

<p>1 Wednesday, 12 April 2017                  2 (10.30 am)                  3 Submissions by MR DICKER (continued)                  4 LADY JUSTICE GLOSTER: Yes, Mr Dicker.                  5 MR DICKER: Can I start by dealing with one short point                  6 arising from yesterday concerning the position of                  7 creditors with open positions.                  8 LADY JUSTICE GLOSTER: Yes.                  9 MR DICKER: Now, our understanding, but no doubt the                  10 administrators can confirm whether this is right or not,                  11 is that if you wanted to participate in an early                  12 distribution and sign a CDD, you needed to have closed                  13 your transaction.                  14 Obviously, there's a certain amount of logic to that                  15 because --                  16 LADY JUSTICE GLOSTER: Yes.                  17 MR DICKER: -- if you haven't, then the value of that                  18 transaction may continue fluctuating day by day. There                  19 really is no way for anyone to value it.                  20 LADY JUSTICE GLOSTER: Except as a contingent claim,                  21 possibly.                  22 MR DICKER: Perhaps. But certainly our understanding, i.e.                  23 the understanding of the SCG, is that my clients needed                  24 to have closed their positions before they could enter                  25 into a CDD and participate in this process.</p> <p style="text-align: center;">Page 1</p>	<p>1 document the position, and invited creditors to enter                  2 into a CDD. On my learned friend's case, if that CDD                  3 you entered into was a CDD expressed in sterling, you                  4 lost the currency conversion claim which you had                  5 otherwise kept.                  6 LADY JUSTICE GLOSTER: Yes.                  7 MR DICKER: Just to show you the relevant provisions in this                  8 CRA CDD --                  9 LORD JUSTICE BRIGGS: Is this an agreed or an admitted                  10 claims CRA CDD?                  11 MR DICKER: This one is an admitted claim CDD. Again, you                  12 can see that from the index to the bundle.                  13 LORD JUSTICE BRIGGS: Okay.                  14 MR DICKER: Clause 2 -- there are three sub-paragraphs in                  15 clause 2.1 that are relevant. Firstly, 2.1.1:                  16 "The creditors' aggregate net financial claim shall                  17 be limited to and in an amount equal to the net                  18 financial claim amount and shall constitute the                  19 creditor's entire claim against the company."                  20 2.1.3:                  21 "The creditor's net financial claim in an amount                  22 equal to the net financial claim amount shall constitute                  23 an ascertained claim."                  24 In other words, eligible for dividends, as 2.1.3                  25 goes on to say. And then 2.14:</p> <p style="text-align: center;">Page 3</p>
<p>1 LADY JUSTICE GLOSTER: Yes, but that could easily have been                  2 post-administration.                  3 MR DICKER: Oh, yes.                  4 I was making submissions --                  5 LADY JUSTICE GLOSTER: Sorry, Mr Bayfield, that's right, is                  6 it?                  7 MR BAYFIELD: I am seeking instructions. I believe so but                  8 can I check, please?                  9 LADY JUSTICE GLOSTER: Yes.                  10 MR DICKER: I was making submissions yesterday in relation                  11 to the CRA CDDs, and I thought I should at least show                  12 you one such CDD and the one I was going to show you was                  13 in bundle B3, tab 1. (Pause)                  14 LADY JUSTICE GLOSTER: These are no longer an issue on the                  15 appeal, is that right?                  16 MR DICKER: They're not. The reason I'm referring you to                  17 them is, obviously, because of the logic of my learned                  18 friend's submissions.                  19 LADY JUSTICE GLOSTER: Yes.                  20 MR DICKER: Just to remind you, as I submitted yesterday, if                  21 you were a party to the CRA, you didn't release                  22 a currency conversion claim and you could have simply                  23 followed the process in the CRA for having your claim                  24 admitted. The administrators said, however, they                  25 thought a CDD was a more convenient and easier way to</p> <p style="text-align: center;">Page 2</p>	<p>1 "Save solely for the net financial claim, subject to                  2 2.2 and 2.3, the creditor, the company and the                  3 administrators hereby irrevocably, unconditionally                  4 release and forever discharge each other from any and                  5 all losses ..."                  6 Et cetera, et cetera.                  7 Now, the only other provision I should show you is                  8 the definition of net financial claim amount --                  9 LORD JUSTICE BRIGGS: Yes, and that's sterling.                  10 MR DICKER: -- which you'll find on page 4:                  11 "Net financial claim amount is a sterling sum ..."                  12 And then it goes on to say:                  13 "... being the value of the net financial claim                  14 converted to pounds sterling at the official exchange                  15 rate set out in rule 2.862 of the Insolvency Rules                  16 which, for the purposes of converting US dollars to                  17 pounds sterling, shall mean the following exchange                  18 rate ..."                  19 So this document, effectively, unpacks what we say                  20 was inherent in an admitted claim CDD. And this                  21 document is essentially doing exactly the same as                  22 an admitted claims CDD, save only that it concerns                  23 a creditor who had previously entered into the CRA.                  24 LORD JUSTICE PATTEN: Just remind me, the judge found that                  25 the CRAs didn't release currency for conversion claims.</p> <p style="text-align: center;">Page 4</p>

1 Why, as a matter of construction?  
 2 MR DICKER: He deals with that at some length --  
 3 LORD JUSTICE PATTEN: What I am trying to do is just to  
 4 remind myself -- I understand your submission about the  
 5 logic and the inconsistency --  
 6 MR DICKER: The logic in relation to the CRA, in brief, was,  
 7 the claims under the CRA were effectively expressed in  
 8 US dollars.  
 9 LORD JUSTICE PATTEN: Yes.  
 10 MR DICKER: So our submission below was that simply because  
 11 you've expressed a claim previously in US dollars, in US  
 12 dollars as part of the CRA, can't lead you to have given  
 13 up a currency conversion claim.  
 14 LORD JUSTICE PATTEN: No, I understand.  
 15 MR DICKER: And the short point which the judge accepted --  
 16 LORD JUSTICE PATTEN: So it all turned on that aspect of it?  
 17 MR DICKER: Essentially. There were arguments from  
 18 Wentworth you will see referred to in the judgment,  
 19 about the extent to which other possible currency  
 20 conversion claims may have been lost as a result. There  
 21 was also an argument from the SCG that's actually in  
 22 response which was, "Well, if that's right, then perhaps  
 23 you could have gained a currency conversion claim by  
 24 expressing it in US dollars", and the judge essentially  
 25 said no to both of those, as I recall.

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1 But the starting point for all of this, as I say, is  
 2 the short point, entering into the CRA did not involve  
 3 losing a currency conversion claim.  
 4 LORD JUSTICE PATTEN: No.  
 5 LADY JUSTICE GLOSTER: Just to get me back into the case,  
 6 explain to me why this aspect is not -- the admitted  
 7 claims CRA CDD is not being appealed. Explain to me the  
 8 logic of that.  
 9 MR DICKER: That's not a thing for me to explain, it would  
 10 be for my learned friend --  
 11 LADY JUSTICE GLOSTER: Just one sentence, Mr Zacaroli.  
 12 MR ZACAROLI: Yes, they are being appealed. We say at  
 13 paragraph 1 of our skeleton, our appeal is limited to  
 14 any CDD where the claims amount is expressed in  
 15 sterling.  
 16 LORD JUSTICE PATTEN: In sterling.  
 17 MR ZACAROLI: We don't distinguish between any of the forms  
 18 of CDDs to that extent.  
 19 LORD JUSTICE PATTEN: That's what I was trying to bottom  
 20 out, because it all turns, does it, simply on this  
 21 question of the currency that it's expressed in --  
 22 MR ZACAROLI: Yes.  
 23 LORD JUSTICE PATTEN: -- rather than -- I am talking about  
 24 the ones that don't have --  
 25 MR ZACAROLI: Yes. We say anything with a sterling amount

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1 has the effect of waiving the currency conversion claim.  
 2 LORD JUSTICE PATTEN: So, for example, just looking at the  
 3 section of the bundle we're in, number 1 that Mr Dicker  
 4 has just been showing us, on your argument would waive  
 5 them but number 2 wouldn't?  
 6 MR ZACAROLI: Yes, that's right, yes. My Lord, yes, for the  
 7 reason my Lord gave.  
 8 LORD JUSTICE PATTEN: Even though the language is identical  
 9 in both, save for the currency in which the net  
 10 financial claim amount is expressed?  
 11 MR ZACAROLI: Correct, my Lord, yes.  
 12 LORD JUSTICE PATTEN: Yes, okay.  
 13 MR DICKER: I'm sorry, I had misunderstood my learned  
 14 friend.  
 15 LADY JUSTICE GLOSTER: Yes.  
 16 MR DICKER: I had assumed from the fact that he hadn't shown  
 17 you the CRA CDDs, this wasn't something --  
 18 LADY JUSTICE GLOSTER: That's why I was getting muddled but  
 19 it's now been clarified.  
 20 MR DICKER: And the point remains, if one looks at the CRA  
 21 CDDs, on my learned friend's case, some creditors who  
 22 entered into the CRA retained a currency conversion  
 23 claim, despite entering into a CDD, some did not,  
 24 depending on whether it's an agreed CRA CDD or  
 25 an admitted claim CRA CDD. My Lord, so far as my Lord,

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1 Lord Justice Briggs, CRA CDDs, as I said, came in two  
 2 flavours.  
 3 LORD JUSTICE BRIGGS: Yes.  
 4 MR DICKER: Agreed versions and admitted versions.  
 5 LORD JUSTICE BRIGGS: Were all the admitted ones in  
 6 sterling?  
 7 MR DICKER: All admitted. Effectively they each -- the two  
 8 flavours follow in broad terms, if I may put it this  
 9 way, the recipe inherent in the original and admitted  
 10 claim CDDs.  
 11 LORD JUSTICE BRIGGS: Save the recipe does have the  
 12 additional what you call express spelling out of what  
 13 you say is implied in the others?  
 14 MR DICKER: Yes, at least in this agreement.  
 15 LADY JUSTICE GLOSTER: Can I take just take a note. I am  
 16 doing the note on paragraph 39 of your skeleton. So  
 17 you're saying that agreed CRA CDDs are all in sterling,  
 18 are they?  
 19 MR DICKER: No, admitted CRAs --  
 20 LADY JUSTICE GLOSTER: Sorry, I'm talking about agreed  
 21 claims CDDs.  
 22 MR DICKER: Not necessarily.  
 23 LADY JUSTICE GLOSTER: That's where there's a dichotomy  
 24 between what is the principal currency.  
 25 MR DICKER: Correct. Where you have got multiple

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1 currencies, if the largest one was a sterling sum --  
 2 LADY JUSTICE GLOSTER: Yes.  
 3 MR DICKER: -- then as we understand it, it would then be  
 4 a sterling sum in the CRA agreed claims CDD.  
 5 LADY JUSTICE GLOSTER: Yes.  
 6 MR DICKER: So again, just so we're clear, if one starts --  
 7 you enter into the CRA, you haven't lost a currency  
 8 conversion claim.  
 9 LADY JUSTICE GLOSTER: Yes.  
 10 MR DICKER: The administrator says to you "There's a more  
 11 convenient way to document getting your claim admitted.  
 12 It's called a CDD. Do you mind entering into it?"  
 13 LADY JUSTICE GLOSTER: Yes.  
 14 MR DICKER: And the creditor says "Fine". If he enters into  
 15 an admitted claims CDD, on my learned friend's case, he  
 16 does then lose his currency conversion claim. If he  
 17 enters into an agreed claim CDD CRA version, whether he  
 18 does or doesn't lose it, depends on the currency in  
 19 which that CRA CDD is expressed.  
 20 LADY JUSTICE GLOSTER: Yes, Fine.  
 21 LORD JUSTICE BRIGGS: Is there one in the bundle?  
 22 MR DICKER: I'm sure those behind me will --  
 23 LADY JUSTICE GLOSTER: Shall we have a look at one, because  
 24 we've now identified an example of a CRA CDD admitted  
 25 claim but we haven't -- or at least I haven't got a note

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1 of --  
 2 MR DICKER: I am told tab 2.  
 3 LADY JUSTICE GLOSTER: -- is a CRA CDD agreed claim; is that  
 4 right?  
 5 MR DICKER: I am told tab 2.  
 6 LADY JUSTICE GLOSTER: Is --  
 7 LORD JUSTICE BRIGGS: That's in dollars and we should have  
 8 all that stuff about --  
 9 MR DICKER: Is a dollar version. You'll see that from  
 10 page 3.  
 11 LADY JUSTICE GLOSTER: So tab 2 in bundle 3 is a CRA CDD  
 12 agreed claim --  
 13 MR DICKER: Yes, I understand.  
 14 LADY JUSTICE GLOSTER: -- in dollars, so there isn't  
 15 a problem, and do we have one in sterling where there  
 16 is?  
 17 MR DICKER: Well, the one we were just looking at is  
 18 a sterling one.  
 19 LORD JUSTICE BRIGGS: But that's an admitted claim.  
 20 LADY JUSTICE GLOSTER: I am looking for an agreed claim in  
 21 sterling, an agreed CRA CDD claim in sterling.  
 22 MR DICKER: And I don't know the answer to that, but  
 23 again --  
 24 LADY JUSTICE GLOSTER: You can tell us.  
 25 MR DICKER: -- those behind me, hopefully --

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1 LADY JUSTICE GLOSTER: It's just so we have an example of  
 2 all flavours.  
 3 MR DICKER: This does illustrate this or my difficulty in  
 4 trying, as it were, to explain sufficiently clearly how  
 5 all these agreements operate on currency conversion  
 6 claims. The point is simply this, that these documents  
 7 were all intended to achieve, essentially, the same  
 8 purpose: a quick and easy early distribution.  
 9 LADY JUSTICE GLOSTER: Yes.  
 10 MR DICKER: The differences between them, largely relating  
 11 to whether you have a client money claim or not, have  
 12 nothing to do with releasing currency conversion claims.  
 13 On my learned friend's case, you end up with a whole  
 14 series of random results, so far as whether you keep  
 15 a currency conversion claim or not.  
 16 So, for example --  
 17 LORD JUSTICE PATTEN: Sorry to interrupt, Mr Dicker, but  
 18 when we get to the CDDs, because, for the reasons you've  
 19 explained, the CRA, the judge has held, don't release  
 20 the claims, it's not an issue on this appeal. But so  
 21 far as the CDDs are concerned, is this right, I haven't  
 22 had a chance to check them all through, but the  
 23 structure -- the format is essentially the same, isn't  
 24 it, in each? The point that I put to you yesterday is  
 25 trying to identify precisely which bits of the agreement

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1 raise this point of construction. It's in every case,  
 2 isn't it, the relationship between 2.13 and the  
 3 definition of the -- whatever it is.  
 4 MR DICKER: Admitted claim and admitted claim amount.  
 5 LORD JUSTICE PATTEN: Agreed claim or -- the words are  
 6 slightly different as between them, but it is  
 7 essentially that, the juxtaposition and interaction  
 8 between those two provisions in the agreement, isn't it?  
 9 MR DICKER: That's it, and we say the way into the  
 10 construction of those provisions is essentially through,  
 11 firstly, the agreed claims CDD.  
 12 LORD JUSTICE PATTEN: Yes.  
 13 MR DICKER: So one starts out with a foreign currency sum  
 14 which is the agreed claim amount. You have clause 3  
 15 which once the client money issue has been resolved,  
 16 converts it into sterling, pursuant to Rule 2.86. My  
 17 learned friend says that doesn't result in you losing  
 18 a currency conversion claim, and what we say is when one  
 19 comes to an admitted claims CDD, because the premise of  
 20 these agreements is that you probably don't have  
 21 a client money claim --  
 22 LORD JUSTICE PATTEN: Yes.  
 23 MR DICKER: -- that distinction no longer needs to be  
 24 maintained, it has been collapsed. In drafting terms,  
 25 it may have been collapsed, so far that what's going on

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<p>1 isn't visible on the face of the document. What is, in                  2 effect, going on is the same two-stage process that was                  3 involved in the agreed claims CDD.                  4 LORD JUSTICE PATTEN: Yes --                  5 MR DICKER: And I made the point yesterday, one of the                  6 points the judge made was that if you look at the claims                  7 agreement process, you can see very clearly that this is                  8 precisely what happened. It was the point I made that                  9 the creditor submits his claim in the foreign currency,                  10 the administrator responds with an offer in the foreign                  11 currency. If it's acceptable to the creditor, then they                  12 go to the stage of documenting it in a CDD. So,                  13 essentially, the deal which has been done is by                  14 reference to a foreign currency sum. When they come to                  15 the CDD, if it is going to be admitted into the dividend                  16 and therefore an admitted claims CDD is used, it                  17 necessarily follows that the sum that goes into that                  18 agreement has to be a sterling sum because of Rule 2.86.                  19 LORD JUSTICE PATTEN: Yes.                  20 MR DICKER: Now, in the context of the consensual approach                  21 which was all about an early distribution to unsecured                  22 creditors and had nothing to do with what would happen                  23 in the event of a surplus, one can see why the admitted                  24 claims CDD took that form. Obviously, now we're                  25 focusing on a surplus, if the administrators had had</p> <p style="text-align: center;">Page 13</p>	<p>1 a currency conversion claim or not.                  2 LADY JUSTICE GLOSTER: Was there any means by which                  3 a creditor could dispute which was the largest currency?                  4 MR DICKER: There's no evidence in relation to that.                  5 LORD JUSTICE BRIGGS: But surely they did all the                  6 conversions on the cut-off date, as by reference to the                  7 exchange rates at the cut-off date. So it wouldn't                  8 matter what date you did it, if you're doing it by                  9 reference to a single historical set of exchange rates.                  10 MR DICKER: Yes. No, that's probably right. So it is --                  11 LORD JUSTICE BRIGGS: I'm assuming -- maybe they didn't but                  12 it would be odd if they didn't.                  13 MR DICKER: Again, I'm not sure. I think that must be                  14 right, I would have thought, as a matter of logic.                  15 LORD JUSTICE BRIGGS: Yes.                  16 MR DICKER: But the point remains, which is the largest                  17 claim, in a sense depends on which valuation methodology                  18 you use. It is possible that different valuation                  19 methodologies would result in, at least in theory,                  20 different values for different claims and therefore                  21 result in a different underlying claim being identified                  22 as the largest. (Pause)                  23 We do say, in construing these agreements, you need                  24 to construe them as a whole. It's not right simply to                  25 look at a small subset in the way that my learned friend</p> <p style="text-align: center;">Page 15</p>
<p>1 that in mind at the time, no doubt they would have                  2 spelled it out in more detail than they did. But we say                  3 that's the effect of the agreement.                  4 LORD JUSTICE BRIGGS: Can I just check one point of detail,                  5 Mr Dicker? If you were a creditor with claims in                  6 a number of different currencies, as I understand it,                  7 when you went into the portal, you put each one in                  8 separately but the administrators then took a view about                  9 the largest one and converted all the other ones into                  10 the currency of the largest one and came back with                  11 a single offer in the largest currency.                  12 MR DICKER: Yes.                  13 LORD JUSTICE BRIGGS: Right.                  14 MR DICKER: One submission I made yesterday in relation to                  15 that is that there's a certain potential fuzziness in                  16 that approach.                  17 LORD JUSTICE BRIGGS: Yes.                  18 MR DICKER: Because, obviously, which claim the                  19 administrators regarded as the largest claim could be                  20 a matter of happenstance, the consequences of                  21 a particular valuation approach adopted by the                  22 administrators, the day on which they did the valuation.                  23 All of those factors irrelevant to whether you should                  24 keep a currency conversion claim or not, could have the                  25 effect, on my learned friend's case, of extinguishing</p> <p style="text-align: center;">Page 14</p>	<p>1 has done and if one looks at the whole, the consequences                  2 for which my learned friend contends, makes absolutely                  3 no sense at all. So whether or not you have kept                  4 a currency conversion claim would depend on whether the                  5 administrators considered you were likely to have                  6 a client money claim or not. If they thought you were                  7 likely to have one, you kept it. If they thought you                  8 probably didn't, you would lose it. It would depend                  9 on -- in situations where you had claims in more than                  10 currency, which one was regarded as the largest claim,                  11 again, if the largest claim happened to be in a foreign                  12 currency, you kept your currency conversion claim. If                  13 it happened to be in sterling, on my learned friend's                  14 case, you lost it.                  15 If you were a party to the CRA, did you accept the                  16 administrators' invitation to enter into a CRA CDD or                  17 not? If you did, which one? And whether you entered                  18 into a CDD at all. Obviously, creditors who didn't were                  19 pushed to the back of the queue and wouldn't be entitled                  20 to participate in interim distributions until their                  21 claim had eventually been determined. But obviously,                  22 a creditor who said "I don't like the number you've                  23 given me, I prefer to have my claim determined on the                  24 evidence that I put forward", would in due course not                  25 lose any currency conversion claim he otherwise had.</p> <p style="text-align: center;">Page 16</p>

