 24 So the very basic idea is: creditor makes a claim, 25 his claim gets recorded. It gets recorded as an agreed</p> <p style="text-align: center;">Page 145</p>	<p>1 with Rule 2.86. 2 LORD JUSTICE BRIGGS: And the client money fund was in 3 dollars, wasn't it? 4 MR DICKER: Yes. Just identifying the scope of the issues 5 before the judge below in relation to agreed claims 6 CDDs, three points. 7 First of all, a creditor with an entitlement to be 8 paid in a foreign currency obviously didn't lose 9 a currency conversion claim simply because his claim was 10 recorded, inserted, into the agreed claims CDD in 11 a foreign currency. 12 So you have someone with a US dollar claim, his 13 agreed claims CDD identifies his claim on a US dollar 14 sum, he did not lose his currency conversion claim. 15 That was common ground. 16 The second point is there was an issue as to what 17 happened where a creditor had claims in more than one 18 foreign currency. Take a creditor who had claims in, 19 say, euro, yen and US dollars and whose claim was 20 expressed in US dollars as the largest entitlement. 21 Wentworth's argument below was that in such a situation, 22 the creditor lost any currency conversion claim he had 23 in respect of his euro and yen claims, so his claim had 24 been converted into US dollars. 25 But to use my friend's language, he'd elected to be</p> <p style="text-align: center;">Page 147</p>
<p>1 claim in an agreed claim amount. At that stage, if it's 2 in a foreign currency, it's not converted into sterling 3 and it's not an admitted claim because that can't happen 4 until the client money claim has been resolved. When 5 the client money claim is resolved under clause 3, it is 6 converted into sterling in accordance with Rule 2.86 and 7 is then admitted. 8 LORD JUSTICE BRIGGS: Yes. The thinking being presumably if 9 you succeeded in a client money claim, that would have 10 to come off your unsecured claim. 11 MR DICKER: Precisely. 12 LORD JUSTICE BRIGGS: In the end, the client money claims 13 all turned into a disaster, didn't they, and everybody 14 just went for their unsecured claims? Is that a fair 15 summary, cutting a very, very long story short? 16 MR DICKER: Others may be able to speak better than I can to 17 the second part. But the logic, absolutely. Because 18 you had a potential client money claim, you could not 19 admit the claim at this stage, it had to be kept out -- 20 LORD JUSTICE BRIGGS: Otherwise it would be double-counted. 21 MR DICKER: At this stage, it could be kept out, it could 22 simply therefore be recorded in a foreign currency. 23 When the client money claim had been resolved, it could 24 then be admitted. Once it was admitted under clause 3, 25 it was admitted, converted into sterling in accordance</p> <p style="text-align: center;">Page 146</p>	<p>1 a US dollar creditor, therefore he lost his currency 2 conversion claims in relation to euro and yen. Slightly 3 oddly, he didn't get a currency conversion claim for the 4 full extent of his US dollar claims, he simply preserved 5 his existing US dollar currency conversion claim. 6 The judge rejected this argument, describing it as 7 frankly absurd, and he said that in such cases the 8 currency in which the claim is recorded should just be 9 regarded as a currency on account for arriving at a net 10 position, which could then be used in relation to the 11 determination of client money claims. 12 LADY JUSTICE GLOSTER: Yes. 13 MR DICKER: So no issue on the first. Wentworth argued 14 a currency conversion loss in the example I just gave; 15 US dollar, euro and yen, a loss. 16 The third point was a creditor whose agreed claim 17 amount is subsequently converted into sterling under 18 clause 3 -- I showed you -- pursuant to Rule 2.86 did 19 not thereby lose the currency conversion claim. That 20 also was common ground below. 21 Now subject to one exception, Wentworth accepts all 22 of that on appeal. The one exception concerns the 23 second situation, the multi-currency claim situation. 24 Wentworth persists in the same argument where a creditor 25 had claims in, say, euro, yen and sterling, and sterling</p> <p style="text-align: center;">Page 148</p>

