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Case No: 7942 of 2008

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

Royal Courts of Justice
Rolls Building,
London, EC4A 1NL

Date: 31 July 2015

Before :

MR JUSTICE DAVID RICHARDS

- -

IN THE MATTER OF LEHMAN BROTHERS INTERNATIONAL (EUROPE) (IN ADMINISTRATION)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Between:

(1) ANTHONY VICTOR LOMAS
(2) STEVEN ANTHONY PEARSON
(3) PAUL DAVID COPLEY
(4) RUSSELL DOWNS
(5) JULIAN GUY PARR

(THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS INTERNATIONAL (EUROPE) (IN ADMINISTRATION)) — **Applicants**

- and -

(1) BURLINGTON LOAN MANAGEMENT LIMITED
(2) CVI GVF (LUX) MASTER SÀRL
(3) HUTCHINSON INVESTORS LLC
(4) WENTWORTH SONS SUB-DEBT SÀRL
(5) YORK GLOBAL FINANCE BDH LLC — **Respondents**

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William Trower QC, Daniel Bayfield and Alexander Riddiford
(instructed by **Linklaters LLP**) for the **Applicants**

Robin Dicker QC, Richard Fisher and Henry Phillips
(instructed by **Freshfields Bruckhaus Deringer LLP, Ropes & Gray International LLP** and **Schulte Roth & Zabel International LLP**) for the **1st, 2nd and 3rd Respondents**

Antony Zacaroli QC, David Allison QC and Adam Al-Attar
(instructed by **Kirkland & Ellis International LLP**) for the **4th Respondent**

Hearing dates: 18, 19, 20 and 21 May 2015
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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr Justice David Richards:

Introduction

1. This judgment concerns the construction and effect of agreements made since the commencement of the administration of Lehman Brothers International (Europe) (LBIE) between LBIE acting by its joint administrators and very significant numbers of its creditors.

2. The agreements are in standard forms. The first, the Claims Resolution Agreement, was a multi-lateral agreement made in late 2009 to which over 90 per cent in value of eligible creditors with claims to trust assets became party. The others, Claims Determination Deeds, were bilateral agreements in largely standard terms. The first were made in late 2010 and their terms evolved over time. By September 2014, some 1,600 deeds with about 1,290 different counterparties, agreeing claims totalling over £9.9 billion, had been made.

3. The principal purpose of these agreements was to simplify and accelerate the ascertainment of claims to trust assets and unsecured claims and to accelerate the return of trust assets and distributions among unsecured creditors. As counsel for the administrators say in their skeleton argument, these agreements:

> "have made a significant contribution to the success of the Administration. They have enabled the Administrators to deal with an estate of unprecedented size and complexity with much greater efficiency than would otherwise have been the case."

4. The claims to trust assets and client money have all been substantially satisfied and the admitted claims of all unsecured creditors have been paid in full. The surplus funds available in the administration are estimated to reach or exceed £7.39 billion. Counsel for the administrators are right to say that the agreements have "resulted in substantial benefits to the estate (and thus its stakeholders)."

5. The issues in short are whether the agreements, or any of them, have the effect of releasing or modifying the rights of creditors to interest on their proved debts or to currency conversion claims.

6. These issues are among those raised by the administrators in an application notice issued in June 2014 and amended in May 2015. The issues require resolution so that the administrators can proceed to a distribution of the surplus funds. An earlier application (*Waterfall I*) raised other issues relevant to the distribution of the surplus. In order to make the present application (*Waterfall II*) manageable, it has been divided for the purpose of hearing into three. The first part (*Waterfall IIA*), on which I am handing down judgment at the same time as this, raised issues concerning, principally, the entitlement of creditors to interest on their proved debts: see [2015] EWHC 2269 (Ch). The present judgment concerns the post-administration agreements (*Waterfall IIB*). The third part concerns the effect of pre-administration ISDA and other market standard contracts and is fixed for hearing later this year.

7. The principal issue as regards the post-administration agreements is their effect on currency conversion claims. These claims arise where debts and liabilities are payable in a foreign currency but, as required by rule 2.86 of the Insolvency Rules 1986, are, for the purposes of proof and the payment of proved debts, converted into sterling at the prevailing exchange rate at the date of commencement of the administration and where sterling depreciates against the foreign currency between that date and the date of distribution(s). It was held in *Waterfall I* at first instance and on appeal that creditors are entitled to payment of currency conversion claims as non-provable debts, ranking after statutory interest under rule 2.89: see [2014] EWHC 704 (Ch), [2015] Ch 1 and [2015] EWCA Civ 485.