<p>1 That's all I was proposing to say in relation to 2 construction.</p> <p>3 I was now going to turn to Ex parte James and 4 paragraph 74 and, again, to deal with those issues in 5 relation to currency conversion claims. And I was, 6 having done that, going to turn to deal with items 3 and 7 4 on the table, in relation to interest, because I can 8 deal with those much more shortly.</p> <p>9 LADY JUSTICE GLOSTER: Yes.</p> <p>10 MR DICKER: Essentially, as my learned friend said, the 11 arguments are pretty much the same for those.</p> <p>12 LADY JUSTICE GLOSTER: Yes.</p> <p>13 MR DICKER: So turning to Ex parte James and paragraph 74, 14 which is item 2 on the part B table --</p> <p>15 LADY JUSTICE GLOSTER: Yes.</p> <p>16 MR DICKER: -- we say the judge was right to hold that if 17 any of the documents did have the effect of releasing 18 currency conversion claims, then the administrator 19 should be directed not to enforce such releases. As you 20 know, he dealt with this in paragraphs 171 to 189 of his 21 judgment.</p> <p>22 Our starting point is that the judge correctly 23 summarised the law in relation to Ex parte James. If 24 you go to his judgment, which is bundle B1 at tab 2, he 25 dealt with the principle in Ex parte James at</p> <p style="text-align: center;">Page 17</p>	<p>1 The foundation of this is that what you are dealing with 2 here is an officer of the court.</p> <p>3 LORD JUSTICE PATTEN: Yes.</p> <p>4 MR DICKER: And in fact, strictly speaking, a liquidation or 5 an administration is in fact being conducted by the 6 court through its own officers, that was the expression 7 that used to be used in a number of cases, and the 8 starting point is if this is essentially the court doing 9 something through its own officers, that has an impact 10 on what its own officers should be permitted to do.</p> <p>11 LORD JUSTICE PATTEN: Yes.</p> <p>12 MR DICKER: That's why, as my learned friend indicated, it 13 doesn't apply in voluntary liquidations. One might 14 expect it should but it doesn't apply because, strictly 15 speaking, a liquidator in a voluntary liquidation is not 16 an officer of the court because it has not been 17 appointed as a result of an order of the court.</p> <p>18 LORD JUSTICE PATTEN: But in relation to administrators, 19 you've got paragraph 74, so we would expect that to 20 constitute the jurisdiction, wouldn't you, now?</p> <p>21 MR DICKER: Well --</p> <p>22 LORD JUSTICE PATTEN: It seems a bit odd that there should 23 be some sort of parallel historic jurisdiction which has 24 survived paragraph 74.</p> <p>25 MR DICKER: Well we say there that -- there's two separate</p> <p style="text-align: center;">Page 19</p>
<p>1 paragraph 174. The authorities in relation to it are 2 paragraphs 174 to 182.</p> <p>3 Can I just start my reminding you of the quotation 4 from Lord Neuberger's judgment In re Nortel which he 5 sets out at paragraph 182.</p> <p>6 LADY JUSTICE GLOSTER: Yes.</p> <p>7 MR DICKER: There Lord Neuberger says:</p> <p>8 "A number of cases, starting with Ex parte James, in 9 which a principle has been developed and applied to the 10 effect that ..."</p> <p>11 And he then quotes Walton J In re Clark and uses the 12 phrase:</p> <p>13 "Where it would be unfair for a trustee in 14 bankruptcy to take full advantage of his legal rights as 15 such ...(Reading to the words)... to do so."</p> <p>16 And he says the same point is made by Slade LJ in Re 17 TH Knitwear, quoting Salter J in Re Wigzell and we say 18 that is an accurate summary of the principle in Ex parte 19 James.</p> <p>20 Just showing you --</p> <p>21 LORD JUSTICE PATTEN: What's going on in Ex parte James? Is 22 the court giving directions to the officer holder? Is 23 that what it amounts to? Is that the jurisdiction 24 that's being exercised?</p> <p>25 MR DICKER: I will come to that but that is precisely it.</p> <p style="text-align: center;">Page 18</p>	<p>1 bases here, the first is --</p> <p>2 LORD JUSTICE PATTEN: It may not make any difference in 3 terms of what principles one's applying but --</p> <p>4 MR DICKER: And that, just to cut to the chase, is indeed 5 what we would submit. My learned friend says, "Well, Ex 6 parte James requires shabby or dishonourable conduct."</p> <p>7 LORD JUSTICE PATTEN: Yes.</p> <p>8 MR DICKER: And he says, "If that's right, paragraph 74 9 can't be any wider." We say that now, actually, is the 10 wrong way round --</p> <p>11 LADY JUSTICE GLOSTER: What, one should be looking at the 12 statutory provision first?</p> <p>13 MR DICKER: Well --</p> <p>14 LORD JUSTICE BRIGGS: That what I asked yesterday, isn't it? 15 Why should we be digging around in Ex parte James, 16 when we now have a perfectly modern statutory test 17 which, on the face of it, appears to cover the same 18 ground?</p> <p>19 MR DICKER: Well, if it does, yes. If it doesn't, we say Ex 20 parte James would then apply. There could be 21 an argument that paragraph 74 conceivably was directed 22 at a slightly different state of affairs. If that 23 argument was made, then we say, still got the point the 24 administrator is an officer of the court. If their 25 actions as officers of the court would be subject to</p> <p style="text-align: center;">Page 20</p>

<p>1 Ex parte James, if they were a liquidator, so too -- 2 they should be subject to Ex parte James, if they are 3 an administrator. 4 But if one starts with paragraph 74, on any basis, 5 paragraph 74 uses the word "unfair". My learned friend 6 may or may not be right, and we say he's wrong when he 7 says Ex parte James requires shabby or dishonourable 8 conduct. But he can't, in our submission, say that when 9 you come to paragraph 74, paragraph 74 can't be any 10 wider, because that's effectively reading down 11 paragraph 74. His submission is, essentially, that 12 although paragraph 74 uses the word "unfair", you should 13 read it down as if it used the phrase "shabby or 14 dishonourable conduct", and that can't be right. 15 LORD JUSTICE PATTEN: Which is why I would have thought your 16 starting point ought to be paragraph 74. 17 MR DICKER: With your Lordship's encouragement, that is 18 where I will now start. 19 Paragraph 74 was also referred to by Lord Neuberger 20 in Nortel. Can I just show you the relevant paragraph. 21 It is authorities 3, tab 96. 22 LADY JUSTICE GLOSTER: Paragraph? 23 MR DICKER: 3/96. It is paragraph 121. 24 LADY JUSTICE GLOSTER: Yes, we've been here, haven't we? 25 We've been here.</p> <p style="text-align: center;">Page 21</p>	<p>1 and one may say: okay, so the contract means that -- so 2 that is the right they have. That's precisely the 3 situation in which Ex parte James operates. If one goes 4 back to its origins, where the office holder had 5 received a sum of money as a result of a mistake of law, 6 whether pursuant to an agreement or not, as a matter of 7 law, as a matter of equity, title in that money 8 obviously passed to the debtor -- 9 LADY JUSTICE GLOSTER: Yes, I know all that but here you're 10 not -- construction is the construction. If there was 11 a mistake, no doubt, if you wanted to, you could assert 12 rectification or claim rectification. If the simple 13 answer is that you've released everything in return for 14 a counter-release, that's the true construction. I just 15 don't see why we get into the language of paragraph 74 16 or the spirit, if there is one, of Ex parte James. 17 MR DICKER: Because the circumstances in which that 18 agreement was agreed were unfair, discriminatory and 19 such as to invoke paragraph 74 or Ex parte James. 20 Can I just -- 21 LADY JUSTICE GLOSTER: Yes, I'm sorry to pour cold water but 22 that's where I'm coming from. 23 MR DICKER: I understand. 24 LADY JUSTICE GLOSTER: I can't speak for my brothers. 25 MR DICKER: I understand. In a sense --</p> <p style="text-align: center;">Page 23</p>
<p>1 MR DICKER: Yes, but just noting, when Lord Neuberger says, 2 after referring to paragraph 74: 3 "This cannot, in my view, apply to a case where the 4 administrator is proposing to do that which the 5 legislation requires him to do. It applies where the 6 administrator is exercising a power of discretion, most 7 obviously carrying on the company's business in 8 a certain way, selling off an asset of the company or 9 not performing an obligation, such as paying off 10 creditors in the order mandated by the legislation." 11 So that's Lord Neuberger -- 12 LADY JUSTICE GLOSTER: Mr Dicker, can I just say where I'm 13 coming from? It seems to me if you win on construction, 14 fine. If you don't, why should it be unfair? That's my 15 real problem here. 16 MR DICKER: And I understand that, but if one goes back to 17 the slightly more developed jurisprudence in relation to 18 Ex parte James, the one thing that's plain is that Ex 19 parte James can operate in relation to a contract which 20 is valid as a matter of law and equity, as my learned 21 friend put it, to override whatever the strict legal 22 rights of the parties are. 23 LADY JUSTICE GLOSTER: Yes. 24 MR DICKER: So the premise of Ex parte James is essentially 25 that the administrators have a right at law or equity</p> <p style="text-align: center;">Page 22</p>	<p>1 LORD JUSTICE PATTEN: If the true construction -- these, 2 after all, were agreements which were professionally 3 drafted, with the benefit of masses of legal advice on 4 all sides at great expense, and it's a very different 5 situation from the oil delivery or whatever it was. 6 LADY JUSTICE GLOSTER: Texaco. 7 LORD JUSTICE PATTEN: Having thought, you know, that they 8 were obliged to pay the money over, it's a completely 9 different level of -- 10 MR DICKER: Again, our submissions, which -- 11 LORD JUSTICE PATTEN: You know, why isn't your objectively 12 determined intention, as per the construction of the 13 agreement, attributable to your clients? It may be that 14 it was the fault of their legal advisers but it doesn't 15 matter. That's the contract your clients signed and 16 they must be taken to have intended its consequences. 17 MR DICKER: Well -- 18 LADY JUSTICE GLOSTER: And they got advantages under it 19 because they got release of any claims that could have 20 been made against them, theoretically at least. 21 MR DICKER: I understand all of these points. In a sense, 22 the logic of them is that paragraph 74 and Ex parte 23 James has no room in this situation. 24 LADY JUSTICE GLOSTER: Yes. 25 MR DICKER: And we say that's wrong. What happened here was</p> <p style="text-align: center;">Page 24</p>

1 currency conversion claims were, if we're wrong on  
 2 construction, released for some creditors, not others,  
 3 in circumstances where that was simply not necessary for  
 4 what the administrators were trying to achieve. Just  
 5 pausing on that point --  
 6 LADY JUSTICE GLOSTER: Yes.  
 7 MR DICKER: -- go back to the example I gave of a creditor  
 8 with claims 1 to 10. Obviously, necessary for the  
 9 administrators to ensure that claims 2 to 10, if the  
 10 creditor chooses not to prove them, are released,  
 11 otherwise they can't safely make distributions. Also  
 12 necessary to ensure the creditor can't come back and  
 13 amend his proof to increase the amount because that  
 14 would just be another way of upsetting distributions.  
 15 Nothing in relation to that that required the release of  
 16 rights that the creditor would have in respect of the  
 17 claim which he had chosen to prove, in the event of  
 18 a surplus.  
 19 So that's one aspect of it.  
 20 The second aspect is that -- again, if we're wrong  
 21 as a matter of construction, whether you released such  
 22 a claim or not would be the result of a completely  
 23 random series of irrelevant factors. I've been through  
 24 those, I won't repeat them.  
 25 LADY JUSTICE GLOSTER: I see the argument and you say that's

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1 unfair within paragraph 74 or discriminatory or just  
 2 because it's random and, perhaps, careless? That makes  
 3 it shabby and --  
 4 MR DICKER: No, I am focusing, obviously, on Lord  
 5 Neuberger's phraseology of unfairness.  
 6 LADY JUSTICE GLOSTER: Yes.  
 7 MR DICKER: I don't want to, as it were, sort of get ahead  
 8 of myself. Can I just --  
 9 LADY JUSTICE GLOSTER: I'm sorry, I am taking you out of  
 10 your course. But I suppose it reflects the problem  
 11 I have with Ex parte James anyway, and even with  
 12 paragraph 74.  
 13 MR DICKER: And, again, it's a similar issue that arose  
 14 below. It is an unusual situation and normally, the  
 15 courts are required to resolve legal disputes between  
 16 parties. Ex parte James, obviously, is not part of that  
 17 process in quite the same way. This goes back right to  
 18 the origins of bankruptcy and the idea, as I said, that  
 19 insolvency proceedings involve the court conducting the  
 20 insolvency proceedings through its own officers. That's  
 21 the origin of the principle and that's why it operates  
 22 when, in other circumstances, a similar principle would  
 23 not.  
 24 Now, can I just finish -- so far as paragraph 74 is  
 25 concerned, there are two other authorities you haven't

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1 been shown but I think I should show you, in relation to  
 2 paragraph 74. The first is a case Coniston which is in  
 3 the bundles at volume 3, tab 92. And it is two  
 4 paragraphs of Norris J's judgment, paragraphs 36 and the  
 5 start of paragraph 37. If I could just ask you to read  
 6 those.  
 7 LADY JUSTICE GLOSTER: Yes. (Pause)  
 8 MR DICKER: So the two points Norris J was making in 37, he  
 9 says doesn't depend on breach of fiduciary or some other  
 10 duty. In 36 he says:  
 11 "Focuses on unfair harm. That I think, will  
 12 ordinarily mean unequal or differential treatment to the  
 13 disadvantage of the applicant.  
 14 "Obviously that, on its own, is not enough but it is  
 15 enough where it cannot be justified by reference to the  
 16 interests of the creditors as a whole or to achieving  
 17 the objective of the administration."  
 18 That's why we say in this case it's important to  
 19 understand that procuring releases of currency  
 20 conversion claims didn't advance one jot what the  
 21 administrators were seeking to achieve by the consensual  
 22 approach. (Pause)  
 23 Now, the other authority is a case called London and  
 24 Westcountry Estates, otherwise known as Hockin v Marsden  
 25 and you will have that in the same bundle at tab 95A.

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1 LADY JUSTICE GLOSTER: I've got Multiguarantee which  
 2 I appeared there, at 95A.  
 3 MR DICKER: Ah.  
 4 LADY JUSTICE GLOSTER: I don't mind looking at that because  
 5 I remember it.  
 6 MR DICKER: I'm sorry, at 48A.  
 7 LORD JUSTICE PATTEN: Really?  
 8 MR DICKER: So volume 1 -- sorry, that was my --  
 9 LORD JUSTICE PATTEN: What are we looking at, Mr Dicker?  
 10 LADY JUSTICE GLOSTER: 48A.  
 11 LORD JUSTICE PATTEN: London and Westcountry Estates; yes?  
 12 MR DICKER: Yes.  
 13 LORD JUSTICE PATTEN: Mr Le Poidevin's decision.  
 14 MR DICKER: Yes.  
 15 LORD JUSTICE PATTEN: I've got it at 95A. That's the only  
 16 reason --  
 17 LADY JUSTICE GLOSTER: Maybe we've got it wrong on the  
 18 electronic. I've got Multiguarantee at 95A.  
 19 LORD JUSTICE BRIGGS: I've got it at 48A.  
 20 LADY JUSTICE GLOSTER: Let me look at 48A.  
 21 LORD JUSTICE PATTEN: As long as we've all got it, it  
 22 doesn't really matter.  
 23 MR DICKER: If everyone has, at one place or another, London  
 24 and Westcountry Estates Limited --  
 25 LADY JUSTICE GLOSTER: Let me look at 48A.

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<p>1 LORD JUSTICE PATTEN: It's a decision of March 2014.                  2 MR DICKER: That's it.                  3 LADY JUSTICE GLOSTER: Yes, I've got it.                  4 MR DICKER: There's just one paragraph from the judgment of                  5 deputy High Court judge. Paragraph 16 on page 445. At                  6 16 he says:                  7 "Unlike sections 167 [et cetera], lays down its own                  8 test for interference, test of unfair harm. Evidently                  9 not the same thing as a test of perversity. To adopt                  10 a test of perversity based on the statutory test would                  11 be impermissible. To adopt it in addition to the                  12 statutory test would lack any legislative warrant."                  13 And then at paragraph 19 he says, essentially                  14 echoing a point made by Norris J:                  15 "Paragraph 74 requires unfair harm, not merely harm                  16 and the requirement of unfairness certainly prevents                  17 a creditor complaining of a disadvantage to his own                  18 interest, when the disadvantage is justifiable by                  19 reference to the interests of the creditors as a whole.                  20 But I do not myself see why the requisite unfairness                  21 must necessarily be found in an unjustifiable                  22 discrimination. A lack of commercial justification for                  23 a decision causing harm to the creditors as a whole, may                  24 be unfair, in the sense that harm is not one which they                  25 should be expected to suffer."</p> <p style="text-align: center;">Page 29</p>	<p>1 appropriate just to show you is Multiguarantee, which is                  2 either, I assume, at 48A or at 95A and I'm sorry for the                  3 confusion.                  4 LORD JUSTICE PATTEN: So it will be 2/2/48A?                  5 MR DICKER: It's in volume 1. Tab 48A is in volume 1.                  6 LORD JUSTICE BRIGGS: I've got it at volume 3, 95A.                  7 LADY JUSTICE GLOSTER: Yes, electronically, it is 95A.                  8 MR DICKER: I think, chronologically, it probably should be                  9 at 48A, but as long as we all have it.                  10 It is a short paragraph from Lawton LJ's judgment at                  11 page 270. You'll see at letter F on page 270, Lawton LJ                  12 said:                  13 "Various words have been used in the cases to                  14 indicate the kind of conduct to which the principle of                  15 Ex parte James may apply, such as a point of moral                  16 justice, dishonest, dishonourable, unworthy, unfair and                  17 shabby. Words are not words of art at all. Words of                  18 ordinary English usage and the concept behind them, as                  19 I understand the cases, that an officer of the court,                  20 such as a trustee in bankruptcy or a liquidator, should                  21 not behave in a way which a reasonable member of the                  22 public, knowing all the facts, would regard as either                  23 dishonest, unfair or dishonourable."                  24 Now, you should note the next sentence:                  25 "The full extent of the doctrine in Ex parte James,</p> <p style="text-align: center;">Page 31</p>
<p>1 LORD JUSTICE BRIGGS: I note from 16 that unfair harm                  2 replaces unfair prejudice in an earlier version of this                  3 paragraph.                  4 MR DICKER: Yes.                  5 LORD JUSTICE BRIGGS: One asks oneself what subtle                  6 difference and effect was that meant to have, otherwise                  7 than possibly just modernising the language?                  8 MR DICKER: I'm not sure, for present purposes, whether the                  9 distinction matters.                  10 LORD JUSTICE BRIGGS: No.                  11 MR DICKER: And then briefly, conscious that now we have                  12 paragraph 74, that's at least the first port of call,                  13 but in case, for whatever reason, it doesn't cover the                  14 ground. Just briefly in relation to Ex parte James, you                  15 saw Lord Neuberger cite Walton J in Re Clark. In our                  16 submission, when one reads the decision of Walton in Re                  17 Clark, it is perfectly clear that he thought unfairness                  18 was the acid test. He says it's the critical factor.                  19 He goes through the various cases and he describes                  20 them all in terms of unfairness.                  21 When he comes to his conclusion, page 567E, he says:                  22 "The question, as I feel it ought to be posed is                  23 simply: is it fair that trustees should recover the                  24 amount of these cheques from Tokyo?"                  25 The only other authority which we thought it</p> <p style="text-align: center;">Page 30</p>	<p>1 as this has been developed, has not been discussed in                  2 this court because we did not call on counsel, on behalf                  3 of the liquidator, to comment on it."                  4 Because they regarded it as a case in which it was                  5 clear it didn't apply. But we thought you ought, at                  6 least, to see that Lawton LJ, summarising the                  7 authorities, includes the word "unfairness" as well.                  8 Now, can I just make six submissions in relation to                  9 paragraph 74 and Ex parte James.                  10 The first is, we say both apply, where it would be                  11 unfair for the administrators to act in a particular                  12 way, in the case of paragraph 74, where harm would                  13 result.                  14 Secondly, both jurisdictions inevitably apply to                  15 produce a different result than would arise as a matter                  16 of law or equity. In a sense, that's the whole point of                  17 the two jurisdictions.                  18 So it's no answer to say the result would be                  19 inconsistent with legal or equitable rights of the                  20 parties.                  21 Thirdly, we say one relevant question is whether the                  22 unfairness resulted from anything done by the officers                  23 of the court. Now, although the principle can apply --                  24 certainly Ex parte James can apply -- even if that's not                  25 the case, even if the relevant act was done by the</p> <p style="text-align: center;">Page 32</p>



1 bankrupt or the debtor company, the principle is much  
 2 more likely to be engaged where the unfairness results  
 3 from something done by the office holders themselves,  
 4 and that's obviously necessary for the purposes of  
 5 paragraph 74.  
 6 Now, the fourth point, and it's obviously the  
 7 critical one, is identifying when something should be  
 8 regarded as unfair. And, ultimately, that is a matter  
 9 for the court and I say that not just because it's  
 10 a legal issue but because, as I said, this is  
 11 a situation in which the court is conducting the  
 12 administration through its own officers and that informs  
 13 the application of the principle.  
 14 LORD JUSTICE PATTEN: But it's got to be unfair for them,  
 15 the officers, to stand on their legal rights. Is that  
 16 the question --  
 17 MR DICKER: Yes.  
 18 LORD JUSTICE PATTEN: -- we're seeking to identify?  
 19 MR DICKER: Yes. So we have a certain state of affairs  
 20 would result from the application of the underlying  
 21 legal and equitable rights.  
 22 LORD JUSTICE PATTEN: Yes.  
 23 MR DICKER: And the question is whether or not that state of  
 24 affairs should be allowed to happen, to persist,  
 25 depending on the circumstances.