<p>1 is the currency of the largest entitlement. 2 LADY JUSTICE GLOSTER: You say that's illogical? 3 MR DICKER: Worse than illogical. It is both illogical and, 4 to use the judge's phrase, frankly absurd. 5 If one goes back to the example I gave a couple of 6 minutes ago, take the creditor who had euro, yen and US 7 dollars. The judge held that merely recording his claim 8 in US dollars -- because that's the currency of the 9 largest entitlement -- could not mean he gave up the 10 currency conversion claim. Wentworth accepts that, they 11 haven't appealed that aspect of the judgment. 12 They also say it is different if the creditor had 13 claims not in euro, yen and US dollars, but instead in 14 euro, yen and sterling, and sterling happens to be the 15 currency of the largest claim, therefore sterling is the 16 currency of the agreed claim amount. They say they do 17 lose whatever currency conversion claim they might 18 otherwise have had. 19 We say that that is wholly illogical. The two 20 situations are the same and they should produce the same 21 result. We also say the precise nature of the 22 illogicality is important because it undermines 23 Wentworth's argument as a matter of construction. This 24 is the point, just so you have the reference, we deal 25 with in our skeleton at paragraph 61. (Pause).</p> <p style="text-align: center;">Page 149</p>	<p>1 this is why the argument is, in our respectful 2 submission, absurd. The difference is driven by only 3 one thing, which is which of the claims did the 4 administrators regard as the largest claim and therefore 5 the appropriate claim to use the currency of that claim 6 to record the agreed claim amount? Commercially, 7 obviously utterly irrelevant; and in many cases, no 8 doubt to some extent at least arbitrary, depending on 9 the administrators' approach to valuation. 10 Going back to my learned friend's phrase about the 11 creditor having elected to be a sterling creditor, with 12 all the force he says that has, we say that simply 13 cannot possibly fairly describe what's going on in 14 relation to an agreed claim CDD. 15 So we say in relation to an agreed claim CDD, we 16 know if they recorded it as a foreign currency claim, 17 you don't lose a conversion -- a currency conversion 18 claim. We know that you don't lose it when it's 19 subsequently converted into sterling under clause 3 20 pursuant to Rule 2.86, Wentworth agrees with that as 21 well. And it would be absolutely ridiculous, we say, if 22 in the one situation which Wentworth identifies, the 23 currency claim disappears. 24 The next type of CDD that was developed was the 25 admitted claims CDD. These were used from about</p> <p style="text-align: center;">Page 151</p>
<p>1 Just to tease out the illogicality, go back to the 2 two examples I gave; the creditor with a euro, yen and 3 US dollar claim on the one hand and a creditor with 4 a euro, yen and sterling claim on the other. In both 5 cases, the creditor agrees that a specific sum, defined 6 as his agreed claim amount, is his entire claim and he's 7 releasing all other claims that he has. The only 8 difference is that in the first situation his entire 9 claim is expressed in US dollars; in the second it's 10 expressed in sterling. 11 Wentworth say the result is different so far as 12 currency conversion claims are concerned. A creditor 13 whose entire claim is expressed in US dollars hasn't 14 given up any currency conversion claim in relation to 15 his euro and yen claims. A creditor whose entire claim 16 is expressed in sterling has. 17 So somehow by doing what is in effect exactly the 18 same thing, Wentworth argues you come up with two 19 different results as a matter of construction. If you 20 agree that your entire claim is in US dollars, despite 21 doing that, you still have a currency conversion claim 22 for euro and yen. If you agree your entire claim in 23 sterling, you don't have a currency conversion claim in 24 euro and yen. That simply cannot be right. 25 But there's another point in relation to this and</p> <p style="text-align: center;">Page 150</p>	<p>1 April 2011 onwards, after the position in relation to 2 client money had become slightly clearer, although as 3 I said, the evidence is that agreed claims CDDs 4 continued to be used during at least part of this 5 period, so there was an overlap between the two. 6 The fact that things had become clearer in relation 7 to client monies explains why the admitted claims CDD 8 takes a different form from the agreed claims CDD. 9 LORD JUSTICE BRIGGS: It just cuts out all the stuff about 10 client money claims. 11 MR DICKER: You just truncate. You just say, "Well, let's 12 just cut to the chase. We don't need this process of 13 recording your foreign currency claim and then 14 converting into sterling pursuant to Rule 2.68. We will 15 in effect simply as part of one package convert it into 16 sterling pursuant to Rule 2.86 and record the result". 17 And that's the short reason why every single 18 admitted claim CDD is in sterling, because we're now 19 talking about a sum which is to be admitted for 20 dividends in the administration. And as the 21 administrators explained at length in their fourth 22 report, you have to convert those into sterling under 23 2.68. 24 LORD JUSTICE BRIGGS: So if you go from A to Z via B, it 25 doesn't kill off your currency conversion claim. But if</p> <p style="text-align: center;">Page 152</p>