8. This is a significant issue. Most of the business of LBIE was conducted, and therefore most of its liabilities were incurred, in US dollars. Between 15 September 2008, when LBIE was placed in administration, and the dates of distributions in respect of proved debts, sterling depreciated against the US dollar and against the euro and the Japanese yen, in which business was also conducted. Currency conversion claims may amount to some £1.3 billion.

9. A further issue raised on this part of the application is whether, if on their true construction the post-administration agreements release or modify the claims in question, the administrators should be directed not to give effect to them, by an application of the principle in *Ex parte James* (1874) LR 9 Ch App 609 or by analogy with it or under paragraph 74 of schedule B1 to the Insolvency Act 1986 (relief against acts which would cause unfair harm to one or more creditors).

10. The administrators have adopted for the most part a neutral stance on the issues in *Waterfall IIB*. The main submissions have been made on behalf of the first to third respondents, which are creditors with proved debts with a principal value of over £2.75 billion (the Senior Creditor Group, or SCG) and on behalf of the fourth respondent (Wentworth), the holder of the US $2.27 billion subordinated debt. The subordinated debt was held in *Waterfall I* to rank after statutory interest and non-provable debts. It is therefore, broadly speaking, in the interests of the SCG to argue that claims to interest and currency conversion claims are not released or modified by the post-administration agreements and in the interests of Wentworth to argue the contrary.

11. The respondents have not been appointed as representatives of different classes of creditors but they have advanced submissions in effect on behalf of those classes, and the administrators are content to act on directions given by the court on this basis. Where either of them have not made submissions that they might have done and the administrators consider them arguable, counsel for the administrators have advanced those submissions. The administrators uploaded all the position papers of the respondents and their own position paper on the LBIE administration website and invited any creditor who considered there to be relevant positions or arguments not canvassed in those position papers to contact them.

The Issues

12. There are five issues raised on this part of the application.

13. Issue 1 (paragraph 34 of the application notice) concerns the effect of the various agreements on currency conversion claims and any other non-provable claims:

> "Whether (as a matter of construction) a creditor's Currency Conversion Claim and/or any other non-provable claim has been released in circumstances in which the creditor entered into either:
>
> (i) a Foreign Currency CDD incorporating a Release Clause;
>
> (ii) a Sterling CDD incorporating a Release Clause; or
>
> (iii) the CRA."

14. Issue 2 (paragraph 35 of the application notice) concerns the effect of some of the agreements on claims to statutory post-administration interest payable under rule 2.88 of the Insolvency Rules 1986:

> "Whether (as a matter of construction) a creditor's claim to Statutory Interest has been released in whole or in part in circumstances in which the creditor entered into either:
>
> (i) a CDD incorporating a Release Clause; or
>
> (ii) the CRA."

15. Issue 3 (paragraph 36A of the application notice) asks whether, if any of the agreements have the effect of releasing any claims referred to in Issues 1 and 2, the administrators should be directed not to enforce such releases:

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

16. Issue 4 (paragraph 38 of the application notice) raises a specific issue on one of the agreements, the Claims Resolution Agreement:

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

Evidence

17. The administrators have filed witness statements, giving evidence of the background to and the development of the relevant post-administration agreements. The respondents have also filed witness statements, giving evidence from their standpoint. Some of the evidence is not admissible on questions of construction of the agreements, particularly as it concerns the parties' own contemporaneous understanding of the effect of the agreements. The parties are, however, agreed that facts known, or reasonably available, to creditors about the administration and the financial state of LBIE, and communications by the administrators to creditors generally, before any particular agreement was made are admissible as regards the construction of that agreement.

18. The parties have agreed statements of agreed facts, one for the issues of construction and the other for the *Ex parte James* and related issues.

Structure of the judgment

19. I will first summarise the background to the agreements and their development and the communications with creditors concerning them. I will then refer to relevant authorities, followed by general features of the context which appear to me particularly relevant to the construction of the agreements. After that, I will refer to the agreements in detail and the parties' submissions. Finally, I will deal with the submissions on *Ex parte James* and paragraph 74 of schedule B1 to the Insolvency Act 1986.