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1 LORD JUSTICE PATTEN: But you can't criticise or complain  
 2 about the fact you entered into the agreement as such,  
 3 can you?  
 4 MR DICKER: Yes, we did below. We put it on two grounds:  
 5 either these were agreements which, if, inadvertently,  
 6 they required creditors to give up currency conversion  
 7 claims, the administrators should not have promulgated  
 8 and, essentially, required the creditors to enter into  
 9 as a condition for receiving an interim distribution.  
 10 We also said that it would also be unfair if that  
 11 was the effect of the agreements, for the administrator  
 12 now to enforce them.  
 13 Now, the judgment in -- I think it is paragraph 184  
 14 of his judgment --  
 15 LADY JUSTICE GLOSTER: He said it would be grossly unfair.  
 16 MR DICKER: Yes. He, in the event, reached, as you've seen,  
 17 a very clear conclusion. (Pause)  
 18 Yes, it is 186, where the judge dealt with the point  
 19 I've just been making, where he says:  
 20 "Although...(Reading to the words)... kept open the  
 21 submission the administrators had, by entering into the  
 22 CRA and the CDDs containing the releases of currency  
 23 conversion claims, acted so as unfairly to harm the  
 24 interests of the creditors who had signed them, the main  
 25 focus of the submissions rightly, in my view, was on

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1 paragraph (b), whether in seeking to enforce the  
 2 releases, the administrators would be acting in a way  
 3 which would unfairly harm the interests of those  
 4 creditors."  
 5 I freely accept Ex parte James is a slightly unusual  
 6 exercise for the court to have to conduct but it's not  
 7 that different, we say, from paragraph 74, unfairness.  
 8 They both apply, essentially, to govern the actions of  
 9 an officer of the court to produce a result which strict  
 10 application of law or equity would not. But the  
 11 touchstone in each case, we say is, essentially: is the  
 12 court itself happy that its own officers conducting its  
 13 insolvency process have produced this consequence?  
 14 LORD JUSTICE PATTEN: But how do we deal with the point that  
 15 the process is consensual?  
 16 MR DICKER: By looking at the circumstances that resulted in  
 17 the CDDs, and I will come to these in a moment, and  
 18 decide whether or not, despite being consensual, the  
 19 consequences either of entering into the agreement or of  
 20 enforcing it, would be unfair.  
 21 Now, you could say if you go back to Ex parte James,  
 22 there's an agreement between two parties involving the  
 23 payment of a sum of money. That's consensual. It may  
 24 have been an agreement heavily negotiated, but the  
 25 lawyers made a mistake, at that stage a mistake of law,

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1 which didn't ground recovery.  
 2 Nevertheless, the estate has received an asset which  
 3 the court considers it would be unfair to distribute  
 4 amongst the creditors. As a result, the office holder  
 5 should not be permitted to stand on his strict legal and  
 6 equitable rights.  
 7 LORD JUSTICE PATTEN: I haven't checked back, but does the  
 8 agreement statement of facts in this case tell us that  
 9 there was a mistake on your client's side in entering  
 10 into the agreement?  
 11 MR DICKER: I don't think --  
 12 LORD JUSTICE PATTEN: It doesn't.  
 13 MR DICKER: I don't think the statement of facts could say  
 14 that.  
 15 LORD JUSTICE PATTEN: No, well I see that.  
 16 MR DICKER: Because they are intended to set out only facts  
 17 of general application.  
 18 LORD JUSTICE PATTEN: Of course, but doesn't that mean that  
 19 we are in ignorance as to what went on in the  
 20 negotiations?  
 21 MR DICKER: And you are in ignorance about one side of it.  
 22 You're not in ignorance about what the position of the  
 23 administrators was because, as I'll show you, we do have  
 24 evidence from the administrator who was primarily  
 25 involved in this part of the process, and the long and

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1 the short of it is that the administrators didn't intend  
2 to release currency conversion claims.  
3 LORD JUSTICE PATTEN: Right. And that's where?  
4 LADY JUSTICE GLOSTER: In your skeleton argument, I think.  
5 LORD JUSTICE PATTEN: It is referred to in there, is it?  
6 MR DICKER: It is referred to and I will come to it.  
7 LORD JUSTICE PATTEN: All right.  
8 MR DICKER: I am happy to come to it. (Pause)  
9 Can I just make --  
10 LORD JUSTICE PATTEN: Don't come to it out of turn for me.  
11 MR DICKER: Can I make one more submission of law and then  
12 turn to the relevant facts?  
13 LORD JUSTICE PATTEN: Of course.  
14 MR DICKER: We say the principle in Ex parte James and  
15 paragraph 74 has a special force, where the  
16 administrator's actions related in some way to their  
17 duty to adjudicate on proofs of debt. We say that  
18 because of the authorities I referred to earlier that  
19 describe that duty as, essentially, itself  
20 a quasi-judicial duty.  
21 So as part of the process the administrators were  
22 engaged in, as a result of the order of Briggs J, in  
23 adjudicating on claims, there was a quasi-judicial  
24 element to that.  
25 So coming on to the relevant facts, we make the

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1 following points. What happened here happened as  
2 a result of documents originally devised by the  
3 administrators for the benefit of creditors. So this  
4 isn't one of those situations where something has  
5 happened and the question is, can the office holder take  
6 advantage of it? This is something which has happened  
7 as a result of actions by the office holder himself.  
8 LADY JUSTICE GLOSTER: Well you say "by himself", but as my  
9 Lord pointed out, it was consensual, the relevant  
10 clients agreed to enter into the agreements.  
11 MR DICKER: And, again, that's the other side of the  
12 picture.  
13 LADY JUSTICE GLOSTER: Yes.  
14 MR DICKER: From the perspective of the creditors, their  
15 perspective was they were told they had to enter into  
16 these if they wanted early interim distribution. They  
17 were told that the terms of the CDDs were, essentially,  
18 non-negotiable. They were strongly encouraged to enter  
19 into them, in the sense that they were told -- you've  
20 seen in the reports -- the agreements were intended to  
21 be fair and in their best interests, not simply intended  
22 to result in a haircut. They were given a strong  
23 incentive to enter into them, in the sense that if they  
24 didn't, they were also told their claim would be dealt  
25 with but only in due course, after delay, which would

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1 mean --  
2 LADY JUSTICE GLOSTER: We're not in the consumer context of  
3 people selling timeshares or something, we're looking at  
4 creditors, often in the secondary market, trading this,  
5 trading LBIE debts, where they can take their own  
6 advice.  
7 MR DICKER: We say it's unfair to expect all creditors in  
8 this estate, let alone in any other, to effectively  
9 second-guess the administrators. This is a process  
10 which the administrators decided they should pursue, to  
11 carry out their statutory duty of distributing the  
12 assets pari passu amongst creditors. The administrators  
13 have access to the best lawyers and are highly  
14 experienced insolvency practitioners. The creditors in  
15 this estate, like others, were a variety of creditors.  
16 They included foreign banks, who may not have much  
17 experience of English insolvency law, they included  
18 corporates, they may --  
19 LADY JUSTICE GLOSTER: I've got the point, Mr Dicker.  
20 MR DICKER: And they weren't told anywhere that the  
21 consequence of entering into these agreements or, more  
22 precisely, the consequence of entering into one rather  
23 than another, might result in them losing their currency  
24 conversion claims.  
25 Now --

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1 LORD JUSTICE PATTEN: One way of -- well, you're going to  
2 come on to the evidence. I was going to say that you  
3 can have different situations. It may be that nobody  
4 thought this was the effect of what they were signing up  
5 to, in which case, the question for us is rather  
6 different because it is whether or not the  
7 administrators -- if the judge was wrong on  
8 construction, can take advantage of that, in the sense  
9 of, as I said earlier, standing on their rights under  
10 the agreement.  
11 MR DICKER: What part 36A, this question, question 36A, was  
12 intended to try and achieve, was to see whether or not  
13 there was an answer applicable to all creditors. One  
14 could conceivably get to a situation, based on the  
15 material you have, that it is not something you can  
16 finally answer because you don't have evidence from the  
17 individual creditors, but you might get to the position  
18 where, unless a creditor appreciated that this was the  
19 consequence of the agreement he was signing up to, it  
20 would be unfair. It's not, as it were, then, a final  
21 answer to the questions but it is halfway there.  
22 Now, the other point is one also needs to take into  
23 account how the problem came about.  
24 The answer, and this is coming on to the evidence,  
25 would appear to be inadvertence or oversight by the

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1 administrators or their legal advisers. I don't say  
 2 that by way of criticism. The task they faced was,  
 3 obviously, extremely complicated and difficult to  
 4 address but if the outcome is unfair, we say it's  
 5 a relevant factor that the unfairness occurred because,  
 6 for whatever reason, no one in the administrators' camp  
 7 appears to have thought what would happen if there  
 8 turned out to be a surplus. Well, no one in the  
 9 administrators' camp appears to have focused on Re  
 10 Lines Brothers and appreciated the possibility of  
 11 a currency conversion claim.

12 Now, in that sense, we're not a million miles away  
 13 from a mistake of law.

14 So far as --

15 LORD JUSTICE BRIGGS: Inadvertence is different from  
 16 a mistake of law, isn't it? This is the unexpected  
 17 inadvertent consequence of a torrentially drafted  
 18 release which isn't saved by the inclusion of a claim  
 19 nobody thought about in that which was preserved,  
 20 assuming you're wrong on construction.

21 MR DICKER: The way I phrased it was "We're not a million  
 22 miles away from a mistake of law." In the sense that, as  
 23 you can see with what happened, if the administrators  
 24 had appreciated at the time that this would be the  
 25 consequence, they would have carved such claims out.

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1 LORD JUSTICE BRIGGS: You say we can infer that from the  
 2 fact that when they did appreciate it, they did?

3 MR DICKER: And from --

4 LADY JUSTICE GLOSTER: And it is Mr Copley's evidence, isn't  
 5 it?

6 MR DICKER: Just dealing with that, and I think it is  
 7 important you should understand how this arose, there  
 8 was a CMC in front of the judge. The SCG asked the  
 9 administrators to put in evidence dealing with their  
 10 intention in relation to currency conversion claims.  
 11 Mr Lomas' tenth witness statement was served. It didn't  
 12 deal with that.

13 The SCG asked again and filed a very short witness  
 14 statement themselves. If I can just show you that.  
 15 It's bundle B supplemental, tab 12. It's a witness  
 16 statement by Mr Zambelli, one of the SCG, and he says at  
 17 paragraph 5, he's:

18 "... discussed currency conversion claims with  
 19 Mr Copley, one of the administrators, either in  
 20 face-to-face meetings or by the telephone on a number of  
 21 occasions. At each of the meetings a call was set out  
 22 in paragraph 5 above. Mr Copley stated that he, as the  
 23 LBIE joint administrator who had signed CDDs on behalf  
 24 of LBIE, did not intend to compromise currency  
 25 conversion claims. He also informed me he had

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1 communicated a similar message to other creditors.  
 2 Mr Copley also stated to me at certain of the meetings,  
 3 a call was set out in paragraph 5 he was willing to  
 4 evidence in any court proceedings, to ensure that the  
 5 CDD provisions were correctly interpreted."

6 Now, in response to the SCG's request in that  
 7 statement, the administrators responded, saying they  
 8 would be content to provide further evidence if the  
 9 court considered it appropriate for them to do so.  
 10 There was then a further CMC in front of  
 11 David Richards J in November 2014, when he required the  
 12 administrators to put in such evidence and, as a result,  
 13 we received the evidence of Mr Copley, which I was going  
 14 to show you next. I notice the time, I wonder if that  
 15 would be a convenient moment?

16 LADY JUSTICE GLOSTER: Yes, sure. Ten minutes.  
 17 (11.45 am)

18 (A short break)

19 (12.07 pm)

20 LADY JUSTICE GLOSTER: Yes, Mr Dicker.

21 MR DICKER: As I indicated, so David Richards J in  
 22 November 2014 CMC, made an order. The order included  
 23 an order that the administrators' evidence was to  
 24 include a witness statement from Mr Copley, and you will  
 25 find that in B supplemental bundle, tab 17.

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1 LADY JUSTICE GLOSTER: Yes.

2 MR DICKER: The entirety of the statement obviously repays  
 3 reading but I'm not going to take you through all of it.  
 4 Can I start right at the end with paragraph 32. It  
 5 deals with --

6 LORD JUSTICE PATTEN: 32, did you say?

7 MR DICKER: Paragraph 32.

8 LORD JUSTICE PATTEN: Yes.

9 MR DICKER: Which is the penultimate paragraph and responds  
 10 to statements you've seen made by Mr Zambelli and  
 11 perhaps if you just read paragraphs 32 and 33. (Pause)

12 And then so far as the detail is concerned, I was  
 13 going to start at paragraph 21.

14 LADY JUSTICE GLOSTER: Does the context he puts round it,  
 15 does that row back from what he said?

16 MR DICKER: We say not materially, no. You'll see the  
 17 context, however, in more detail. Can I just show you  
 18 a few paragraphs. Picking it up at paragraph 21, you'll  
 19 see:

20 "Following the joinder of Lydian [which was a party  
 21 who had proceedings in Waterfall I at an earlier stage],  
 22 certain creditors began to raise queries when speaking  
 23 to me and other members of my team. We're dealing with  
 24 creditor claims as to the possible existence of currency  
 25 conversion claims and latterly the impact, if any, of

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1 the release clause thereon. In the context of such  
 2 discussions that from mid-2013, certain creditors first  
 3 enquired as to whether the joint administrators would be  
 4 willing, expressly, to preserve creditors' rights. My  
 5 overriding preference at the time was to resist any  
 6 change to the then standard form CDDs being used, in  
 7 light of the fact that joint administrators wanted to  
 8 deal with creditors on as consistent a basis as possible  
 9 and a significant number of CDDs had already been  
 10 executed."  
 11 So that was the initial reaction.  
 12 If you then go over to 24:  
 13 "The suggestion the release clause waived currency  
 14 conversion claims specifically made on 11 October 2013  
 15 at the PTR of the Waterfall I application.  
 16 Notwithstanding my initial resistance to the  
 17 introduction of language ..."  
 18 LADY JUSTICE GLOSTER: Who made the point?  
 19 MR DICKER: "Deal with currency conversion claims ..."  
 20 LADY JUSTICE GLOSTER: Mr Dicker, who made the point? Who  
 21 was LBH12?  
 22 MR DICKER: A shareholder in LBIE and a party to the  
 23 Waterfall I proceedings.  
 24 LORD JUSTICE PATTEN: So who was counsel who is being  
 25 referred to here?

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1 MR DICKER: Leading counsel for LBH12 at that stage was  
 2 Anthony Trace, I am told, I am reminded.  
 3 LADY JUSTICE GLOSTER: For somebody in Mr Zacaroli's  
 4 position on the waterfall, effectively.  
 5 MR DICKER: Effectively someone appearing at his level.  
 6 LADY JUSTICE GLOSTER: Or below.  
 7 MR DICKER: Someone lower in the waterfall, yes.  
 8 LADY JUSTICE GLOSTER: So that's not right.  
 9 MR ZACAROLI: We appeared -- I appeared for Lydian in  
 10 Waterfall I. It wasn't us that made that comment but it  
 11 is LBH12, I believe, are within the joint venture which  
 12 is now called Wentworth.  
 13 LADY JUSTICE GLOSTER: Yes.  
 14 MR ZACAROLI: So it wasn't me but it was someone who now is  
 15 the same camp, yes.  
 16 LADY JUSTICE GLOSTER: Somebody at your sort of level in the  
 17 waterfall anyway?  
 18 MR ZACAROLI: Yes.  
 19 MR DICKER: And then Mr Copley, if one drops to about eight  
 20 lines from the end of 24:  
 21 "On or shortly after the date of the PTR, I decided  
 22 to stop signing admitted claim CDDs unless there was  
 23 an express preservation of currency conversion claims."  
 24 Then he says:  
 25 "I'm aware of a limited number of isolated examples.

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1 They were signed afterwards without such preservation  
 2 language."  
 3 And then could I ask you to read 25, 27 and 28.  
 4 (Pause)  
 5 LADY JUSTICE GLOSTER: Yes.  
 6 MR DICKER: Now, obviously, the reason we're here debating  
 7 this issue is not because of the administrators. The  
 8 administrators have never sought to contend that they  
 9 ought to enforce the releases. We're here because of  
 10 Wentworth --  
 11 LADY JUSTICE GLOSTER: Yes, because if the administrators  
 12 took that course, Wentworth no doubt would say "It's  
 13 unfairly prejudicial of you to take that course".  
 14 MR DICKER: Yes. Now, what are the consequences if  
 15 Wentworth are correct? We say, essentially, the  
 16 estate --  
 17 LADY JUSTICE GLOSTER: Or a breach of fiduciary duty to take  
 18 that course, whatever.  
 19 MR DICKER: We say if my learned friend is right, the  
 20 consequence would be that the estate has, in effect,  
 21 been enriched, in the sense that claims that would have  
 22 otherwise had to be met by LBIE will not be paid because  
 23 of the effect of the releases and the benefit of that  
 24 enrichment will ultimately enure for the benefit of  
 25 other creditors, but including subordinated creditors

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1 and shareholders.  
 2 Now, obviously, when one thinks about Ex parte James  
 3 cases, the classic case of enrichment is where money has  
 4 been paid to the estate but in a sense, this is just as  
 5 much an enrichment, in the sense that the number of  
 6 claims against the estate has been reduced, producing  
 7 a greater return for others.  
 8 LADY JUSTICE GLOSTER: But we've got no evidence, have we --  
 9 forget the secondary market for a moment, but we've got  
 10 no evidence which demonstrates in relation to -- or  
 11 maybe the creditors (inaudible) knew but in relation to  
 12 the vast majority of creditors, what they thought at the  
 13 time, whether they envisaged that there was a risk that  
 14 this cut out any possible currency conversion claim,  
 15 whether they thought, nonetheless, it was a valuable  
 16 quid pro quo to get your money upfront earlier and  
 17 whether they thought, "Well, what does matter here is  
 18 that we're getting a release from potential claims that  
 19 the administrators might have against us".  
 20 So we're operating -- you can't say that the  
 21 position is necessarily the same across the board just  
 22 because the evidence does not demonstrate that anybody  
 23 had publicly referred to currency conversion claims  
 24 prior to 2013, or whenever it was.  
 25 MR DICKER: I understand that and this was an issue raised

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1 at the CMC in front of David Richards J and the decision  
 2 that was taken was that it was worth seeing whether or  
 3 not, on the basis of facts generally applicable to all  
 4 creditors, an answer could be found to this question, to  
 5 avoid having to deal with on an individual creditor  
 6 basis.  
 7 Now we say it's highly unlikely, in the light of the  
 8 evidence you do have, that any creditor looked at this  
 9 and thought "I'm giving up a currency conversion claim".  
 10 We also say that, absent that, as it were, express,  
 11 conscious, fully informed acceptance of the position,  
 12 what was happening here was essentially unfair and  
 13 discriminatory, for the reasons I've explained.  
 14 It may be that some qualification is potentially  
 15 required to that. If you imagine a creditor, and we  
 16 submit the vast majority of creditors were probably in  
 17 this position, they were not consciously, voluntarily,  
 18 fully -- giving up currency conversion claims on a fully  
 19 informed basis.  
 20 LORD JUSTICE PATTEN: If this was a claim for rectification  
 21 by your clients, the lis would simply lie between you  
 22 and the administrators, wouldn't it?  
 23 MR DICKER: Yes.  
 24 LORD JUSTICE PATTEN: The views of any other class of  
 25 creditors would simply be irrelevant.