<p>1 you go straight there from A to Z, don't go past B and 2 don't collect £200, it does. And that's your point, 3 isn't it? 4 MR DICKER: That is our point. And imagine if the agreement 5 had spelt out what was going on in the two stages that 6 were effectively involved. If the agreement had said, 7 "Right, the sum we are agreeing as your entire claim is 8 the following sum", which if it happens to be a foreign 9 currency sum would be recorded in the foreign currency, 10 and then it said, "Because we can admit this straight to 11 proof, we are now converting that sum pursuant to 2.68 12 for the purposes of proof into sterling". 13 Again, I come back to the same point. There are 14 really two ways of looking at this. Either you've got 15 a sterling sum because it is being converted pursuant to 16 Rule 2.86 for the purposes of proof -- that's what we 17 say -- or you have what my learned friend says, which is 18 that's not so. What you've got here is a creditor who 19 is electing to be a sterling creditor and to have his 20 only claim as a sterling claim. 21 LADY JUSTICE GLOSTER: What's the paradigm example of 22 an admitted claim CDD that you'd like to us to -- 23 MR DICKER: The one we've been looking at is in tab 7 of 24 bundle 2. 25 LADY JUSTICE GLOSTER: B2/7. (Pause).</p> <p style="text-align: center;">Page 153</p>	<p>1 currency. So when it refers to the proof of debt in 2 4.3, the document it is referring to will itself have 3 identified the foreign currency claim because that's how 4 creditors were required to fill out their -- 5 LADY JUSTICE GLOSTER: Where do we get the evidence that 6 they were required to -- 7 MR DICKER: I don't have the reference to hand -- 8 LADY JUSTICE GLOSTER: -- prove in the foreign currency? 9 MR DICKER: Do you remember it's where in the fourth report, 10 I think it was -- 11 LADY JUSTICE GLOSTER: Yes. 12 MR DICKER: -- I referred to the claims portal automatically 13 converting it into sterling. 14 LADY JUSTICE GLOSTER: Yes, I see. So you actually prove in 15 your underlying currency? 16 MR DICKER: Correct. 17 LORD JUSTICE BRIGGS: Or to put it another way, you stick in 18 your underlying currency and the portal converts it to 19 sterling for you. 20 MR DICKER: Sorry, I missed that. 21 LORD JUSTICE BRIGGS: To put it another way, you stick in 22 your underlying currency and the portal converts it to 23 sterling for you. 24 MR DICKER: Yes. 25 LORD JUSTICE BRIGGS: I'm not sure whether that means you</p> <p style="text-align: center;">Page 155</p>
<p>1 LORD JUSTICE BRIGGS: Yes. (Pause). 2 MR DICKER: Just before we leave that document, can I just 3 show you one other provision which I am not sure you've 4 seen so far. It's in the appendix and it's in the form 5 of transfer notice, pages 21 and 22. 6 LADY JUSTICE GLOSTER: Yes. 7 MR DICKER: It's clause 4, page 21: 8 "The transferor and transferee agree that ..." 9 4.1 I think we can pass over. 4.2: 10 "The whole of the admitted claim and the whole of 11 the transferor's right to receive any and all dividends 12 in respect of or in connection with the admitted claim 13 shall be unconditionally and immediately transferred to 14 the transferee." 15 And then 4.3: 16 "The proof of debt and accompanying information 17 lodged by or on behalf of the transferor shall stand as 18 the transferee's proof of debt." 19 Again, it just illustrates that this is not simply 20 an agreement in a sum so that one would be concerned 21 simply with transfer of the relevant sum. This is part 22 of the accelerated proof process, and one needs to read 23 the documents in that context. (Pause). 24 I am reminded from those behind that as you've seen, 25 the proof of debt was itself in the underlying foreign</p> <p style="text-align: center;">Page 154</p>	<p>1 prove in the underlying currency, but there we are. 2 MR DICKER: We'd say that ... (Pause). 3 It is on page 35 of the fourth progress report that 4 I showed you at tab 22. Just to read out the sentence 5 again, which is in section 6.2 "Currency matters": 6 "To assist creditors, the claims portal contains 7 relevant exchange rates as at 15 September 2008 and 8 automatically converts non-sterling denominations." 9 LORD JUSTICE BRIGGS: But if somebody gives you a portal 10 that enables you to stick in your foreign currencies and 11 out the far end comes the sterling claim, you might be 12 said to be proving in sterling with the assistance of 13 a piece of software in the portal. 14 MR DICKER: In a sense, the point we make in relation to the 15 claims process is if one looks at the statement of 16 facts, the creditor as part of the consensual approach 17 makes a claim in the foreign currency, the administrator 18 comes back with an offer in the foreign currency. 19 LORD JUSTICE BRIGGS: Yes. 20 MR DICKER: If that's accepted, we then go to formalising it 21 in a CDD, the form of which will depend on how far we 22 have got with dealing with client monies. The only 23 point I would make in relation to the automatic 24 conversion is if you look at the context of that 25 sentence, the context is in a page where the</p> <p style="text-align: center;">Page 156</p>