Background to the Claims Resolution Agreement (CRA)

(i) The administration of LBIE

20. LBIE was placed in administration on 15 September 2008. The collapse of the Lehman Brothers group worldwide has been described as the largest ever corporate failure. LBIE, based in London, was the principal operating company for the European operations of the Lehman Brothers group. The scale of the task faced by the administrators was unprecedented. As an international investment bank, LBIE's business principally comprised financial arrangements, often of a very complex nature.

21. LBIE contracted with a large number of counterparties. On 15 September 2008 there were many open contracts, some but not all of which automatically terminated on its entry into administration. By December 2009, the administrators had identified about 6,000 counterparties. By March 2014, a total of 2,366 creditors with unsecured claims totalling some £9.92 billion had been agreed or admitted to proof.

22. This situation was further complicated by the fact that, in the course of its business, LBIE held in its own name or to its order substantial quantities of securities (trust assets) and cash (client money) on trust for clients and other parties (together, trust property). The value of trust assets held as at 15 September 2008 was approximately US $35.2 billion, to which some 2,000 clients had claims involving over 31,000 stock lines.

23. The return of trust property was identified as a key priority by the administrators from an early stage in the administration. They came under considerable pressure from clients to return trust property as quickly as possible as these assets were, in many cases, critical to the clients' businesses. On an application by the administrators, Blackburne J made an order dated 7 October 2008 directing the administrators to prioritise the return of trust property by implementing certain processes, pending the approval by creditors of the administrators' proposals for achieving the purpose of the administration. The return of trust property took priority over the ascertainment of unsecured claims.

24. Initially the administrators undertook the return of trust assets on a bilateral basis, giving priority to those clients who could make out a special case for being treated quickly and who were able and willing to accept returns on stringent conditions, including the provision of indemnities to protect against third party claims. The administrators, however, considered that this process was unsatisfactory for both them and the trust asset claimants, as it was time-consuming, costly and subject to uncertainties arising from the existence of competing claims to trust assets. By way of illustration, over 100 staff from the administrators' firm and their solicitors and from LBIE, among others, were deployed specifically to work on trust asset issues in the first six months of the administration.

25. The administrators therefore began to consider alternatives to the process of bilateral returns, based on a defined series of methodologies for the evaluation of claims and the allocation of any stock shortfalls which could be applied to all trust asset claimants. As Mr Pearson makes clear in his seventh witness statement at paragraph 17, the administrators were concerned to ensure the efficiency and fairness of the process for returning trust assets. With competing claims to the same trust assets and the fact that some trust assets were held under sub-custodian arrangements with other companies in the Lehman Brothers group that were also in insolvency proceedings, there appeared to be a significant risk that there would be a shortfall in trust assets.

(ii) The proposed scheme of arrangement

26. The administrators concluded that the best framework for dealing generally with these issues was by means of a scheme of arrangement under Part 26 of the Companies Act 2006. On the administrators' application, Blackburne J made an order on 16 March 2009 confirming that the administrators were at liberty to promote a scheme of arrangement to deal with trust property.

27. With the agreement of the creditors' committee, the administrators established a scheme working group, whose members included representatives of creditors with claims to trust assets and a representative of an unsecured creditor without any such claims. Many of them were legally trained. Between February and November 2009, the scheme working group met on at least ten occasions and held a number of conference calls, to discuss the scope and terms of the proposed scheme and, later, the Claims Resolution Agreement.

28. On 14 April 2009, the administrators published their first progress report, for the period 15 September 2008 to 14 March 2009. It contained a brief outline of the problems facing the administrators in dealing with trust asset claims and of the proposed scheme of arrangement. It stated that:

> "The objective of the Scheme is to materially speed up the return of Client Assets to clients through, inter alia, the imposition of a bar date for submitting final claims."

29. Further information concerning the proposed scheme was provided to clients who appeared to have claims to trust assets in a letter dated 26 June 2009. It stated that:

> "The return of client assets is a core objective of the Joint Administrators of LBIE and our priority is to return these assets as expeditiously as possible."

30. Under the heading "Purpose of the Scheme", the letter stated:

> "Whilst we continue to return certain client assets under current mechanisms which involve indemnities and client credit support, broadly speaking, the objective of the proposed Scheme will be to increase the speed of the return of certain client assets through, among other things, the imposition of a "bar date" for submitting final claims.
>
> The proposed Scheme has been designed to provide the following benefits:
>
> - achieve finality of the population of claimants to client assets;
> - identify and resolve competing claims to stock lines;
> - define Scheme creditors' trust and unsecured claims;
> - define rules for dealing with asset shortfalls;
> - allow distributions without the need for recipients to give indemnities;
> - ensure finality of asset distributions;
> - ensure no future claims may be made against LBIE for assets distributed under the Scheme;
> - allow the controlled termination of open contracts;
> - apply a consistent set of rules for a number of issues, including valuation methodology, allocation of client assets and dispute resolution;
> - allow the valuation of all positions once they have been terminated and the application of unsecured claims and/or assets in satisfaction of any resulting net liabilities to LBIE; and

- allocate and make provision for the costs of implementing the Scheme and distributing assets pursuant to the Scheme."