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1 MR DICKER: And similarly if, for example, there was a claim  
 2 based on mistake, mutual mistake or induced unilateral  
 3 mistake, there may be alternative remedies available to  
 4 individual creditors. As you know, those are all held  
 5 over.  
 6 LORD JUSTICE PATTEN: Yes. But what I am thinking is  
 7 that -- I mean, obviously, we're not going into the  
 8 question of whether you would have a viable claim in  
 9 equity or law to -- I'm not quite sure, either for  
 10 rectification or conceivably, if it was unilateral  
 11 mistake, it might be rescission but I don't suppose  
 12 anybody wants that.  
 13 But the list at the moment on paragraph 74 is  
 14 essentially a fight between classes of creditors, isn't  
 15 it? Are we going to hear from the administrators on  
 16 this issue?  
 17 MR DICKER: The administrators are not taking a position in  
 18 relation to this particular part of the application.  
 19 You've seen Mr Copley's --  
 20 LORD JUSTICE PATTEN: Well, of course. So I assume their  
 21 position is consistent with that, is it? Well, I don't  
 22 know why I'm asking you.  
 23 MR DICKER: It would be inconceivable --  
 24 LORD JUSTICE PATTEN: Yes, quite.  
 25 MR DICKER: -- it could be otherwise. Otherwise, no doubt

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1 Mr Trower below and Mr Bayfield here, would have said  
 2 so.  
 3 Now, the judge, as the court observed, reached  
 4 a very, very clear and firm view on this. You've seen,  
 5 I think, Scrutton LJ in Wiggzell say:  
 6 "The court will only interfere with a conclusion  
 7 reached by the judge at first instance, if clearly  
 8 satisfied that he was wrong."  
 9 In our submission, that's plainly the right  
 10 approach. This is essentially a question of discretion.  
 11 LADY JUSTICE GLOSTER: Well, why? Because if we don't think  
 12 that it's unfairly prejudicial, whatever the words are  
 13 in paragraph 74, it's a question of law, not just  
 14 discretion.  
 15 MR DICKER: Your Ladyship is absolutely right. Assuming the  
 16 judge got the law right, which we submit he did, if he  
 17 went wrong in the application of the law to the facts,  
 18 that is essentially a discretionary issue which this  
 19 court should only interfere with if convinced that he  
 20 clearly went wrong.  
 21 LORD JUSTICE PATTEN: I'm not sure that's right. There are  
 22 two levels of it. One is giving yourself a direction as  
 23 to what test and then applying it to the facts. But if  
 24 you come to the conclusion that it is unfair and having  
 25 regard to the facts, albeit applying that test and

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1 that's simply a decision which couldn't reasonably come  
 2 to on, on a proper application of the test, then it's  
 3 an error of law, isn't it? There is an element of --  
 4 I wouldn't necessarily say "discretion", but there's  
 5 a margin of appreciation as to what would or wouldn't  
 6 constitute unfairness, to which we would give respect to  
 7 the judge's views, obviously.  
 8 MR DICKER: And I would be content with the way  
 9 your Lordship has just expressed it. Another line of  
 10 authorities that may be relevant is -- I think it's  
 11 Lord Hoffmann talking about cases involving  
 12 multi-issue --  
 13 LORD JUSTICE BRIGGS: Multi-factorial balancing exercise.  
 14 MR DICKER: Yes, your Lordship has the phrase, I'm afraid  
 15 I've lost it for a moment.  
 16 LORD JUSTICE BRIGGS: I think "value judgment" is quite  
 17 a nice abbreviation.  
 18 MR DICKER: When again, he says a similar deference applies.  
 19 LORD JUSTICE PATTEN: Of course, yes.  
 20 MR DICKER: Now my learned friend made six points. They all  
 21 appear to involve a limited number of themes, and  
 22 I think I've largely dealt with them but just  
 23 identifying what we say are the three themes.  
 24 The first theme is that the CDDs are valid  
 25 agreements, enforceable according to law and equity, and

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<p>1 the assumption at this stage is there's no vitiating 2 factor, such as misrepresentation, mistake, fraud or 3 duress. I've already dealt with it. These two 4 principles operate in a situation in which law and 5 equity produces a particular result which the court, 6 nevertheless, thinks involves unfair harm or unfairness 7 within Ex parte James.</p> <p>8 Wentworth's second theme is the CDDs were freely 9 agreed. Again, we say that's not necessarily an end of 10 it. Neither paragraph 74 nor Ex parte James require 11 undue influence, duress or something of that sort. The 12 circumstances in which they were agreed may be a factor 13 in deciding whether or not it is unfair, but one has to 14 look at the circumstances.</p> <p>15 And if one looks at the circumstances, as you know, 16 we emphasise these were agreements promulgated by the 17 administrators, presented essentially, on a take it or 18 leave it basis. They were presented by administrators 19 who were not commercial parties entitled to extract the 20 best outcome they could for themselves. They were 21 officers of the court, essentially engaged in a proof 22 process.</p> <p>23 Insofar as the creditors were concerned, there was 24 pressure on them, commercial pressure, in the sense that 25 if they didn't agree to this, they wouldn't get paid</p> <p style="text-align: center;">Page 53</p>	<p>1 not permitting him to insist on all the legal 2 consequences of, on the one hand, a transaction 3 initiated by himself or by the court, in the interests 4 of the general body of creditors, and on the other hand, 5 a transaction initiated by the bankrupt. In the first 6 case, the creditors are the constituents of the trustee 7 throughout and as they are entitled to benefit by the 8 transaction, so it does not seem to be wrong to say they 9 shall take it, as it honourably is no more, no less."</p> <p>10 Now, obviously, if it's unfair for the office holder 11 to insist on strict legal rights, one can't say that 12 will have an impact on creditors. Therefore the 13 principle doesn't operate because nine times out of ten, 14 that would effectively mean the principle never 15 operated.</p> <p>16 That's all I was proposing to say in relation to 17 item 2. I was now going to turn and deal relatively 18 briefly with items 3 and 4 in the table.</p> <p>19 Just to start by reminding us where we are, we are 20 moving from non-provable currency conversion claims to 21 non-provable claims to interest.</p> <p>22 As you know, the judge held as part of part A, 23 Rule 2.88 was a complete code, with the result that no 24 non-provable claim for interest could exist. So it 25 logically follows that if we're right in relation to</p> <p style="text-align: center;">Page 55</p>
<p>1 until later and they wouldn't be compensated for the 2 delay.</p> <p>3 The third theme my learned friend made was, well, if 4 the releases are not to be enforced, that would 5 prejudice other creditors.</p> <p>6 Now, again, we say that's obviously not an answer. 7 If one goes back to Ex parte James, the mistake of law 8 case, the money has been received as a matter of law and 9 equity and forms part of the estate. If it is handed 10 back to the counterparty, in one sense creditors will 11 suffer because they won't receive part of it.</p> <p>12 But that's no answer. If it is unfair for the 13 office holder to enforce their strict legal rights, it's 14 no answer to say that will, in turn, have consequences 15 for creditors. And just one paragraph which I think 16 I haven't shown you and I'm not sure you've seen which 17 makes precisely this point. It is in re Wigzell, 18 authorities 1, tab 32, and it's from Younger LJ's 19 decision at page 869.</p> <p>20 Halfway down there's a sentence in the middle of the 21 line that begins "In my view, in considering the 22 extent", where he says:</p> <p>23 "In my view, in considering the extent of this 24 particular jurisdiction, it is quite vital to 25 distinguish between a trustee not insisting or the court</p> <p style="text-align: center;">Page 54</p>	<p>1 2.88, it gives a creditor his full entitlement, then 2 this item doesn't arise. Essentially, everyone gets 3 paid out, pursuant to Rule 2.88.</p> <p>4 It obviously does arise if Rule 2.88 does not 5 provide a creditor with its full entitlement and the 6 judge was wrong about it being an exclusive code.</p> <p>7 So one has, 2.88, you don't get everything you're 8 owed. The judge is wrong in saying it's an exclusive 9 code, so one has a non-provable claim. The question 10 then is, have you released it? And that's what this 11 item is concerned with.</p> <p>12 Now, just so you know how this was decided and 13 what the judge concluded, he dealt with this in his 14 supplemental judgment. It's in bundle A2, tab 1, 15 paragraphs 59, 60 and 61. (Pause)</p> <p>16 59, he refers to his main judgment. He says: 17 "I expressed the view the agreements did preclude 18 any such claim without making an actual decision to that 19 effect."</p> <p>20 It says: 21 "It would be desirable to make a formal decision on 22 this point. To this end, I have been supplied with the 23 submissions made in Waterfall IIB which bear on this 24 issue."</p> <p>25 Then he deals with construction in 60:</p> <p style="text-align: center;">Page 56</p>

1 "Having reviewed those submissions I am satisfied,  
 2 and I hold, that the express provisions relating to  
 3 interest in the agreements have the effect of releasing  
 4 any such putative claims to interest. As I held in  
 5 Waterfall IIB, the effect and purpose of the agreements  
 6 was to deal fully and finally with provable claims.  
 7 This was achieved by agreeing the amount of such claims  
 8 and (as all parties agree) expressly or implicitly  
 9 providing for the payment of interest on those claims  
 10 under Rule 2.88. No further interest on such claims was  
 11 to be payable, being waived by the terms of the  
 12 agreements to which I referred in the relevant  
 13 paragraphs of my judgment mentioned above."  
 14 In 61 he deals with Ex parte James and paragraph 74,  
 15 in which he says:  
 16 "A clear purpose, as reflected in the terms of the  
 17 agreements, was to compromise the provable claims of  
 18 creditors and interest on those claims. Nothing unfair  
 19 or improper in giving effect to those terms."  
 20 LADY JUSTICE GLOSTER: So this is where he's saying that  
 21 remission to contract claims for interest outside the  
 22 statutory scheme are not provable; is that right? Is he  
 23 saying -- what's he precisely deciding at 59?  
 24 MR DICKER: If one backs up a stage --  
 25 LADY JUSTICE GLOSTER: Yes.

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1 MR DICKER: -- his first point was 2.88 doesn't give  
 2 everyone their full entitlement.  
 3 LADY JUSTICE GLOSTER: Yes.  
 4 MR DICKER: Bower v Marris compound interest, whatever. His  
 5 next point was it's also an exclusive code, so you don't  
 6 have a non-provable claim --  
 7 LADY JUSTICE GLOSTER: For interest.  
 8 MR DICKER: -- to your shortfall.  
 9 LADY JUSTICE GLOSTER: Yes.  
 10 LORD JUSTICE PATTEN: To the extent that, 2.88, that  
 11 statutory interest doesn't give you the full amount you  
 12 would get under the contract.  
 13 LADY JUSTICE GLOSTER: Yes.  
 14 MR DICKER: Because there's the issue in relation to  
 15 interest on non-provable currency conversion claims,  
 16 where he took a different view.  
 17 LORD JUSTICE PATTEN: Yes.  
 18 LADY JUSTICE GLOSTER: Yes.  
 19 LORD JUSTICE PATTEN: But we're talking about the interest  
 20 accruing on the proved debts --  
 21 MR DICKER: Correct.  
 22 LORD JUSTICE PATTEN: -- at a rate under the contract that  
 23 would be higher than the amount you'd recover under  
 24 2.88?  
 25 MR DICKER: Correct. So we only get here if 2.88 doesn't

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1 give you a full entitlement. If it does, there's  
 2 nothing to argue about. We're only get here if the  
 3 judge was wrong that it's an exclusive code because if  
 4 he was right about that, it is gone and there's nothing  
 5 to argue about.  
 6 LADY JUSTICE GLOSTER: But if he's wrong on exclusive code  
 7 and you have got a non-provable claim --  
 8 MR DICKER: For the shortfall and the question is whether or  
 9 not that's a Pyrrhic victory because under the --  
 10 LORD JUSTICE BRIGGS: Because you've sold your --  
 11 LADY JUSTICE GLOSTER: You sold the parts.  
 12 LORD JUSTICE BRIGGS: That's right. (Overspeaking) in the  
 13 CRA -- this is CRAs and CDDs.  
 14 MR DICKER: Yes.  
 15 LADY JUSTICE GLOSTER: Yes, I see. But all he's deciding at  
 16 59 is the release point?  
 17 MR DICKER: At 60 he's deciding -- he's already decided in  
 18 part A --  
 19 LADY JUSTICE GLOSTER: Yes.  
 20 MR DICKER: -- the scope of 2.88 and the fact that it's  
 21 an exclusive code.  
 22 LADY JUSTICE GLOSTER: Code, yes.  
 23 MR DICKER: So 60, essentially it's a part B issue.  
 24 LORD JUSTICE PATTEN: If it's not an exclusive code.  
 25 MR DICKER: On the assumption it's not an exclusive code,

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1 you've given it up.  
 2 LORD JUSTICE PATTEN: The question is whether it is cut out  
 3 by the agreement?  
 4 MR DICKER: Correct. This is all about the construction of  
 5 the agreement.  
 6 LORD JUSTICE PATTEN: Yes.  
 7 MR DICKER: And if the effect of those agreements was to  
 8 release such claims, whether or not Ex parte James and  
 9 paragraph 74 apply, in the way they had applied in  
 10 relation to currency conversion claims.  
 11 LORD JUSTICE BRIGGS: Yes.  
 12 LADY JUSTICE GLOSTER: So he just gives the same reason as  
 13 he's given in Waterfall IIB, does he, here, in 60?  
 14 MR DICKER: What's slightly odd, we would say, is, and  
 15 what's immediately apparent is, that he's reached  
 16 a different conclusion in relation to interest than he  
 17 reached in relation to currency conversion claims --  
 18 LORD JUSTICE BRIGGS: Yes.  
 19 MR DICKER: -- on this part.  
 20 Currency conversion claims have not been released by  
 21 the document. Non-provable claims to interest have  
 22 been. Releases of currency conversion claims, if they  
 23 occurred, could not be enforced because of Ex parte  
 24 James and paragraph 74 but non-provable claims for  
 25 interest would be.

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1 LADY JUSTICE GLOSTER: Yes. But what I'm struggling with is  
 2 what is he referring to when he says "As I held in  
 3 Waterfall IIB"? Because, as you've reminded me, in  
 4 Waterfall IIB, he holds that as a matter of  
 5 construction, currency conversion claims are not  
 6 excluded.  
 7 MR DICKER: Well those are --  
 8 LADY JUSTICE GLOSTER: So what is he referring to?  
 9 MR DICKER: Those are non-provable claims.  
 10 LADY JUSTICE GLOSTER: Yes. Oh, I see, so it is provable.  
 11 So the emphasis is on provable claims?  
 12 MR DICKER: I think it must be.  
 13 LORD JUSTICE BRIGGS: And that's, in a sense, the whole  
 14 thrust of his decision in Waterfall IIB, which is  
 15 that --  
 16 LADY JUSTICE GLOSTER: What paragraph is he referring to?  
 17 LORD JUSTICE BRIGGS: -- because the use of sterling was  
 18 simply designed so as to enable the agreements to deal  
 19 fully and finally with provable claims. That's what he  
 20 was -- if you boil it all down to one sentence, that's  
 21 what he was saying --  
 22 LADY JUSTICE GLOSTER: What paragraph is that referring to?  
 23 MR DICKER: I'm not sure.  
 24 LADY JUSTICE GLOSTER: Right.  
 25 LORD JUSTICE PATTEN: Well don't we need to look at the

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1 agreement? Because I think what the judge is saying is  
 2 that your provable claim becomes the amount provided  
 3 under, for example, the CDDs. We know he's held in his  
 4 Waterfall IIB judgment that that doesn't exclude  
 5 currency conversion claims, for all the reasons you've  
 6 gone into, but he's held that it does provide the amount  
 7 of your provable claims and it provides the terms on  
 8 which that amount is paid, which I take him to be  
 9 saying, exclude the possibility of contractual interest  
 10 continuing to run.  
 11 LORD JUSTICE BRIGGS: Outside the statute.  
 12 MR DICKER: This is a question of construction. Obviously,  
 13 the same argument -- the argument that we make in  
 14 relation to currency conversion claims, plainly can't be  
 15 made in relation to interest --  
 16 LORD JUSTICE BRIGGS: No.  
 17 MR DICKER: -- because we're not concerned with conversion.  
 18 So there's a different question of construction and  
 19 a focus on different provisions.  
 20 But the starting point is one needs to start by  
 21 noting how the judge concluded that creditors had not  
 22 released their right to statutory interest under  
 23 Rule 2.88.  
 24 Now, I say that because if one goes to -- to take  
 25 the admitted claims CDD you have been taken to which is

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1 in bundle B2, tab 7, and go to clause 2, what one gets  
 2 in 2.1 is that:  
 3 "The creditor shall have an admitted claim in  
 4 an amount equal to the agreed claim amount."  
 5 And one has seen that is a fixed sum. Then in 2.3:  
 6 "Save solely for the admitted claim, the creditor  
 7 and the company and the administrators hereby  
 8 irrevocably and unconditionally released and forever  
 9 discharged from any and all losses, costs, charge  
 10 expenses, claims, including all claims for interest ..."  
 11 And then dropping to the last three lines:  
 12 "... whether in existence now, coming into existence  
 13 at some time in the future, whether or not in the  
 14 contemplation of the creditor and/or company and/or the  
 15 administrators on the date hereof."  
 16 Now, if one reads that literally, as the judge said,  
 17 that gives you a right to a fixed sum and no claim to  
 18 interest over and above any interest which had been  
 19 wrapped up in the fixed sum.  
 20 The judge's response was that may be what it appears  
 21 to say but that's not, plainly, what it means.  
 22 LORD JUSTICE BRIGGS: He just said the admitted claim  
 23 carried with it, statutory interest.  
 24 MR DICKER: Yes, and to be fair, my learned friend accepted  
 25 below:

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1 "This did not amount to a release of a creditor's  
 2 claim to statutory interest because the right to  
 3 statutory interest is an incident or an attribute of the  
 4 admitted claim ..."  
 5 LORD JUSTICE BRIGGS: Yes.  
 6 MR DICKER: "... with the result the admitted claim CDD  
 7 could not be read entirely literally."  
 8 A similar point obviously arises in relation to the  
 9 agreement:  
 10 "... not to take any steps to prove for or to claim  
 11 for any debt in the administration or other insolvency  
 12 process of the company, save in respect of any and all  
 13 of the claims and matters that are referred to in  
 14 clause 2.3 above."  
 15 LADY JUSTICE GLOSTER: Mr Dicker, aren't we back to what the  
 16 admitted claim means?  
 17 MR DICKER: Yes. The short difference --  
 18 LADY JUSTICE GLOSTER: If your arguments are right on the  
 19 previous point about construction of the previous --  
 20 what the admitted claim means, aren't you right here as  
 21 well?  
 22 MR DICKER: We say, essentially, the debate between the two  
 23 of us is -- you can't read 2.3 entirely literally -- is  
 24 the only thing that the parties intended to preserve was  
 25 interest under 2.88 or were they also intending to

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1 preserve a right to non-provable interest, in the event  
 2 there was a --  
 3 LORD JUSTICE BRIGGS: On proved debts.  
 4 MR DICKER: In the event that 2.88 didn't cover it.  
 5 LORD JUSTICE PATTEN: Yes, but you've got to give some --  
 6 the words "including all claims for interest", have to  
 7 apply to something. They can't apply to the interest  
 8 that's accrued to you at the date you've put your proof  
 9 in because that's part of the debt for which you prove.  
 10 So it is therefore going to, and is wrapped up in, the  
 11 admitted amount, but it's got to apply, therefore, to  
 12 interest that's falling due on the provable debt from  
 13 that date onwards, one would have thought. It's  
 14 accepted in your favour it doesn't apply to statutory  
 15 interest. Well, then, query, what does it apply to?  
 16 The only thing it can apply to is the residue of your  
 17 contractual claim for interest that isn't covered by  
 18 statutory interest. Are you suggesting that no effect  
 19 should be given to those words?  
 20 MR DICKER: No. Plainly -- go back to the example I gave of  
 21 a creditor with claims 1 through to 10. He chooses not  
 22 to prove for claims 2 to 10. He loses those claims,  
 23 plus any claim to interest on those claims.  
 24 So far as claim 1 is concerned, he chooses to prove  
 25 for it.