1 administrators are explaining, "We have to convert under
 2 2.86, it's mandatory. That's why we're converting and
 3 that's why we're converting at this particular exchange
 4 rate".
 5 In other words, it is entirely reflective and does
 6 no more than Rule 2.86 normally does.
 7 LADY JUSTICE GLOSTER: At 2.86, the wording suggests you are
 8 actually proving in the foreign currency, doesn't it?
 9 Because it says:
 10 "For the purpose of proving a debt incurred in
 11 a currency other than sterling, the amount of the debt
 12 shall be converted into sterling."
 13 MR DICKER: Yes. And in a sense what you are proving is
 14 your debt, your debt is a foreign currency claim.
 15 LADY JUSTICE GLOSTER: Claim which is converted, yes.
 16 MR DICKER: It's interesting again if one just goes back --
 17 it may well be I've made this point, but just to make it
 18 again if I haven't -- if one goes back to the agreed
 19 claims CDD, clause 3 says, "When we resolve the client
 20 money claim we're going to convert your claim in
 21 sterling pursuant to Rule 2.86". Why does the mere fact
 22 we've now resolved client money claims, we don't need
 23 a two-stage process any more, can having a one-stage
 24 process make a difference? Why should the
 25 administrators have been required nevertheless to spell

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1 out that in a sense there was a two-stage process
 2 because 2.86, as your Ladyship has just indicated,
 3 involves a two-stage process: proving your debt in a
 4 foreign currency, having it converted for the purposes
 5 of proof under 2.86 into sterling.
 6 My learned friend, if I may say, chose for obvious
 7 reason to concentrate almost entirely on admitted claims
 8 CDDs. In our respectful submission, you get a very
 9 different picture if as a matter of chronology one does
 10 start with agreed claims CDDs and then interprets the
 11 admitted claims CDDs in the light of that background.
 12 LORD JUSTICE BRIGGS: I am just thinking of the sort of
 13 admissible matrix of fact. How far and by what route is
 14 the whole chronological history of CDDs to be taken to
 15 be something known by both parties when they make
 16 an admitted claim CDD?
 17 MR DICKER: For the purposes of these proceedings,
 18 everything in the statement of facts is being treated as
 19 admissible for the purposes of construction --
 20 LORD JUSTICE BRIGGS: Yes.
 21 MR DICKER: -- on the basis that it is information known or
 22 reasonably to be taken as known by all parties. And
 23 bear in mind, all I've shown you is the order of
 24 2 December 2009 which started this process, three
 25 reports by the administrators and some references to the

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1 way in which the claims portal operated.
 2 LADY JUSTICE GLOSTER: I think it is fair to say that we
 3 need to know the function of the figures in the CDD
 4 and why they're in there and what's actually happening.
 5 We need to understand the mechanisms of how the
 6 agreements of the underlying close-out amount, or
 7 whatever it is, and how the agreed claim amount comes
 8 about so we understand why the figures have been stuck
 9 in there.
 10 MR DICKER: Yes.
 11 LORD JUSTICE BRIGGS: Yes.
 12 MR DICKER: And the solution we say is to appreciate that
 13 when you see a sterling figure in the admitted claims
 14 CDD, it really is shorthand for a claim which has been
 15 submitted to proof in a foreign currency, converted into
 16 sterling pursuant to Rule 2.86.
 17 LORD JUSTICE BRIGGS: Yes. I have no difficulty about the
 18 admissibility of the process of proof, I am thinking
 19 more of the history that it was previously a two-stage
 20 agreement and it has all been boiled down into one
 21 stage. But you say it's all agreed, it's all admitted,
 22 it is in the statement of facts.
 23 MR DICKER: Yes. And it has never even suggested -- there's
 24 a statement of disputed facts, for what's that worth,
 25 and there's a part 36B which holds over any facts

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1 particular to creditors, whether allegations of mistake
 2 or something of that sort, in case that may become
 3 necessary. Everything I've said to your Lordships is
 4 part of the agreed factual matrix.
 5 LORD JUSTICE BRIGGS: Yes.
 6 MR DICKER: One does end up with -- I will come back to this
 7 in due course in the context of Ex parte James -- on
 8 Wentworth's case, there's some truly bizarre results.
 9 If you enter into an agreed CDD, by and large you will
 10 not be giving up a currency conversion claim. The one
 11 situation in which you will is if you happen to have
 12 multiple currency claims and the administrators happen
 13 to think your largest claim is denominated in sterling.
 14 When you come to an admitted claim CDD, everyone is
 15 giving up a currency conversion claim. What has changed
 16 between the agreed claims CDD and the admitted claims
 17 CDD only that further progress has been made in the
 18 administration in terms of resolving client money
 19 claims. What on earth does that have to do with whether
 20 or not you should have a currency conversion claim?
 21 It was no part of -- it was not necessary for the
 22 administrators to procure the release of such claims to
 23 achieve what they wanted. What they wanted was to
 24 achieve an early distribution. As the judge said,
 25 non-provable claims, whether they exist or not and for

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1 how much, has no impact on that at all. You don't have
 2 to consider them at this stage.
 3 More strongly, if one imagines the administrators
 4 had gone out and expressly demanded that creditors with
 5 currency conversion claims give up those claims as the
 6 price for participating in an early distribution, that
 7 could not possibly have been justified and would have
 8 been a breach of duty by the administrators.
 9 LADY JUSTICE GLOSTER: I don't see why that might just have
 10 been a commercial deal on the table. But that's all
 11 speculation, because they didn't do that.
 12 MR DICKER: Well, we say certainly in the ordinary course,
 13 that would have been a breach of duty for the simple
 14 reason it wasn't something they needed to do to enable
 15 them to make an early distribution. And the consequence
 16 of that would be to say to one group of creditors
 17 essentially, "You're going to have to give up any
 18 possibility of a claim in the event of a surplus for the
 19 benefit of subordinated creditors or shareholders as the
 20 price" --
 21 LADY JUSTICE GLOSTER: Well, they might have said it for all
 22 kinds of reasons, but nobody did say it, so we're not
 23 there.
 24 MR DICKER: The only point is this, and I'm not -- just in
 25 case there's any confusion, to repeat what I said on