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1 LORD JUSTICE PATTEN: Yes.  
 2 MR DICKER: And assume there's no dispute. Submits a claim  
 3 for 1 million. The administrator says "Absolutely,  
 4 I agree. Here's a CDD". He signs an agreement saying  
 5 he gives up all rights to interest on that sum. It is  
 6 common ground and the judge agreed, he hasn't given up  
 7 his statutory right to interest under 2.88. We say,  
 8 similarly, as a matter of construction, he hasn't given  
 9 up his right to any non-provable claim to interest on  
 10 his proved debt.  
 11 Now, there's one additional point in this respect.  
 12 When one comes to 2.88(9), you'll remember you're only  
 13 entitled to -- you get, rather, the greater of the  
 14 Judgments Act rate and the rate applicable to the debt  
 15 apart from the administration.  
 16 Now, an argument made below, not pursued before this  
 17 court, was that because the release has effectively  
 18 extinguished your underlying claim, when you come to  
 19 deal with calculating interest under 2.88 --  
 20 LADY JUSTICE GLOSTER: You can't use the contractual rate.  
 21 MR DICKER: -- you can't use the contractual rate because  
 22 there's no contract. The judge said "That can't be  
 23 right. This entitles you to refer back to the  
 24 underlying contract. You were plainly intended to be  
 25 able to do so for the purposes of calculating the

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1 interest which you should receive on your proved debt,  
 2 pursuant to 2.88(9)". So that's another --  
 3 LORD JUSTICE PATTEN: All right. But in terms of wording,  
 4 it just comes down to what's meant by "all claims for  
 5 interest", does it?  
 6 MR DICKER: And in this context, in our submission, one  
 7 needs to bear in mind the cautionary observation of  
 8 Lord Bingham in BCCI v Ali. He made the point when  
 9 people use releases, they invariably use the widest  
 10 possible words that they can and as a result, it is  
 11 extremely important to identify precisely the context or  
 12 the area within which those releases were intended to  
 13 operate.  
 14 LADY JUSTICE GLOSTER: Mr Dicker, the way I am looking at  
 15 it, but tell me if I'm wrong, is that what matters here,  
 16 as it did on your previous argument, is whether or not  
 17 this non-provable claim for interest comes within the  
 18 definition of "admitted claim".  
 19 MR DICKER: Yes.  
 20 LADY JUSTICE GLOSTER: Because if it is within the  
 21 definition of "admitted claim", or within the concept or  
 22 whatever you want to call it and then it is preserved by  
 23 the "save solely" words, even though, subsequently,  
 24 we're looking at claims for interest -- because it's all  
 25 part of the animal, it's part of the tree that is the

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1 concept of the admitted claim.  
 2 MR DICKER: Yes, absolutely right. And the image which we  
 3 have had on this side we have found helpful is,  
 4 essentially, a distinction between the sort of X and Y  
 5 axes, if I can use those.  
 6 LADY JUSTICE GLOSTER: Yes.  
 7 MR DICKER: So you have claims 1 to 10. 2 to 10 disappear  
 8 but this is not really intended to effect the one you've  
 9 chosen to prove, that there's no dispute about, which  
 10 the administrator accepts is just to prevent you coming  
 11 back in relation to that one and changing the amount of  
 12 the proof, increasing it, so as to get a bigger share of  
 13 the distribution amongst unsecured creditors than you  
 14 would otherwise get.  
 15 LADY JUSTICE GLOSTER: Yes.  
 16 MR DICKER: Otherwise it is meant to operate in exactly the  
 17 same way as a normal proof would and just as 2.88 is  
 18 an incident or attribute of the claim which you have  
 19 submitted to proof, so too, if we're wrong about the  
 20 scope of 2.88 and the judge is wrong about it being  
 21 an exclusive code, is non-provable interest in that  
 22 claim.  
 23 LORD JUSTICE PATTEN: But you haven't submitted your claim  
 24 for interest to proof. That's simply the amount of the  
 25 debt. Even on your interpretation, it's still the

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1 amount of the debt. It doesn't include any element of  
 2 interest proceeding thereafter.  
 3 MR DICKER: No, because the rules say --  
 4 LORD JUSTICE PATTEN: Exactly.  
 5 MR DICKER: -- that you can't prove for --  
 6 LORD JUSTICE PATTEN: Quite. And your argument is that that  
 7 is simply no more than a contractual way of giving  
 8 effect to the rules.  
 9 MR DICKER: Yes. Our argument is that in this respect at  
 10 least, the rules operate in the way a normal submission  
 11 to prove would and you can imagine -- forget about the  
 12 CDD --  
 13 LORD JUSTICE PATTEN: Yes.  
 14 MR DICKER: -- exactly the same discussion taking place,  
 15 with exactly the same result. A sum is fixed and the  
 16 administrator says "I agree that is the amount of your  
 17 claim. That is the amount for which I will admit it to  
 18 proof". You can't prove for post-insolvency interest --  
 19 LORD JUSTICE PATTEN: No.  
 20 MR DICKER: -- but you will receive interest under 2.88 and  
 21 if we're right, it's not an exclusive code. You will  
 22 also receive non-provable interest on that sum.  
 23 LORD JUSTICE PATTEN: But is this right, that the judge  
 24 is -- just looking forward slightly, the judge's  
 25 paragraph 61, reasoning about Ex parte James, is simply

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1 that he says the point of construction that we've just  
 2 discussed is so clear, the answer is so clear, that  
 3 there was no unfairness because -- am I reading too  
 4 much? That it would have been obvious to your clients,  
 5 as much as to anybody else, that they were giving up  
 6 a right to continuing contractual interest?  
 7 MR DICKER: Yes. I haven't got on, obviously, to Ex parte  
 8 James or paragraph 74.  
 9 LORD JUSTICE PATTEN: No, I know you haven't but that's the  
 10 way the judge is dealing with it, isn't he?  
 11 MR DICKER: In other words, as everyone appreciated --  
 12 LORD JUSTICE PATTEN: They might not have appreciated that  
 13 they were giving up or intending to give up currency  
 14 conversion claims, but what anybody reading the document  
 15 would have appreciated is that they were giving up  
 16 interest.  
 17 MR DICKER: Yes, that shows a certain degree of legal  
 18 foresight --  
 19 LORD JUSTICE PATTEN: Yes.  
 20 MR DICKER: -- that maybe not all of us have because it  
 21 would require a creditor to have appreciated that --  
 22 LORD JUSTICE PATTEN: I'm not saying the judge is right, I  
 23 just merely want to make sure I've understood what the  
 24 judge's reasoning is.  
 25 MR DICKER: Yes. That does appear to be the distinction

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1 he's drawing.  
 2 LORD JUSTICE PATTEN: Yes.  
 3 MR DICKER: It's clear here it isn't in relation to the  
 4 currency conversion claim.  
 5 Now, is it clear here? Well, only if you're  
 6 expected to understand that Rule 2.88 doesn't provide  
 7 you with your full entitlement. In other words, you're  
 8 expected to understand that whatever happened between  
 9 1869 and 1986, no longer happens, but there is therefore  
 10 the possibility of a shortfall which won't be picked up,  
 11 that the judge was wrong about Rule 2.88 being  
 12 an exclusive code, such that there's something there for  
 13 you to give up. That does appear to be the distinction  
 14 which the judge has sought to draw.  
 15 LORD JUSTICE BRIGGS: Do you get into slightly more  
 16 difficult territory, when we look at the version of the  
 17 admitted claims CDD that expressly preserves statutory  
 18 interest for the avoidance of doubt? Because I think we  
 19 were all working, up until now, on the assumption that  
 20 that effectively made express what everybody said had  
 21 been implied in the one we've just been looking at, the  
 22 vanilla form of admitted claims CDD, with no reference  
 23 to the preservation of statutory interest.  
 24 MR DICKER: Made express, at least part of --  
 25 LORD JUSTICE BRIGGS: Yes, you have to say "part of", don't

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1 you?  
 2 MR DICKER: Yes. No, plainly, and the reason why statutory  
 3 interest was inserted was because creditors had  
 4 identified the possibility that the releases might  
 5 exclude statutory interest.  
 6 LORD JUSTICE BRIGGS: Yes.  
 7 MR DICKER: Now at that stage, if everyone had been working  
 8 on the -- if I may call it the pre-1986 position in  
 9 relation to liquidations --  
 10 LORD JUSTICE BRIGGS: Yes.  
 11 MR DICKER: -- that would have been sufficient, everything  
 12 would have been covered.  
 13 LADY JUSTICE GLOSTER: Could you just explain to me why you  
 14 say at paragraph 60 of the supplemental issue judgment,  
 15 the judge is making the distinction you say he was  
 16 between currency conversion claims, nobody knew about  
 17 them, and oh well, people might have thought about the  
 18 possibility of future interest claims? Because the way  
 19 I read paragraph 60, I think the judge is basing his  
 20 conclusion, not on what is the nature of an admitted  
 21 claim, what are its incidents, but rather, on the wide  
 22 terms of the release.  
 23 MR DICKER: My understanding, and it is shortly expressed in  
 24 60, is the judge is drawing a distinction between  
 25 non-provable claims, currency conversion claims which

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1 are not released --  
 2 LADY JUSTICE GLOSTER: Yes.  
 3 MR DICKER: -- and provable claims which he said are  
 4 intended to be fully dealt with by this.  
 5 The question then arises: well, what are we dealing  
 6 with here? We're dealing with a non-provable claim to  
 7 interest.  
 8 LADY JUSTICE GLOSTER: Precisely.  
 9 MR DICKER: So why is the judge assuming that that is to be  
 10 dealt with not in the same way as a non-provable  
 11 currency conversion claim?  
 12 LADY JUSTICE GLOSTER: Yes.  
 13 LORD JUSTICE BRIGGS: He says because it's a claim on a  
 14 provable debt, for interest on a provable debt.  
 15 MR DICKER: In a sense, so also is the currency  
 16 conversion --  
 17 LADY JUSTICE GLOSTER: Precisely. That's why I don't  
 18 understand the distinction between the two situations.  
 19 MR DICKER: And we respectfully agree.  
 20 LORD JUSTICE PATTEN: Yes, but it's a non-provable debt only  
 21 in the sense that the assumption that the sterling  
 22 equivalent of the dollar sum is worth the same in your  
 23 hand is falsified by subsequent events. Otherwise,  
 24 analytically, it is undoubtedly, as of day one, part of  
 25 the provable debt, whichever currency you operate in.

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1 MR DICKER: And on that basis, you could say -- you could  
 2 argue that a currency conversion claim was actually  
 3 closer to a provable debt because at least --  
 4 LORD JUSTICE PATTEN: Exactly, a currency conversion claim  
 5 clearly is, yes.  
 6 MR DICKER: Whereas a non-provable claim --  
 7 LORD JUSTICE PATTEN: An interest claim never can be, by  
 8 definition. That's the difference, I think.  
 9 MR DICKER: We would say both are non-provable and both  
 10 would normally be paid to a creditor who submitted  
 11 a proof in the ordinary way and this agreement wasn't --  
 12 LORD JUSTICE PATTEN: If in answer to my Lady's question the  
 13 position is that as a matter of construction, if you  
 14 like, if that's the right way of putting it, the balance  
 15 of continuing contractual interest is not within the  
 16 concept of or within the admitted claim for the purposes  
 17 of the agreement, I thought in relation to currency  
 18 conversions you accepted that the wording, if we were  
 19 into the release clause, 2.13, was wide enough to  
 20 release it.  
 21 MR DICKER: Yes, if either of those are --  
 22 LORD JUSTICE PATTEN: So is the same not the position here?  
 23 MR DICKER: The answer to that is "yes". If you're simply  
 24 looking at the words in 2.3 "All claims to interest" --  
 25 LORD JUSTICE PATTEN: Then you're out?

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1 MR DICKER: Correct.  
 2 LORD JUSTICE PATTEN: Yes. Just as in the other currency  
 3 conversion part of this argument, you've got to be able  
 4 to shelter within what is meant by "an admitted claim"?  
 5 MR DICKER: Yes. That's, again, going back again to the  
 6 image of claims 1 to 10.  
 7 LORD JUSTICE BRIGGS: Yes.  
 8 LORD JUSTICE PATTEN: Yes.  
 9 MR DICKER: If it is of any help, the X or Y axis --  
 10 LORD JUSTICE PATTEN: No, I understand.  
 11 MR DICKER: -- or, as I think my learned friend put it at  
 12 one stage when accepting the releases didn't amount to  
 13 a release of a creditor's claim to interest because "the  
 14 right to statutory interest is an incident or  
 15 an attribute of the admitted claim".  
 16 The context, we say, does assist this construction  
 17 because, just as with currency conversion claims,  
 18 releasing non-provable claims to interest on a proved  
 19 debt is an entirely irrelevant part of what the  
 20 administrators were trying to achieve. It didn't help  
 21 them one jot in their task of making a distribution.  
 22 Again, in terms of consistency of reasoning, I will  
 23 come on to this in a moment, but one also needs to bear  
 24 in mind the judge himself concluded that the agreement  
 25 did not release a non-provable claim to interest on

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1 a non-provable currency conversion claim.  
 2 LORD JUSTICE BRIGGS: No.  
 3 MR DICKER: So again if one looks at 2.3 "all claims to  
 4 interest", they've gone. The judge says "No,  
 5 a non-provable claim to interest doesn't go but if, and  
 6 only if, it is a non-provable claim to interest on  
 7 a currency conversion claim".  
 8 In our submission, the concept to hold on to here is  
 9 the idea of the creditor submitting a proof, getting  
 10 an agreed sum for that claim and to be entitled to the  
 11 normal incidents and attributes on that claim which he  
 12 would have received if he had proved in the normal way.  
 13 LORD JUSTICE PATTEN: But do you say that that's  
 14 inconsistent with his reasoning in relation to  
 15 continuing contractual interest on the proved debt?  
 16 MR DICKER: In our submission, it's hard to see how the two  
 17 decisions --  
 18 LORD JUSTICE PATTEN: Right. So they are either both right  
 19 or both wrong --  
 20 MR DICKER: Yes.  
 21 LORD JUSTICE PATTEN: -- for the same reason?  
 22 MR DICKER: Realistically.  
 23 LORD JUSTICE PATTEN: Yes.  
 24 MR DICKER: Just because I can deal with it very briefly,  
 25 Ex parte James and paragraph 74, my learned friend said

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1 it's essentially exactly the same issues, the only  
 2 difference is we're applying it now to non-provable  
 3 claims to interest rather than non-provable currency  
 4 conversion claims.  
 5 We do say in 61, where the judge says:  
 6 "The clear purpose, as reflected in the terms of the  
 7 agreements, is to compromise the provable claims of  
 8 creditors to interest on those claims."  
 9 There is nothing unfair or improper in giving effect  
 10 to those terms if, as appears to be the case, he is  
 11 saying, "Well, you knew what were you doing in this  
 12 situation". We say, with the greatest respect, that  
 13 can't possibly be right.  
 14 I still then have the fourth item to deal with. It  
 15 won't take me more than a few minutes but I notice the  
 16 time, and I wonder if that will be a convenient moment.  
 17 LADY JUSTICE GLOSTER: Very well. We're going to finish  
 18 well this afternoon?  
 19 MR DICKER: Yes. I will be --  
 20 LADY JUSTICE GLOSTER: We're not going to be up against it?  
 21 MR DICKER: We will have no difficulty, I would have  
 22 thought, finishing and I have no more than, I would have  
 23 thought, ten minutes.  
 24 LADY JUSTICE GLOSTER: Yes. What about you, Mr Zacaroli?  
 25 MR ZACAROLI: Absent a very heavy headwind, I am confident

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1 of finishing this afternoon, well within the time this  
 2 afternoon.  
 3 LADY JUSTICE GLOSTER: We would hope to finish before  
 4 4.15 pm.  
 5 MR ZACAROLI: Yes, I would think I would have got about no  
 6 more than an hour.  
 7 LADY JUSTICE GLOSTER: We'll try and not interrupt quite so  
 8 much.  
 9 (1.01 pm)  
 10 (The short adjournment)  
 11 (2.00 pm)  
 12 LADY JUSTICE GLOSTER: Yes, Mr Dicker.  
 13 MR DICKER: One very short point arising out of this  
 14 morning. There is obviously a question as to whether or  
 15 not the different answers the judge gave to the  
 16 different questions, can logically sit with each other.  
 17 Just so the court is clear, one comparison which  
 18 could be made is between the release of currency  
 19 conversion claims on the one hand and interest on the  
 20 other.  
 21 Now, in relation to that, plainly the arguments of  
 22 construction are slightly different.  
 23 LADY JUSTICE GLOSTER: Yes.  
 24 MR DICKER: And, in our submission, the answer to one  
 25 doesn't necessarily determine the answer to the other.

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1 LADY JUSTICE GLOSTER: Predicate the other.  
 2 MR DICKER: Where, however, one is dealing with, on the one  
 3 hand, release of non-provable claims to interest on  
 4 approved debt --  
 5 LADY JUSTICE GLOSTER: Yes.  
 6 MR DICKER: -- on the one hand and non-provable claims to  
 7 interest on a non-provable currency conversion claim on  
 8 the other, in our submission, it is harder to see --  
 9 LADY JUSTICE GLOSTER: I yes.  
 10 MR DICKER: -- how a logical distinction could be drawn.  
 11 And that does then bring me to the last item, which  
 12 is item 4 in the part B list. Here we are concerned  
 13 with non-provable interest on a non-provable currency  
 14 conversion claim.  
 15 As you know, the judge held as part of part A that  
 16 such a claim exists and survives Rule 2.88 and the  
 17 question is now: has it been released on the  
 18 construction of the various agreements?  
 19 Now, the judge here reached a different result,  
 20 depending on whether one's talking about a CDD or the  
 21 CRA.  
 22 And dealing with each in turn, if you go to his  
 23 judgment at -- it's bundle A, volume 2, tab 1. He deals  
 24 with supplemental issue 5, which is item 4, paragraph 62  
 25 to 68, and my learned friend took you through this.

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1 LADY JUSTICE GLOSTER: Yes.  
 2 LORD JUSTICE PATTEN: Sorry, which paragraph did you say?  
 3 MR DICKER: It is paragraphs 62 to 68.  
 4 LORD JUSTICE PATTEN: Yes.  
 5 MR DICKER: I want to start with the CDDs which he deals  
 6 with in paragraph 67 and 68. In 67 he says:  
 7 "I've held those provisions in the CDDs do not  
 8 release currency conversion claims and, if that is  
 9 right, it is not a plausible construction to read  
 10 general words, including 'all claims for interest', as  
 11 extending to contractual interest on the currency  
 12 conversion claims.  
 13 "As I have held under supplemental issue 4, they are  
 14 by contrast, effected to release contractual interest on  
 15 claims that are subject to the CDDs."  
 16 We obviously say the judge was right as a matter of  
 17 construction --  
 18 LADY JUSTICE GLOSTER: Yes.  
 19 MR DICKER: -- in paragraph 67. In 68 he deals with the  
 20 paragraph 74 and Ex parte James point in the second  
 21 sentence, where he says:  
 22 "However, they would be directed to do so if the  
 23 CDDs, on their true construction, released any claim to  
 24 contractual interest and currency conversion claims ..."  
 25 LADY JUSTICE GLOSTER: And you say he was right on that?

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<p>1 MR DICKER: Yes, and we say again, he was right on that.                  2 The judge reached the opposite conclusion on both                  3 points in relation to the CRA and he dealt with that, as                  4 my learned friend said, in 64 to 66.                  5 The essential difference is that the term of the                  6 release is different in the CRA. Take, for example,                  7 20.4.7 in paragraph 64:                  8 "In determining the close-out amount in respect of                  9 a financial contract, no interest shall accrue on any                  10 unpaid liability of the company from the administration                  11 date, save to the extent such interest would accrue                  12 under Rule 2.88 of the Insolvency Rules."                  13 Now, we say this is one of those cases in which it                  14 is plain that a mistake has been made and which the                  15 court is entitled to cure as a matter of construction.                  16 We say that because it makes absolutely no sense to                  17 preserve a creditor's right to interest under                  18 Rule 2.88(7) and (9) but to exclude a creditor's -- and                  19 also to preserve a right to a creditor's claim to                  20 a currency conversion claim. So to preserve both of                  21 those things, it makes no sense to exclude interest on                  22 the currency conversion claim.                  23 There is no possible reason why the parties may have                  24 wanted to, as it were, lop off that last stage.                  25 So whilst --</p> <p style="text-align: center;">Page 81</p>	<p>1 So our short submission is if you look at the                  2 collection of things which have been preserved, although                  3 on its face, 20.4.7 is, we accept, expressed so as to                  4 preserve solely a claim for interest under 2.88, this is                  5 one of those cases in which it is plain a mistake has                  6 been made.                  7 It is not hard to see how the mistake has been made,                  8 in the sense that if everyone, at this stage, is                  9 thinking that 2.88 gives everyone their full contractual                  10 entitlement, then there's nothing left over anyway.                  11 The final point I would make --                  12 LORD JUSTICE BRIGGS: Then why do you need to say "save to                  13 the extent that"? If you get everything you could                  14 possibly want under 2.88, why have that form of                  15 language? There wouldn't be anything to exclude.                  16 MR DICKER: Your Lordship is right. Our point is simply                  17 that having -- as I say, looking at everything that is                  18 preserved, although the language suggests that the only                  19 thing that is preserved here is statutory interest, as                  20 I say, this is one of those cases, in our submission,                  21 where it is plain a mistake has been made and the court                  22 is entitled, as a matter of construction, to add the                  23 words the parties no doubt would have added.                  24 Now, you may recall, and I won't take you back                  25 there, but one of the paragraphs from Mr Copley's</p> <p style="text-align: center;">Page 83</p>
<p>1 LADY JUSTICE GLOSTER: This is putting the bit of paper,                  2 rice paper between his finding in relation to currency                  3 conversion claims and his finding in relation to                  4 interest on currency?                  5 MR DICKER: Yes. One can see, in a sense, how the judge got                  6 there.                  7 LADY JUSTICE GLOSTER: Yes.                  8 MR DICKER: If you say a currency conversion claim is                  9 preserved, in the sense that it's non-provable, it's the                  10 balance that you're owed, you weren't intended to                  11 release it, well what is, really, the thing you are                  12 preserving? It's the underlying right which is not                  13 merely the balance you're owed but it's the interest to                  14 which you are also entitled.                  15 Now, if you then go on to say --                  16 LADY JUSTICE GLOSTER: Under your contract.                  17 MR DICKER: Under the contract. Now if you also go on to                  18 say: well is there any issue in relation to preserving                  19 interest, as opposed to a currency conversion claim, so                  20 as to lead to a different conclusion? Well, the judge                  21 says: so far as statutory interest is concerned, no,                  22 because that hasn't been released. That's true, even                  23 where the statutory interest is in respect of the rate                  24 applicable to the debt, apart from the administration                  25 which requires reference to the underlying contract.</p> <p style="text-align: center;">Page 82</p>	<p>1 statement. It's paragraph 27. The witness statement is                  2 obviously dealing with currency conversion claims but he                  3 says in paragraph 27:                  4 "To the best of my knowledge, the first assertion,                  5 namely the joint administrators did not indicate that                  6 the CDDs were intended to release non-provable claims,                  7 is accurate."                  8 And we say that essentially reflects the position,                  9 although one such non-provable claim was a currency                  10 conversion claim. Just as they didn't intend to release                  11 that, nor similarly, did they intend to release interest                  12 on currency conversion claims.                  13 LADY JUSTICE GLOSTER: Could you give me a reference,                  14 please, to a relevant CRA for this purpose, just so                  15 I can note it?                  16 MR DICKER: Tab 1 of bundle 3. This is a CRA CDD -- I'm                  17 sorry, this is obviously concerned not with this, as                  18 such, but with the CRA itself.                  19 LADY JUSTICE GLOSTER: Yes, exactly.                  20 LORD JUSTICE BRIGGS: The CRA is tab 11.                  21 LADY JUSTICE GLOSTER: Tab 11, is it?                  22 MR DICKER: That's tab 11, yes.                  23 LADY JUSTICE GLOSTER: In which bundle?                  24 LORD JUSTICE BRIGGS: It is 3.                  25 MR DICKER: And the two paragraphs my learned friend</p> <p style="text-align: center;">Page 84</p>

1 referred you to which I think are the relevant ones, are  
 2 25.1 --  
 3 LADY JUSTICE GLOSTER: Hang on, what bundle are we in,  
 4 bundle 3?  
 5 MR DICKER: Yes, I'm sorry, tab 11 --  
 6 LADY JUSTICE GLOSTER: Yes.  
 7 MR DICKER: -- he referred you to 25.1, the last sentence of  
 8 that.  
 9 LORD JUSTICE BRIGGS: Yes.  
 10 MR DICKER: And also 20.4.7 which is on page 144.  
 11 LORD JUSTICE PATTEN: Right.  
 12 LADY JUSTICE GLOSTER: And everybody who entered into a CRA,  
 13 then entered into a CDD or those are the ones we're  
 14 concerned with anyway?  
 15 MR DICKER: The ones we're concerned with, I think the  
 16 answer to that is yes. Whether or not everyone did,  
 17 I don't think I'm in a position to say.  
 18 LORD JUSTICE PATTEN: I'm not clear, Mr Dicker, what -- your  
 19 argument seems to be that although the wording of 24.7  
 20 and 25.1 clearly limits interest to statutory interest,  
 21 the language isn't difficult, you say that was an error.  
 22 Well, we're not here to try a case of rectification, so  
 23 how do we get there by construction?  
 24 MR DICKER: Well, the court can -- mistake obviously can  
 25 give rise to rectification.

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1 LORD JUSTICE PATTEN: Yes.  
 2 MR DICKER: But on the basis of the authorities, if the  
 3 court is clear both that a mistake has been made and  
 4 it's clear how the parties would have addressed it, then  
 5 the court can, as it were, insert those words or delete  
 6 such words as are necessary to deal with the mistake as  
 7 a matter of construction.  
 8 LORD JUSTICE BRIGGS: You have to do the same to 25.1, don't  
 9 you?  
 10 MR DICKER: Yes.  
 11 LORD JUSTICE PATTEN: Well, I hear what you say, but I think  
 12 there are limits to that. You can't just start to  
 13 rewrite the contract to --  
 14 MR DICKER: Your Lordship is right and the authorities hold  
 15 you can only do it when both it's clear that a mistake  
 16 has been made and it's clear what the parties would have  
 17 inserted, had they not made that mistake.  
 18 LORD JUSTICE PATTEN: Yes.  
 19 MR DICKER: And if I don't succeed on those two points, then  
 20 this is not something which can be resolved as a matter  
 21 of construction.  
 22 LORD JUSTICE BRIGGS: No. (Pause)  
 23 Isn't one of your problems that the way the CRA  
 24 works is that you give up your underlying contractual  
 25 right and it is swapped for a sort of virtual right

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1 which is the comprehensive right set out in the CRA?  
 2 Isn't that how the CRA works?  
 3 LADY JUSTICE GLOSTER: If you look at 4.4.2, what you get --  
 4 4.4.2 on page 119 -- is the right to claim as a new  
 5 obligation of their company, their net financial claim.  
 6 MR DICKER: Again --  
 7 LORD JUSTICE BRIGGS: Which is an artificial construct.  
 8 MR DICKER: You haven't been taken to that but there was  
 9 an issue before the judge below which turned on  
 10 precisely that provision.  
 11 LADY JUSTICE GLOSTER: What, on that argument?  
 12 MR DICKER: The issue was -- if you take that literally and  
 13 say you have a new claim and it's a US dollar claim --  
 14 assume you're a sterling creditor and you swap your  
 15 sterling claim for a US dollar claim under the CRA,  
 16 could you then effectively get a currency conversion  
 17 claim which you didn't have before?  
 18 LADY JUSTICE GLOSTER: Yes.  
 19 MR DICKER: And the judge said the answer to that is "No,  
 20 this is not a new claim in that way", and indeed, it  
 21 can't be a new claim in that way because then,  
 22 effectively, the administrator would be creating new  
 23 liabilities post the administration date which is not  
 24 something he should be doing as part of this process at  
 25 least.

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1 So the CRA undoubtedly involved determining the net  
 2 financial claim of a counterparty to LBIE which involved  
 3 working out how much LBIE owed it and how much it owed  
 4 LBIE, if any, and contained a mechanism which could  
 5 enable that claim to be admitted to proof in due course.  
 6 As I said, as it turned out, the administrators  
 7 asked creditors to sign a CDD instead.  
 8 So the CRA didn't effect a currency conversion  
 9 claim. The judge decided that because, effectively,  
 10 that wasn't a consequence of stating that the claim had  
 11 gone but in US dollars. We're now dealing with whether,  
 12 even though it didn't ensure you -- didn't remove  
 13 a currency conversion claim you had, nevertheless,  
 14 somehow you lose part of your right to interest on that  
 15 currency conversion claim, as a result of going through  
 16 the CRA mangle.  
 17 LORD JUSTICE BRIGGS: Yes, okay, yes. (Pause)  
 18 MR DICKER: Can I just make one further point, which is  
 19 a potential point of construction. If one goes back to  
 20 20.4.7 at page 144. Again, alternatively, it may just  
 21 be a different way of making the same point but what is  
 22 20.4.7 really trying to do?:  
 23 "No interest will accrue on any unpaid liability of  
 24 the company from the administration date, save to the  
 25 extent such interest would accrue under Rule 2.88 of the

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<p>1 Insolventy Rules."</p> <p>2 One way of reading that is, effectively, the</p> <p>3 administrator is making it plain in the CRA that the</p> <p>4 effect of the statutory scheme is that you will receive</p> <p>5 interest under Rule 2.88 and if that's really what this</p> <p>6 clause is getting at, to confirm you are entitled to</p> <p>7 interest under 2.88 because that's part of the statutory</p> <p>8 scheme, we would say equally, part of the statutory</p> <p>9 scheme is that if you have a non-provable currency</p> <p>10 conversion claim, you're also entitled to interest on</p> <p>11 that currency conversion claim.</p> <p>12 LADY JUSTICE GLOSTER: Yes.</p> <p>13 MR DICKER: The only other point I would make is this, and</p> <p>14 it may be more a plea than anything else, but in our</p> <p>15 submission, it would be enormously unfortunate if</p> <p>16 creditors, as it were, were, if I can put it this way,</p> <p>17 caught out by issues of this sort, not just from the</p> <p>18 perspective of creditors but, obviously, from the</p> <p>19 perspective of an administrator wanting to engage in</p> <p>20 this sort of process in due course. It's plainly</p> <p>21 a useful and desirable one. It would be unfortunate if</p> <p>22 creditors were no longer interested in participating for</p> <p>23 fear of what aspect of their claim they would otherwise</p> <p>24 receive in respect of they would lose through the</p> <p>25 documents they had been given. I simply end on that.</p> <p style="text-align: center;">Page 89</p>	<p>1 MR BAYFIELD: The first reference is to bundle B, volume 3,</p> <p>2 tab 11, the CRA, and it's to paragraph 4.7 of the</p> <p>3 reader's guide which is at page 29 of the tab. It's the</p> <p>4 second paragraph of 4.7, where it reads:</p> <p>5 "Under the agreement, all open financial contracts</p> <p>6 will have to be terminated, in order for the company to</p> <p>7 determine that client's net contractual position."</p> <p>8 That was done through clause 19.3 which is at</p> <p>9 page 142. So under the CRA, if one was to enter into</p> <p>10 the CRA as a signatory or to accede to it, the effect</p> <p>11 would be that open contracts would be terminated, so</p> <p>12 that the net financial claim could be established.</p> <p>13 In relation --</p> <p>14 LADY JUSTICE GLOSTER: But there still had to be a process</p> <p>15 after the signing up to the CRA?</p> <p>16 MR BAYFIELD: Of establishing what the value of the claim</p> <p>17 is?</p> <p>18 LADY JUSTICE GLOSTER: Yes?</p> <p>19 MR BAYFIELD: Absolutely but it was done on the basis that</p> <p>20 open contracts would then be terminated pursuant to</p> <p>21 clause 19.3.</p> <p>22 LADY JUSTICE GLOSTER: But they weren't actually terminated</p> <p>23 as on the date of signing up, were they?</p> <p>24 MR BAYFIELD: Well clause 19.3 provides:</p> <p>25 "Each open contract not terminated pursuant to</p> <p style="text-align: center;">Page 91</p>
<p>1 LADY JUSTICE GLOSTER: Well, with the knowledge we now all</p> <p>2 have, presumably all future documents of this sort will</p> <p>3 make it clear what they are and what they are not</p> <p>4 excluding.</p> <p>5 MR DICKER: I expect, so far as those involved in this case</p> <p>6 are concerned, the answer is yes. Whether every</p> <p>7 administrator and every practitioner will get</p> <p>8 sufficiently on top of this case to appreciate its</p> <p>9 nuances, that may be a different question.</p> <p>10 Unless I can help you further, those were my</p> <p>11 submissions.</p> <p>12 LADY JUSTICE GLOSTER: Thank you very much indeed,</p> <p>13 Mr Dicker.</p> <p>14 Yes, Mr Bayfield.</p> <p>15 Submissions by MR BAYFIELD</p> <p>16 MR BAYFIELD: My lady, there were two factual queries which</p> <p>17 arose this morning which I'd like briefly to deal with,</p> <p>18 if I may. The first one was the question of whether or</p> <p>19 not a creditor needed to close out an open contract</p> <p>20 before entering into a CDD.</p> <p>21 LADY JUSTICE GLOSTER: Yes.</p> <p>22 MR BAYFIELD: Can I answer that by, firstly, just giving you</p> <p>23 a couple of references to the CRA, so you can see how</p> <p>24 the CRA dealt with that.</p> <p>25 LADY JUSTICE GLOSTER: Yes, certainly.</p> <p style="text-align: center;">Page 90</p>	<p>1 clause 19.2 shall be deemed to be terminated as between</p> <p>2 the company and the relevant signatory on the relevant</p> <p>3 open contract termination date."</p> <p>4 So one has to go through the definitions but the</p> <p>5 effect was to terminate all open contracts.</p> <p>6 LADY JUSTICE GLOSTER: Yes, I see.</p> <p>7 MR BAYFIELD: And the CDD process followed a similar scheme,</p> <p>8 in that creditors were asked to terminate open contracts</p> <p>9 before entering into a CDD. And that's not entirely</p> <p>10 surprising because if one was to select the value of the</p> <p>11 claim for the purposes of the agreed claim amount but to</p> <p>12 leave the contract open, leaving the contract open would</p> <p>13 be of no real effect, given the release provision, i.e.</p> <p>14 you have to select a number for valuing the claim and</p> <p>15 once that has been agreed, given the release provision,</p> <p>16 it would make no sense for the contract to remain open.</p> <p>17 LADY JUSTICE GLOSTER: Yes.</p> <p>18 MR BAYFIELD: That was the first question. The second</p> <p>19 question related to currency conversion for the purposes</p> <p>20 of establishing which is the greatest claim value, where</p> <p>21 a creditor had claims in different currencies --</p> <p>22 LADY JUSTICE GLOSTER: Yes.</p> <p>23 MR BAYFIELD: -- and also for converting all currencies into</p> <p>24 a single currency for the purposes of the CDD. The</p> <p>25 short answer to that is that the administration date was</p> <p style="text-align: center;">Page 92</p>

<p>1 used for all currency conversion.</p> <p>2 LADY JUSTICE GLOSTER: Yes, thank you. Thank you very much.</p> <p>3 Submissions in reply by MR ZACAROLI</p> <p>4 MR ZACAROLI: I'm going to start with the question of</p> <p>5 construction as it relates to the waiver of currency</p> <p>6 conversion claims.</p> <p>7 LADY JUSTICE GLOSTER: Yes.</p> <p>8 MR ZACAROLI: And that is in the CDDs. Now at the heart of</p> <p>9 my learned friend's submissions on this issue, he</p> <p>10 focused on --</p> <p>11 LADY JUSTICE GLOSTER: Can you just give us the item number,</p> <p>12 please?</p> <p>13 MR ZACAROLI: One. At the heart of my learned friend's</p> <p>14 submissions was the focus on the comparison between the</p> <p>15 different forms of CDD, in particular the agreed claims</p> <p>16 CDD which he says comes first in time and the admitted</p> <p>17 claims CDD. And that, as I say, is the heart of his</p> <p>18 argument because he says the comparisons that you would</p> <p>19 draw from that would lead to absurdities in our</p> <p>20 construction of the admitted claims CDD.</p> <p>21 Now, my first point is that while we agree that the</p> <p>22 agreed claims CDDs are part of the factual matrix, in</p> <p>23 the sense they are information that would have been</p> <p>24 reasonably known to both parties at the time they</p> <p>25 entered into an admitted claims CDD, they are of very</p> <p style="text-align: center;">Page 93</p>	<p>1 construction.</p> <p>2 LORD JUSTICE BRIGGS: What is the basic rule? You don't use</p> <p>3 hindsight?</p> <p>4 MR ZACAROLI: You don't look at any facts after the date on</p> <p>5 which you entered into the agreement or, as my Lord put</p> <p>6 it, you don't use hindsight.</p> <p>7 LORD JUSTICE BRIGGS: The hindsight here is knowing there</p> <p>8 might be a currency conversion?</p> <p>9 MR ZACAROLI: That's right. Now, let me develop this</p> <p>10 because what does matter is what the agreement said as</p> <p>11 a matter of construction and on this point, the SCG's</p> <p>12 case, as my learned friend accepted, depends upon one</p> <p>13 thing. That is, what the proper construction of the</p> <p>14 provision in the CDD which defines the creditors' sole</p> <p>15 and entire claim against LBIE, once it has executed the</p> <p>16 CDD? I.e, what is the outcoming claim from the CDD?</p> <p>17 If, as a matter of construction, that is a claim in</p> <p>18 sterling, then my learned friend accepted that the</p> <p>19 release provisions don't help him, he will lose because</p> <p>20 the release provisions have waived any claim, other than</p> <p>21 that claim in sterling.</p> <p>22 So the crucial question for him is: what is the</p> <p>23 proper construction of the provision which defines what</p> <p>24 it is you have coming out of the CDD?</p> <p>25 Just to remind the court of our two basic points on</p> <p style="text-align: center;">Page 95</p>
<p>1 little probative value, given the very different</p> <p>2 circumstances which the two types of CDD are dealing</p> <p>3 with.</p> <p>4 My learned friend's use of the agreed CDDs, the</p> <p>5 agreed claims CDDs, was predominantly to build up</p> <p>6 a picture of inconsistency and absurdity as to the</p> <p>7 possible outcomes. We say that's a fundamentally flawed</p> <p>8 picture, for the reasons I went through in opening</p> <p>9 because it contravenes the basic rule of construction.</p> <p>10 That is demonstrated by the fact that a constant refrain</p> <p>11 throughout his submissions on this point was, if the</p> <p>12 underlying claims under the agreed claims CDD was in</p> <p>13 dollars or euros or yen, then you would not lose your</p> <p>14 currency conversion claim but if in pounds, you would.</p> <p>15 Now, that's impermissible because it asks the</p> <p>16 irrelevant question, irrelevant because it can only be</p> <p>17 asked with hindsight, namely with the benefit of</p> <p>18 information as to the existence of currency conversion</p> <p>19 claims, which arose subsequently. So taking the</p> <p>20 paradigm case of nobody knowing that currency conversion</p> <p>21 claims exist, you cannot identify for the purposes of</p> <p>22 construction, absurdities which arise or are said to</p> <p>23 arise, when something which wasn't known about at the</p> <p>24 time subsequently emerges.</p> <p>25 So, as we say, it simply contravenes a basic rule of</p> <p style="text-align: center;">Page 94</p>	<p>1 the question of inadvertence or unintended consequences.</p> <p>2 First, where a creditor who agrees a CDD which in fact</p> <p>3 restricts it to a sterling claim, then we say that was</p> <p>4 a deliberate and intended consequence, the restriction</p> <p>5 of the claim to a sterling claim.</p> <p>6 Now, I use the word "election" in opening, picked up</p> <p>7 on for forensic purposes by my learned friend throughout</p> <p>8 his submissions. With hindsight, I wouldn't have used</p> <p>9 that term perhaps, but all we mean is the creditor had</p> <p>10 a choice to enter into that CDD or not. If it entered</p> <p>11 into that CDD, which in fact restricted it to a sterling</p> <p>12 claim, it has done so freely and deliberately. There's</p> <p>13 no question of unintended consequences at that point.</p> <p>14 The question of unintended consequences comes in at</p> <p>15 the second stage. To the extent that a creditor was in</p> <p>16 fact ignorant of the concept of currency conversion</p> <p>17 claims, the unintended consequence was not to agree to</p> <p>18 limit itself to a sterling claim but that, in doing so,</p> <p>19 it was giving up anything that had any value. I.e. it</p> <p>20 didn't understand --</p> <p>21 LORD JUSTICE PATTEN: Can we just be clear when we're</p> <p>22 talking about unintended ... The ignorance or not of</p> <p>23 currency conversion claims is simply linked to whether</p> <p>24 everybody believed there was going to be a surplus,</p> <p>25 isn't it?</p> <p style="text-align: center;">Page 96</p>



1 MR ZACAROLI: Not necessarily. In a sense, a surplus --  
2 LORD JUSTICE PATTEN: What you mean is people didn't  
3 understand how it all worked, even if there was  
4 a surplus? There was a sort of ignorance of the law?  
5 MR ZACAROLI: Yes, yes, the administrators' evidence and the  
6 statement of agreed facts states the administrators were  
7 not aware of the concept of currency conversion claims  
8 and no one had raised with them, no creditor had raised  
9 with them --  
10 LORD JUSTICE PATTEN: Until Mr Trace popped up in front of  
11 the judge and --  
12 MR ZACAROLI: Until my former client popped up sometime in  
13 early 2013, to raise the argument.  
14 LORD JUSTICE PATTEN: Right.  
15 LORD JUSTICE BRIGGS: I think Mr Dicker said you'd had had  
16 to have a long hot bath and in the bath you recalled  
17 Re Lines Bros.  
18 MR ZACAROLI: I've no idea who -- whether anyone had that  
19 hot bath.  
20 LORD JUSTICE BRIGGS: I am not sure he used the bathing --  
21 but he said you'd really had to sit down and think very  
22 hard about how conversion to contractual rights worked  
23 under Lines Bros --  
24 MR ZACAROLI: I think that's right. Indeed, the only  
25 support from the authorities was a dicta in Lines Bros.