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1 a number of occasions below -- we are not criticising
 2 the administrators for anything they intended to
 3 achieve. We are certainly not doing that. All I'm
 4 saying is if that is what they had set out to achieve,
 5 we say they wouldn't have been permitted to do it.
 6 In the two or three minutes left, can I just deal
 7 very quickly with CRA CDDs.
 8 LORD JUSTICE BRIGGS: Oh, yes.
 9 LADY JUSTICE GLOSTER: CRA agreed claims --
 10 MR DICKER: CRA CDDs. I said these are CDDs which are
 11 entered into by a creditor who had signed the CRA. The
 12 judge dealt with these at paragraphs 20 to 38 and 77 to
 13 136 of his judgment.
 14 Very shortly, the starting point is the judge held
 15 that a creditor who signed a CRA did not give up any
 16 currency conversion claim. So merely by entering into
 17 the CRA, being a party to the CRA, you didn't give up
 18 a currency conversion claim.
 19 LORD JUSTICE BRIGGS: And that's now common ground, as
 20 I understand it.
 21 MR DICKER: Yes. A party to the CRA did not need to enter
 22 into a CDD as the CRA already included a mechanism for
 23 calculating and ascertaining his claim. That's the
 24 judgment. The judge refers to this at paragraphs 51,
 25 167 and 170.

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1 However, the administrators subsequently invited
 2 creditors whose claims had been determined by the CRA to
 3 enter into a CRA CDD. Which flavour they entered into,
 4 i.e. the CRA agreed claims CDD or a CRA admitted claims
 5 CDD, just depended on again how far we had got with the
 6 client money issues.
 7 Wentworth's position below was that although
 8 a creditor entering into the CRA didn't give up a client
 9 money claim, if he subsequently entered into a CRA CDD,
 10 he did, provided that it was either a CRA admitted claim
 11 CDD or a CRA agreed claims CDD expressed in sterling.
 12 LADY JUSTICE GLOSTER: They're not appealing that, are they?
 13 MR DICKER: I'm sorry?
 14 LADY JUSTICE GLOSTER: Are they appealing that?
 15 MR DICKER: My learned friend has said nothing about it.
 16 But the logic of his case would presumably be the same;
 17 once you enter into a CDD on his case, you're electing
 18 to be a sterling creditor, if that's the relevant
 19 denomination, giving up everything else.
 20 Again, we say frankly absurd, because the only
 21 reason administrators asked creditors who had signed the
 22 CRA to enter into a CDD was because they considered this
 23 was a more straightforward and less time-consuming way
 24 of documenting the claim. That's the judgment,
 25 paragraph 51. So the logic of their case is you enter

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1 into the CRA, you've still got a currency conversion
 2 claim. The administrator comes along and says to you,
 3 "Well, I could go through the process in the CRA but
 4 actually it's easier if I just ask you to sign a CDD, at
 5 which point in certain cases but not others, you lose
 6 your currency conversion claim". It just makes
 7 absolutely no sense whatsoever.
 8 LORD JUSTICE BRIGGS: Just following this through. The
 9 judge presumably rejected that submission by Wentworth
 10 and is it not appealed? No, there is, and that's
 11 issues 3 and 4, isn't it, with the bolt-on, or is that
 12 just ...
 13 MR DICKER: Well, that's in relation to interest.
 14 LORD JUSTICE BRIGGS: Yes.
 15 MR DICKER: We're talking about currency conversion claims
 16 at this stage.
 17 LORD JUSTICE BRIGGS: Currency conversion claims.
 18 LADY JUSTICE GLOSTER: It is paragraph 40 of your skeleton,
 19 isn't it?
 20 MR DICKER: Yes. I wonder -- I see the time -- if that
 21 would be a convenient moment.
 22 LADY JUSTICE GLOSTER: Yes, certainly. 10.30 am tomorrow
 23 morning.
 24 (4.17 pm)
 25 (The court adjourned until 10.30 am

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