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1 So the point was first raised with the  
2 administrators by my former client in the Waterfall I  
3 proceedings and their evidence is that before that, they  
4 were not aware of them and no one had raised the  
5 possibility of the concept with them. That doesn't mean  
6 to say that nobody else did know about them, but, as my  
7 learned friend says, that may well be the case, since no  
8 one had mentioned them. So it's not just linked to the  
9 surplus emerging, it's also an question of the concept  
10 not being understood.  
11 So that's why I say the unintended consequence, if  
12 there is one, was not agreeing to take a sterling sum,  
13 but that that had any effect, in the sense of depriving  
14 of you anything which might have value, i.e. the right  
15 to be remitted to a dollar claim at the end of the case,  
16 when a surplus arose.  
17 So for those reasons again, we say it is simply  
18 irrelevant to point to different examples of agreed  
19 claims CDDs and ask whether -- it is absurd, pointing  
20 out it is absurd that it turned out, after the discovery  
21 of these claims subsequently, to have waived or not  
22 waived what then became known as a currency conversion  
23 claim either way.  
24 LORD JUSTICE PATTEN: So what does it come down to, the  
25 objective bystander at the date of the agreement, isn't

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1 and doesn't have attributed to him, knowledge of the  
2 existence of a currency conversion claim?  
3 MR ZACAROLI: That is --  
4 LORD JUSTICE PATTEN: Possible existence of a currency  
5 conversion claim?  
6 MR ZACAROLI: Yes. No conception of the possibility of  
7 a currency conversion claim. So that's the likely  
8 matrix. One can't say across the board because you  
9 don't know what was in the mind of a particular  
10 creditor, but there's no evidence that anyone had  
11 thought of this claim before it was raised by Lydian --  
12 LORD JUSTICE PATTEN: But equally, you can't express it in  
13 negative terms. You can't say that the objective  
14 bystander would have had actual knowledge that this  
15 wasn't a legal or factual possibility?  
16 MR ZACAROLI: Would have had knowledge that it wasn't  
17 a possibility?  
18 LORD JUSTICE PATTEN: You've got to be careful with saying  
19 that because somebody doesn't have particular knowledge  
20 attributed to them -- you can't convert that into saying  
21 they have actual knowledge it doesn't exist in  
22 a negative sense, it just simply means it wasn't  
23 a feature in the mind that worked one way or another.  
24 MR ZACAROLI: Yes.  
25 LORD JUSTICE PATTEN: In which case, you may just go back to

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1 the language.  
2 MR ZACAROLI: Yes, that's our point, in the sense that what  
3 subsequently emerged falls within the bracket of  
4 un contemplated claims on that analysis and the parties  
5 have waived --  
6 LORD JUSTICE PATTEN: It doesn't follow from that, that they  
7 are excluded or not included.  
8 MR ZACAROLI: We say it follows from the fact that they were  
9 not contemplated, that they fall within the class of not  
10 contemplated claims. That must follow, as night follows  
11 day. If they were not contemplated, they are within the  
12 class of those things which have been waived by the very  
13 broad release language, unless they are saved by being  
14 within the definition of that which is preserved by the  
15 CDD, i.e. the one thing that is allowed to come out of  
16 it.  
17 LORD JUSTICE PATTEN: I thought we were all agreed, more or  
18 less, that we're construing the inclusion rather than  
19 the exclusion.  
20 MR ZACAROLI: Yes, and that's what I'm on the moment,  
21 explaining that's -- just to repeat my point on that,  
22 the critical question, putting aside inadmissible,  
23 subsequently acquired matters, the principal question is  
24 what is it that was -- what is the proper definition of  
25 what came out of the CDD, was it a sterling sum or was

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1 it something else? And if it was a sterling sum, you  
 2 can't, in a sense, in addressing that question, ask  
 3 yourself "Well, that would be odd, because it would have  
 4 released a currency conversion claim". That's simply  
 5 an inadmissible factor, when asking what is the true  
 6 construction of the thing which comes out of the CDD?  
 7 And that's why I say the heart of my learned  
 8 friend's submissions which was all about comparing the  
 9 consequences of different types of agreed claims CDD,  
 10 compared to the admitted claims CDD, is simply  
 11 irrelevant. It was not in the contemplation of the  
 12 parties. Could not have been in the contemplation of  
 13 the parties at the time.  
 14 Now when you do have regard to the only proper  
 15 question which is, as a matter of construction, what is  
 16 it that the creditor has agreed to restrict itself to,  
 17 coming out of the CDD? Then while it is true that the  
 18 agreed CDDs produce a different answer in different  
 19 circumstances, depending on what was the predominant  
 20 underlying currency, there is nothing illogical or  
 21 absurd about that conclusion. The differences are  
 22 driven by the need for these CDDs to cater for the  
 23 complications created by client money claims. It is  
 24 true they weren't driven by the question whether  
 25 a currency conversion claim was to be preserved or not

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1 but that's irrelevant.  
 2 Now just as a matter of timing, the agreed claims  
 3 CDDs began to be developed after the Court of Appeal  
 4 judgment in the client money litigation. Now, that's  
 5 important for this reason, that --  
 6 LADY JUSTICE GLOSTER: Do we get that in the agreed  
 7 statement of facts which I am looking at at the moment,  
 8 as a fact?  
 9 MR ZACAROLI: I can tell you the Court of Appeal judgment  
 10 was August 2010. That's a matter of record. Someone  
 11 will hand me the reference in a moment, but it was about  
 12 October 2010 that the agreed claims CDDs began to be  
 13 developed. Yes, it is Mr Lomas' -- in fact, Mr Lomas'  
 14 tenth witness statement, supplementary bundle B, tab 10,  
 15 paragraph 53. The first agreed claims CDD was executed  
 16 on 30 November 2010.  
 17 LORD JUSTICE PATTEN: Sorry, B, which --  
 18 MR ZACAROLI: Supplemental bundle B, tab 10, paragraph 53.  
 19 In fact in the same witness statement, paragraph 38  
 20 to 40, it refers to the Court of Appeal judgment in  
 21 August 2010. So that's the time frame.  
 22 Now, what's important about that is that the Court  
 23 of Appeal judgment in the client money litigation  
 24 introduced, for the first time, the concept of claims  
 25 for client money being made on a claims basis. I will

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1 explain that very briefly.  
 2 My Lord Briggs J (as he then was) had determined at  
 3 first instance that this client money pool was  
 4 constituted by the statutory regime in relation to  
 5 client money. That was available only for those for  
 6 whom it was segregated and those persons for whom it was  
 7 segregated, i.e. clients whose money was put aside in  
 8 very short order, it was to be distributed to them on  
 9 a contributions basis. That is, each client who could  
 10 say "I had this amount segregated for me", had a share  
 11 in the CMP, the pool, to that extent. It was a trust  
 12 claim.  
 13 And that was always in dollars because the fund was  
 14 held in dollars and, therefore, entitlements were in  
 15 dollars.  
 16 The Court of Appeal rejected that and said that,  
 17 actually, any client who had as against the firm,  
 18 an entitlement for client money to have been segregated  
 19 for it, had a claim against the client money pool,  
 20 whether any segregation had taken place for it or not.  
 21 So, essentially, virtually all creditors had client  
 22 money claims against the client money pool, and those  
 23 claims were to be assessed or valued by reference to  
 24 their contractual rights and those contractual rights  
 25 were in multiple currencies.

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1 So you created a currency issue in relation to the  
 2 CMP, as well as the complications which that gave rise  
 3 to more generally, and ultimately, led to most people  
 4 abandoning client money claims and asserting claims  
 5 against the estate.  
 6 Now, the drafting of the agreed claims CDDs is  
 7 driven by the need to preserve the possibility of client  
 8 money claims for those creditors who have the potential  
 9 for such a claim. And that is what drives the two-stage  
 10 process, as opposed to the one-stage process, and we  
 11 accept that is a difference between these two forms of  
 12 CDD. The agreed claims CDDs have two stages, the  
 13 admitted claims have only the one but that is a very  
 14 important difference, when one comes to construction.  
 15 The agreed claims CDDs postponed the conversion into  
 16 sterling until a later date. It happened in fact  
 17 pursuant to provisions in the agreed claims CDDs, where  
 18 the claim was denominated in some other currency. And  
 19 thus, the definition of what was preserved in the agreed  
 20 claims CDDs is also different, it's related to the  
 21 underlying claim, as opposed to what became called the  
 22 admitted claim in the admitted claims CDDs.  
 23 Now can I just show you the difference between the  
 24 two for this purpose?  
 25 LADY JUSTICE GLOSTER: Yes.

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1 MR ZACAROLI: If we turn to tab B2 --  
 2 LORD JUSTICE BRIGGS: Sorry?  
 3 LADY JUSTICE GLOSTER: B2.  
 4 LORD JUSTICE BRIGGS: Do you mean bundle B2?  
 5 MR ZACAROLI: I mean bundle B2, yes, sorry.  
 6 LADY JUSTICE GLOSTER: Tab?  
 7 MR ZACAROLI: Just to preface this with, of course, our case  
 8 is that wherever the relevant agreed claim amount was in  
 9 sterling, in either of these, then there has been  
 10 a release of currency conversion claims, but just to  
 11 show how that's achieved, in a different way in both  
 12 agreements.  
 13 So the agreed claims CDD at tab 4 on page 3 --  
 14 internal page 3 that is, of the document -- you have two  
 15 definitions at the top of the page, "Admitted claim --"  
 16 LORD JUSTICE BRIGGS: Yes. And "Agreed claim."  
 17 MR ZACAROLI: -- and "Agreed claim." And admitted claim is  
 18 similar to what we see later in the admitted claims CDD,  
 19 it's a claim qualifying for dividends from the estate:  
 20 "Agreed claim is the creditor's claims against the  
 21 company under and in connection with the creditor  
 22 agreement."  
 23 So the underlying agreements.  
 24 And when you get to the release clause at 2.1 on  
 25 internal page 8:

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1 "The agreement is that the agreed claim shall be  
 2 limited to and an amount equal to the agreed claim  
 3 amount ..."  
 4 It is:  
 5 "... save in respect thereof."  
 6 So save in respect of the agreed claim in the agreed  
 7 claim amount, there's a release of everything else. And  
 8 the reason it takes that course is because it is not  
 9 until later, at some point when a client money claim is  
 10 no longer possible, that the claim will become  
 11 an admitted claim, once it's been converted under  
 12 clause 3.  
 13 LORD JUSTICE BRIGGS: Yes.  
 14 MR ZACAROLI: Tab 7, to show the difference.  
 15 LADY JUSTICE GLOSTER: This is an admitted claims CDD?  
 16 MR ZACAROLI: That's correct, my Lady, yes. So you only  
 17 have the definition of admitted claim on internal page 2  
 18 of the document and then clause 2 on page 6 -- I will  
 19 come back to these when I am dealing with construction  
 20 of this contract but you'll see that clauses 2.1, 2.2  
 21 and 2.3 allow the creditor an admitted claim and then  
 22 "but for the admitted claim at the fixed amount",  
 23 everything else is released. (Pause)  
 24 So the short point at the moment is -- and I will  
 25 come back to these differences in a moment -- but the

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1 short point is that there are logical reasons as to why  
 2 the agreed claims CDD has adopted the approach of  
 3 identifying the preserved claim, i.e. the claim that  
 4 comes out of the CDD, in a variety of different  
 5 currencies, depending upon the underlying circumstances.  
 6 That was being preserved in whatever was the predominant  
 7 currency, for the purposes of making a claim against the  
 8 client money pool, but not otherwise. For any other  
 9 purpose connected with a claim against the estate, it  
 10 would have to be converted later on into sterling, to  
 11 produce the admitted claim.  
 12 It also demonstrates why, on the admitted claims  
 13 CDDs, it's essential that the claim was stated in  
 14 sterling. And I will come back to that when I make  
 15 submissions on admitted claims CDDs in a moment.  
 16 Now --  
 17 LORD JUSTICE BRIGGS: But it just so happens that the  
 18 preservation and release in the agreed claims CDDs  
 19 operate by reference to the agreed claim and not the  
 20 admitted claim, even though there is a concept of  
 21 admitted claim in those CDDs, and the process of  
 22 preservation and release in the admitted claims CDDs, in  
 23 a sense necessarily, because that's the only concept  
 24 being used, operates by reference to the admitted claim.  
 25 MR ZACAROLI: My Lord says "it just so happens", it happens

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1 for a reason. The reason is --  
 2 LORD JUSTICE BRIGGS: Well what is the reason?  
 3 MR ZACAROLI: The reason is because you need to preserve the  
 4 claim in the agreed claim CDDs for the purposes of  
 5 making a claim against the client money pool and until  
 6 that was sorted out, you couldn't get to the admitted  
 7 claims stage.  
 8 LORD JUSTICE BRIGGS: All right, sure.  
 9 MR ZACAROLI: And I accept that the reason is not -- the  
 10 reason for that doesn't have anything to do with whether  
 11 we want to preserve client money claims or not here.  
 12 LORD JUSTICE BRIGGS: Yes.  
 13 MR ZACAROLI: But my basic point is --  
 14 LORD JUSTICE BRIGGS: That's why I say "It just so happens."  
 15 MR ZACAROLI: In that context it does but if I may say so,  
 16 using the phrase "It just so happens", with that loaded  
 17 connotation, is bringing into account knowledge of the  
 18 existence of currency conversion claims. And that is  
 19 not permissible when one is trying to construe these  
 20 contracts in the factual matrix at the time they were  
 21 entered into.  
 22 Now, we say that there's an additional flaw in the  
 23 approach. That is, asking with hindsight, whether it  
 24 was logical for one form of CDD to waive CDDs or not.  
 25 The flaw is demonstrated by the simple expedient of

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<p>1 turning the question around. It's clear that what the                  2 consensual approach that the administrators put in place                  3 from November 2010, was -- indeed before that, with the                  4 CRAs -- was seeking to achieve, was finality and                  5 certainty between the estate and the creditor, involving                  6 a mutual, full and final release of all claims, so that                  7 the only claim left standing is that claim which emerges                  8 from the CDD and is submitted to the proof process.                  9 That's the overall purpose and intention of the process.                  10 The paradigm case, the simple case, is the admitted                  11 claims CDD, where you don't have these complications                  12 that are created because of the client money issues.                  13 That achieves that end very simply and clearly, where                  14 there are no complications about client money. You                  15 simply have one sterling sum identified as your admitted                  16 claim amount which is then admitted for proof.                  17 Everything else is released.                  18 Now we would say, turning the question around, as                  19 a result of the drafting of the agreed claims CDDs                  20 intended to deal with complications arising out of                  21 client money issues, it so happens, as we accept, that                  22 some creditors remain entitled to assert claims under                  23 the underlying contracts of a particular type, namely                  24 this currency conversion claim, but the anomaly lies, we                  25 say, in the fact that those claims were preserved, not</p> <p style="text-align: center;">Page 109</p>	<p>1 claim amount", and everything else being released,                  2 identifying a claim in dollars in that agreement.                  3 So he says: how can we reach the opposite                  4 conclusion, with an agreed claims CDD, where the agreed                  5 claim amount was in sterling or, indeed, by extension,                  6 how can we reach the same conclusion in relation to the                  7 admitted claims CDDs? We're accused of inconsistency in                  8 this regard.                  9 Now, we say there is no inconsistency. We do accept                  10 that there is nothing to preclude that euro creditor,                  11 the original creditor who had a claim in euros, from now                  12 asserting a claim, based on the fact that it's not been                  13 paid its euros. We say the agreed CDD has not waived                  14 that claim and as I say, we haven't appealed the judge                  15 on that point.                  16 We also accept, because this was another point                  17 mooted below, that the conversion into dollars in that                  18 CDD, like the conversion into dollars in the CRA, does                  19 not give rise to a new currency conversion claim based                  20 on the fact you don't get paid your dollars. So they                  21 are two sides of the same coin really, you haven't lost                  22 your original euro currency conversion claim and you                  23 haven't gained a new one in dollars.                  24 Why do we accept that and why isn't it inconsistent?                  25 We need, for this purpose, to look at the judge's</p> <p style="text-align: center;">Page 111</p>
<p>1 that all the other claims were released.                  2 So the admitted claims CDD is the paradigm and the                  3 anomaly lies in some of the drafting that was created                  4 for the admitted claims CDDs creating a different                  5 result, where some people's claims were preserved.                  6 So we say as well as being impermissible to have                  7 regard to what subsequently transpired in construing                  8 these documents, it is of no help because it might just                  9 as well lead to the conclusion that it's the CDDs which                  10 have not waived currency conversion claims which are                  11 anomalous.                  12 Now, my learned friend made another point,                  13 a construction point on the agreed claims CDDs which                  14 I need to deal with. For this purpose we need to                  15 imagine that there is a creditor with one of its                  16 underlying claims, say, in euros but the predominant                  17 underlying currency of its claims was dollars and,                  18 therefore, the agreed claim amount in the agreed claims                  19 CDD is expressed in dollars. My learned friend says                  20 that we accept, because we don't appeal this part of the                  21 judge's judgment, that the CDD does not preclude that                  22 creditor asserting a claim now, for a currency                  23 conversion claim, based on its existing right in respect                  24 of the euro claim.                  25 And that's notwithstanding the definition of "agreed</p> <p style="text-align: center;">Page 110</p>	<p>1 conclusions on a similar argument run in relation to the                  2 CRA. There are two paragraphs in particular to look at                  3 in the judge's judgment but, in short, if I can state                  4 the argument. Where the original debt was in euros,                  5 it's a mandatory part of the statutory scheme that the                  6 claim in euros, if it's to be proved, must be converted                  7 into sterling as at the date of administration. It                  8 being mandatory, it's simply not open to the                  9 administrators and a creditor to agree otherwise, so far                  10 as proving against the estate is concerned. You cannot                  11 contract out of the mandatory aspect of the scheme.                  12 It's mandatory because it's an essential part of the                  13 pari passu distribution that all claims in foreign                  14 currency are converted at the same date, at the same                  15 equivalent rate.                  16 LADY JUSTICE GLOSTER: But that's solely for the purposes of                  17 the scheme.                  18 MR ZACAROLI: That's solely for the purposes of submitting                  19 a claim against the estate, yes. That explains why                  20 there has to be a conversion back in the agreed claims                  21 CDDs into sterling, for the purposes of proof. It also                  22 explains why you could agree a different currency for                  23 the purposes of a claim against the client money pool                  24 which is what the agreed claims CDDs are directed at.                  25 That's why you haven't got a conversion at the</p> <p style="text-align: center;">Page 112</p>

<p>1 beginning. It's to enable the claim against the client                  2 money pool to be preserved in the underlying currency --                  3 the predominant underlying currency.                  4 The judge deals with this at paragraph 127 of the                  5 judgment. And as my learned friend pointed out earlier,                  6 it was our submission below that the consequence of, in                  7 my example, a euro creditor having its claim converted                  8 into dollars under the CRA, caused its euro currency                  9 conversion claim to be released, and that was rejected.                  10 And paragraph 127 contains the reasoning I've just given                  11 you, in short order. Perhaps if you could just read                  12 127. (Pause)                  13 LADY JUSTICE GLOSTER: Yes.                  14 MR ZACAROLI: So we've accepted the logic of the judge's                  15 reasoning in that paragraph, as it applies equally to                  16 the agreed claims CDDs in the example I am giving.                  17 A euro creditor whose claim gets converted into dollars.                  18 So that the agreed claims CDD was simply incapable                  19 of having -- for the purposes of a claim against the                  20 estate, was incapable of converting that euro claim into                  21 dollars. That was improper or could not be done for the                  22 purposes of a claim against the estate because it would                  23 be in breach of the mandatory rule, that the euro claim                  24 had to be converted at the rate applicable to euro and                  25 sterling at the date of administration.</p> <p style="text-align: center;">Page 113</p>	<p>1 LADY JUSTICE GLOSTER: Which one do you want us to look at?                  2 MR ZACAROLI: Tab 7 of B2. (Pause)                  3 Remembering the crucial question is, what is it that                  4 the creditor has agreed to accept as its sole and entire                  5 claim? The answer is found in clauses 2.1 to 2.3. So                  6 2.1:                  7 "The creditor shall have an admitted claim in                  8 an amount equal to the agreed claim amount."                  9 Now, this is in fact conferring on the creditor,                  10 something called an admitted claim because the admitted                  11 claim is not a description of its underlying claim, but                  12 is a generic definition of something which you can then                  13 bring into the estate for proof purposes. I am                  14 paraphrasing. But if you look at the admitted claim                  15 definition, it says "An unsecured claim of a creditor                  16 which qualifies for dividends".                  17 So 2.1, reading in the definition, says "The                  18 creditor shall have an unsecured claim of the creditor                  19 which qualifies for dividends." So it is having                  20 conferred on it by the CDD, an admitted claim in                  21 an amount equal to the agreed claim amount, which is the                  22 sterling number.                  23 And then clause 2.2:                  24 "The admitted claim is fixed at the agreed claim                  25 amount, the sterling sum, and shall constitute the</p> <p style="text-align: center;">Page 115</p>
<p>1 Therefore, the agreement -- the agreed claims CDD                  2 was incapable of having removed, as a matter of                  3 construction, because it couldn't do so, the euro                  4 creditor's underlying euro claim against the estate and                  5 therefore a currency conversion claim, if it didn't get                  6 sterling matching its euro entitlement.                  7 So that's why we say we haven't appealed the judge's                  8 ruling on that aspect.                  9 LADY JUSTICE GLOSTER: Yes.                  10 MR ZACAROLI: It is perfectly consistent, we say, with our                  11 case, that where the conversion at the outset or the                  12 denomination at the outset isn't a sterling, that is                  13 permissible, indeed it had to be converted into                  14 sterling. If, once converted into sterling, that is                  15 what comes out of the CDD, whether an agreed claims CDD                  16 or an admitted claims CDD, and everything else is                  17 released, then there's no remission to a contractual                  18 right in dollars, yen, whatever it might be.                  19 Now, turning to the admitted claims CDD, emphasising                  20 that it must be construed on its own terms and unless                  21 you're going to bring in suggested absurdities because                  22 of what was discovered later, there's really nothing to                  23 be gained in terms of the crucial question of                  24 construction, as to what remains out of the CDD by                  25 looking at the agreed claims CDDs --</p> <p style="text-align: center;">Page 114</p>	<p>1 creditor's entire claim against the company."                  2 So what this is saying is, as a result of                  3 clauses 2.1 and 2.2, "You shall have, if you sign this                  4 CDD, an unsecured claim in the sum of X pounds which                  5 will qualify you for dividends against the insolvent                  6 estate."                  7 Designated in pounds, because the whole purpose of                  8 2.1 and 2.2 is to define something which you can bring                  9 into the estate for the purposes --                  10 LADY JUSTICE GLOSTER: You are in reply, Mr Zacaroli, aren't                  11 you?                  12 MR ZACAROLI: I am, yes.                  13 LADY JUSTICE GLOSTER: Some of these submissions we got                  14 first time round, I think.                  15 MR ZACAROLI: I shall be brief. The next submission is very                  16 short: 2.3 releases everything else, including,                  17 critically, any right under your contract.                  18 Now, the last point on this issue is my learned                  19 friend's submissions on admitted claims CDDs focused on                  20 explaining how and why you arrived at the number that                  21 you put into the agreed claims amount.                  22 We say the fact that it was converted because it had                  23 to be pursuant to the statute, none of that assists in                  24 what he has to do, which is to rewrite the definition of                  25 "agreed claims amount", essentially to be a foreign</p> <p style="text-align: center;">Page 116</p>

1 currency number. And I made these submissions in  
 2 opening but explaining how you got there doesn't help,  
 3 when the whole purpose of this CDD is to identify the  
 4 sum which will now be admitted to proof and release  
 5 everything else.  
 6 We say the wording is absolutely clear and there's  
 7 no escape from it.  
 8 LADY JUSTICE GLOSTER: What's the difference in function  
 9 between clause 2.1 and 2.2? What's 2.2 doing that 2.1  
 10 isn't?  
 11 MR ZACAROLI: I think 2.2 is restricting you to just that  
 12 claim. So 2.1 gives you a claim, says "You shall have  
 13 an admitted claim in that amount." 2.2 then says  
 14 "That's your entire claim".  
 15 LADY JUSTICE GLOSTER: So it is 2.2 that is critical to your  
 16 argument?  
 17 MR ZACAROLI: Well, we would say that 2.1, combined with  
 18 2.3, would get there but 2.2 makes it absolutely clear.  
 19 It's in three stages. Here's what you have. 2.2,  
 20 that's all you have. 2.3, everything else is released.  
 21 LADY JUSTICE GLOSTER: Well there's no debate about the  
 22 width of the release. The question is, what is, as we  
 23 all know, an admitted claim? You say that 2.2 is making  
 24 it clear that it is fixed at the ACA?  
 25 MR ZACAROLI: Yes.

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1 LADY JUSTICE GLOSTER: And that it can be no more than that.  
 2 MR ZACAROLI: That's right, and that's your entire claim, as  
 3 it says. (Pause)  
 4 Moving on to other points, and that was the  
 5 substance of my reply submissions, that's the matter  
 6 I dealt with at most length. Dealing with other matters  
 7 more shortly and some fairly random points. The first  
 8 is my learned friend referred to two authorities about  
 9 the quasi-judicial role of administrators or office  
 10 holders. That was the Menastar case and the Tanning  
 11 Research case. Briefly, we say those cases actually  
 12 support our proposition. Menastar, the context was  
 13 permitting a liquidator to go behind a judgment, i.e. to  
 14 ensure that only proper claims were admitted to proof.  
 15 The Tanning Research case, the context was whether  
 16 to admit a claim or not and again, the point is made in  
 17 that case that it is only proper claims that should be  
 18 admitted. I.e. there's no discretion, as I said there,  
 19 to admit claims that aren't legally enforceable.  
 20 These support us because a liquidator may only admit  
 21 proper claims. In determining whether a claim is proper  
 22 or not, the liquidator or administrator is on the  
 23 opposite side of the debate to the proving creditor. It  
 24 is acting on behalf of all creditors to ensure that  
 25 proving creditor can only prove a proper claim.

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1 A fortiori, in conducting negotiations with that  
 2 creditor for the purposes of a swifter distribution,  
 3 reaching a full and final release, the office holder is  
 4 on the opposite side of the negotiating table in the  
 5 context of a commercial negotiation. So nothing in  
 6 those cases is against us and we say, actually, they  
 7 support us.  
 8 My learned friend made a point about the creditors  
 9 being under real pressure to execute CDDs because, as he  
 10 put it, there was a price to pay if they didn't. We  
 11 would turn that around and say that actually  
 12 demonstrates the real benefit to creditors in getting  
 13 higher up the queue by signing up to a CDD and is,  
 14 indeed, part of the quid pro quo for the release of  
 15 claims.  
 16 Turning then to interest, the first point to make  
 17 about the construction question of release of interest,  
 18 non-provable claims to interest, the first point to make  
 19 is on the CRA. My learned friend addressed you on the  
 20 CRA term, only in the context of the question of release  
 21 of interest on currency conversion claims. It's a much  
 22 broader point, however, on the CRA, and that is that any  
 23 claim to interest that isn't provable, i.e. anything but  
 24 the statutory right to interest, is released.  
 25 The wording is contained in the judgment, you've

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1 seen it just recently, but it is -- the supplemental  
 2 judgment --  
 3 LADY JUSTICE GLOSTER: We're in the CRA, are we?  
 4 MR ZACAROLI: Yes, although I'm going to take you to the  
 5 judgment because the clauses are set out fully in it.  
 6 Yes, it's tab 1 of the part A, volume 2 bundle.  
 7 Supplemental issues judgment is there, paragraph 64 and  
 8 65.  
 9 LADY JUSTICE GLOSTER: What clause are we looking at? I am  
 10 looking at the CRA.  
 11 MR ZACAROLI: Sorry, it is 20.4.7 --  
 12 LORD JUSTICE BRIGGS: Yes.  
 13 MR ZACAROLI: -- and 25.1. It appears twice.  
 14 LORD JUSTICE BRIGGS: Yes.  
 15 MR ZACAROLI: Looking at 20.4.7, this provision, on any  
 16 view, releases interest arising under the very contract  
 17 one is talking about and releases it for the period  
 18 after the date of administration, except for Rule 2.88.  
 19 There is nothing else it can be talking about, other  
 20 than a possible claim to non-provable interest or  
 21 a possible non-provable claim to interest. Nothing else  
 22 could possibly fall within that clause.  
 23 LORD JUSTICE BRIGGS: I think Mr Dicker's submission on  
 24 construction said we've just got to put a black line  
 25 through it and write out what the parties obviously

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<p>1 intended to say.                  2 MR ZACAROLI: Yes, this was in the context --                  3 LORD JUSTICE BRIGGS: He's not saying it doesn't mean that,                  4 he's saying it's a mistake.                  5 MR ZACAROLI: With respect, it was a rather bootstraps                  6 argument on mistake, starting from the premise that this                  7 agreement did not intend to waive currency conversion                  8 claims, therefore did not intend to waive interest on                  9 currency conversion claims. He was dealing with it in                  10 that context only in his submissions.                  11 LORD JUSTICE BRIGGS: Yes.                  12 MR ZACAROLI: Now, he may say it's a broader point, you have                  13 to write through it altogether for that purpose. We                  14 would say there is absolutely no basis for that                  15 submission.                  16 The CRA very clearly releases claims -- all types                  17 of claims, both provable and non-provable. And a piece                  18 of evidence you weren't taken to -- a witness statement                  19 of Mr Pearson, one of the administrators who had                  20 particular responsibility for the CRA, and you were                  21 shown this in evidence, to the effect that I think                  22 Mr Copley says there wasn't an intention to waive                  23 non-provable claims more generally.                  24 LADY JUSTICE GLOSTER: Yes.                  25 MR ZACAROLI: He wasn't dealing with a CRA at that point.</p> <p style="text-align: center;">Page 121</p>	<p>1 So turning to the -- and that must cover both                  2 interest generally, post-administration and interest on                  3 a contractual claim which is relied on for the purposes                  4 of a claim to interest on a currency conversion claim                  5 subsequently. It's interest accruing on the financial                  6 contract after the date of administration. It has been                  7 released.                  8 Turning to the CDDs and release of interest, and                  9 perhaps picking up the one at bundle B2, tab 7, just for                  10 the example language. My learned friend suggested that                  11 the purpose of this was to cover the case where a                  12 creditor has claims 1 to 10. He chooses to prove claim                  13 1 and doesn't prove claims 2 to 10. Well, it would                  14 cover that claim, we accept that, but the language goes                  15 further than that. Clause 2.3 says:                  16 "There's a release of all claims, including claims                  17 for interest ..."                  18 Then reading on, the important words four lines from                  19 the end:                  20 "... whether arising under the creditor agreement or                  21 not."                  22 So it clearly is envisaging the release of claims to                  23 interest arising under the creditor agreement. The                  24 creditor agreement is the one thing that is proved. The                  25 phrase appears four lines from the end, in the middle of</p> <p style="text-align: center;">Page 123</p>
<p>1 The CRA is dealt with by Mr Pearson. It is supplemental                  2 bundle for part B at tab 16, paragraph 118, page 41, in                  3 the middle of that paragraph, where he refers to the                  4 claims being released and then says:                  5 "The language used was not limited by reference to                  6 the concept of provable claims. The broad release                  7 language and the exchange structure were both present                  8 from an early stage of the development of the draft                  9 scheme."                  10 In a sense, that's obvious in relation to the CRA                  11 which was intended to deal with trust asset claims. You                  12 needed a complete release both ways because trust claims                  13 themselves are not provable.                  14 LADY JUSTICE GLOSTER: This is all argument. This isn't                  15 admissible to construction.                  16 MR ZACAROLI: But it's very clear the CRA does indeed                  17 release provable claims and has to do so in order to                  18 enable there to be a netting off in relation to trust                  19 asset claims.                  20 If I can turn it around, there is no evidence                  21 whatsoever to suggest that the parties made a mistake in                  22 the terms of the CRA, in reaching a very clear provision                  23 in 20.4.7, releasing the interest that is there                  24 released.                  25 The same can be said of 25.1.</p> <p style="text-align: center;">Page 122</p>	<p>1 the line:                  2 "Whether arising under the creditor agreement or                  3 not."                  4 So all -- claims released, include claims under that                  5 agreement. Therefore, the example about claims 1 to 10                  6 doesn't work because it is expressly including claims                  7 under the creditor agreement.                  8 We accept the conclusion of the judge and we don't                  9 appeal the conclusion of the judge, that the language of                  10 the CDD, this one and the later one, which says so                  11 expressly, preserves a claim to interest under                  12 Rule 2.8(9), because that's the rate that would have                  13 applied in the counter-factual circumstance, where there                  14 is no administration. So you're not looking at the real                  15 world, you're looking at a hypothetical world, what                  16 would the rate have been then? And it incorporates that                  17 rate, so we accept that.                  18 That does not mean, however, that a non-provable                  19 claim to interest is within the concept of that which is                  20 preserved by the CDD. The argument here is that the                  21 words "admitted claim" somehow include a non-provable                  22 claim to interest.                  23 LADY JUSTICE GLOSTER: Yes.                  24 MR ZACAROLI: We say that can't be right because the                  25 foundation of a non-provable claim to interest is</p> <p style="text-align: center;">Page 124</p>

<p>1 a contractual right that actually exists to interest.                  2 It all works, Humber Ironworks, on the basis of                  3 a remission to a contractual right. That contractual                  4 right is no more, as a result of the release in clause 2                  5 of all rights, all claims, including for interest, under                  6 the creditor agreement.                  7 You can't resolve this by having regard to                  8 a counter-factual world. A non-provable claim to                  9 interest is dependent upon there in fact being                  10 a contractual right that still exists, and it doesn't.                  11 (Pause)                  12 That leaves paragraph 74 and Ex parte James.                  13 I hope to be pretty quick on this. So far as                  14 paragraph 74 is concerned, I reiterate the two points I                  15 made in opening.                  16 LADY JUSTICE GLOSTER: You don't need to repeat those.                  17 MR ZACAROLI: So far as the case of Re Coniston is                  18 concerned, my learned friend relied on, he said about it                  19 that --                  20 LADY JUSTICE GLOSTER: Give me the tab reference.                  21 MR ZACAROLI: Yes, it is tab 92, so bundle 3 --                  22 LADY JUSTICE GLOSTER: Yes.                  23 MR ZACAROLI: -- 92. He relied on it for the proposition                  24 that on the question of unfairness or unfair harm, one's                  25 looking -- it doesn't assist, he says, because the</p> <p style="text-align: center;">Page 125</p>	<p>1 LADY JUSTICE GLOSTER: Yes.                  2 MR ZACAROLI: Now, what it is referring to here is Mr Copley                  3 made statements in discussions with various creditors,                  4 significant creditors, not with everybody, just with                  5 some, where he said he didn't intend to compromise                  6 currency conversion claims. That's unpacked in the two                  7 sub-paragraphs. The critical point here is if you don't                  8 know they exist, you neither intend to release them, nor                  9 preserve them. You have no state of mind addressing                  10 them at all and that is, in fact, Mr Copley's state of                  11 mind at the time. So we say it's an inaccurate folding                  12 up of the true position to say "He did not intend to                  13 release currency conversion claims".                  14 LADY JUSTICE GLOSTER: Yes.                  15 MR ZACAROLI: We would respectfully suggest that you should                  16 pay no regard, in deciding the question that you have to                  17 decide on Ex parte James or paragraph 74, to things the                  18 administrators or one of the administrators may have                  19 said to different groups of creditors at different                  20 points during the administration. He clearly said                  21 different things at different times. As is made clear                  22 by one reference in the disputed statements of facts --                  23 you can't reach a finding on this but you need to know                  24 this is there -- tab 8 of the same bundle, paragraphs 11                  25 and 12. This is based on evidence that was presented by</p> <p style="text-align: center;">Page 127</p>
<p>1 release of currency conversion claims didn't assist in                  2 achieving the administrator's objective. So the release                  3 of currency conversion claims, he says, wasn't part of                  4 the objective and, therefore, it's not saved by the                  5 provision in or the way this is looked at in Coniston,                  6 that provided it's in accordance with the achievement of                  7 the administrators' objectives, it can't be unfair harm.                  8 He says that doesn't apply here.                  9 We say that's the wrong question again. The entry                  10 into a full and final release on a mutual basis was                  11 undoubtedly within the purposes of the administration                  12 and was done to assist in achieving the objective. You                  13 were taken to the evidence of Mr Copley in relation to                  14 the question of there being an intention to release                  15 currency conversion claims. What was said in that                  16 evidence, very boldly, was there was no intention to                  17 release currency conversion claims.                  18 Now, that is unpacked more accurately, we would say,                  19 in the statement of facts, in particular at                  20 paragraph 18.                  21 LADY JUSTICE GLOSTER: Where do we find that?                  22 MR ZACAROLI: The statement of facts is --                  23 LADY JUSTICE GLOSTER: Tab?                  24 MR ZACAROLI: Supplemental bundle tab 7, so it is the 36A                  25 statement of facts, paragraph 18.</p> <p style="text-align: center;">Page 126</p>	<p>1 Elliott, page 4 of the tab, in particular paragraph 12:                  2 "Mr Copley said to some creditors he believed the                  3 CDDs waived the right to payment of claims in the                  4 original currency of the underlying claim."                  5 Now I don't ask you to rely upon that for any                  6 positive purpose, it is simply to show you cannot place                  7 any reliance on what was said at different times by the                  8 administrators, or one of them, to different creditors.                  9 (Pause)                  10 LADY JUSTICE GLOSTER: Yes.                  11 MR ZACAROLI: My Lords, unless you have any further                  12 questions, those are my submissions in reply.                  13 LADY JUSTICE GLOSTER: Thank you very much. Do you want to                  14 say anything else, Mr Dicker? Thank you.                  15 Well thank you all very much and those behind you as                  16 well, for your extremely interesting arguments.                  17 Obviously, we're going to reserve our judgments. The                  18 question is what happens as and when the Supreme Court                  19 publish their judgment -- judgments, perhaps? I think                  20 the best thing would be that the parties, within seven                  21 days, should send in their proposals for the future                  22 conduct of this matter. It may be, depending on the                  23 outcome in the Supreme Court, that we won't need to have                  24 a further oral hearing and any matters arising out of                  25 the Supreme Court judgment can be dealt with just by</p> <p style="text-align: center;">Page 128</p>



<p>1 submissions on the papers. On the other hand, the</p> <p>2 parties may feel or the court might feel that it would</p> <p>3 be assisted by further argument, but I don't see that we</p> <p>4 can make that decision now.</p> <p>5 Will seven days be enough for the parties to agree</p> <p>6 or to indicate, even if they don't agree, the future</p> <p>7 conduct of the case, subject of course, to any points</p> <p>8 the court might have?</p> <p>9 MR DICKER: I think so far as we're concerned, the answer is</p> <p>10 yes.</p> <p>11 MR ZACAROLI: And the same here.</p> <p>12 LADY JUSTICE GLOSTER: You, Mr Bayfield, as well?</p> <p>13 MR BAYFIELD: My Lady, yes.</p> <p>14 LADY JUSTICE GLOSTER: Very well. Can the court be informed</p> <p>15 within seven days either as to the agreed position or as</p> <p>16 to the disputed position of the publication of the</p> <p>17 Supreme Court judgment? In the interim, please can the</p> <p>18 parties, within seven days of today's -- we've got the</p> <p>19 vacation -- 14 days of today's date, submit revised</p> <p>20 schedules, setting out a further column, stating where</p> <p>21 in the transcripts, the parties have dealt with the</p> <p>22 particular issues, so we don't have to do that exercise</p> <p>23 for ourselves.</p> <p>24 MR DICKER: Again, we prepared the originals. We'll</p> <p>25 undertake to do that and obviously circulate it and make</p>	<p>1 LADY JUSTICE GLOSTER: You needn't go back and do the work</p> <p>2 on that but just as an automatic facility on the</p> <p>3 transcripts, that's helpful.</p> <p>4 MR BAYFIELD: We'll make enquiries.</p> <p>5 LADY JUSTICE GLOSTER: Very well. Thank you very much.</p> <p>6 (3.22 pm)</p> <p>7 (The court adjourned)</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
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<p>1 sure it's agreed.</p> <p>2 LADY JUSTICE GLOSTER: That would be extremely helpful.</p> <p>3 Speaking for myself, are the transcripts going to be</p> <p>4 hyperlinked in any way?</p> <p>5 MR DICKER: At that point, I think I should probably sit</p> <p>6 down and take instructions. (Pause)</p> <p>7 I understand in relation to the tables, I think</p> <p>8 Linklaters may already be ahead of the game and marking</p> <p>9 up. I don't know what the answer is --</p> <p>10 LADY JUSTICE GLOSTER: Well can you find out and if there's</p> <p>11 any chance of hyperlinking anything, any hyperlinking,</p> <p>12 whether to transcripts or to judgments -- I don't want</p> <p>13 a lot of work to be done but if it's two things on the</p> <p>14 computer button to hyperlink, then see what you can do</p> <p>15 because that would be extremely --</p> <p>16 MR DICKER: Mr Bayfield, I think is Linklaters --</p> <p>17 MR BAYFIELD: We haven't made a start on those tables, to</p> <p>18 the best of my knowledge and belief but we can certainly</p> <p>19 do what we can to add hyperlinking, once we or</p> <p>20 Freshfields take the lead in producing the tables.</p> <p>21 LADY JUSTICE GLOSTER: Yes, the tables could be usefully</p> <p>22 hyperlinked. I'm not suggesting that the transcripts</p> <p>23 should be, unless they are already. If you know what</p> <p>24 I mean.</p> <p>25 MR BAYFIELD: Understood.</p>	<p>1 INDEX</p> <p>2 PAGE</p> <p>3 Submissions by MR DICKER (continued) .....1</p> <p>4</p> <p>5 Submissions by MR BAYFIELD .....90</p> <p>6</p> <p>7 Submissions in reply by MR ZACAROLI .....93</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
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