31. It was essential to a scheme providing for the return of trust assets that any liabilities between LBIE and the trust asset claimants should be determined. LBIE had rights to apply assets which it held for claimants to satisfy or reduce the liabilities of those claimants to LBIE. Unless the liabilities were first determined, a return of trust assets would deprive LBIE of those rights. Accordingly, as well as containing provisions dealing directly with trust assets, the proposed scheme would also contain provisions for determining these liabilities in a final and binding manner.

32. On 14 July 2009 the administrators issued an application seeking directions as to whether the court would have jurisdiction to sanction the proposed scheme in view of its central proposal to compromise the proprietary claims of trust asset claimants. On 21 August 2009 Blackburne J held that the court would not have jurisdiction to sanction the proposed scheme: see [2009] EWHC 2141 (Ch). The Court of Appeal affirmed his decision on 6 November 2009: see [2009] EWCA Civ 1161, [2010] 1 BCLC 496.

(iii) The Claims Resolution Agreement

33. Following the judgment of Blackburne J, the administrators started to explore alternative mechanisms to the proposed scheme. The administrators concluded, and the scheme working group agreed, that the most viable alternative was a multi-lateral, contractual solution, the provisions of which would be substantially the same as those of the draft scheme. This was to become the Claims Resolution Agreement (CRA).

34. This approach was explained in a posting on the website on 5 October 2009, stating that the administrators were anxious that the appeal process should not lead to any unnecessary delay in the return of client assets and that they were exploring "alternative options which could be utilised to expedite the return of trust property irrespective of the appeal decision." They were developing the terms of a standardised settlement arrangement which:

> "would have substantially the same provisions as the draft Scheme, including a bar date, and deal with all aspects of determining the value of a creditor's net equity, the allocation and the distribution of trust property that are dealt with under the draft Scheme."

35. Successive drafts of the CRA documentation were circulated to members of the re-named CRA working group and there were lengthy conference calls and meetings, with feedback being received from the members of the working group.

36. As anticipated by the administrators' announcements, the provisions of the CRA were closely based on the terms of the draft scheme of arrangement. There was one significant difference. Whereas the draft scheme would have involved only those persons who claimed an entitlement to trust assets, the CRA also made provision for the calculation and ascertainment of unsecured claims under financial contracts with parties who made no claims to trust assets. In the event, the CRA did not become unconditional, and never therefore took effect, as regards such unsecured claims.

37. Overall, the purpose of the CRA was to provide a uniform set of rules for the return of trust assets and a standard methodology for the valuation of financial claims.

38. The CRA was circulated to trust asset claimants and actual or potential creditors in late November 2009. The acceptance condition as regards trust asset claims was reached and the CRA became effective on 29 December 2009. As at 14 March 2015, a total of 9,163 separate asset lines had been returned to 224 signatories to the CRA with a total value of £2.96 billion, excluding derived income.

Background to the Claims Determination Deeds

39. By late 2009, the administrators were in a position to give serious consideration to the preparations necessary to make distributions among unsecured creditors. The making of distributions is not one of the primary statutory purposes of an administration but, since the changes made to the administration regime with effect from 2003, it has been recognised that distributions may more sensibly be made in a continuing administration than in a liquidation. Paragraph 65 of schedule B1 to the Insolvency Act 1986 permits an administrator to make distributions among the general body of creditors with the permission of the court. Briggs J granted such permission by an order dated 2 December 2009 made on the application of the administrators. The administrators duly gave notice of their intention to make distributions in accordance with rule 2.95 and specified 31 December 2010 as the date by which proofs were to be lodged.

40. As earlier mentioned, the size and complexity of the business of LBIE made the task of dealing with claims exceptionally difficult. At the time of the publication of the administrators' third progress report in April 2010, they estimated that approximately 4,500 counterparties were likely to be creditors of LBIE. By October 2010, the estimate was around 3,490 counterparties with total claims of £4.8 billion. Many of these counterparties had claims arising under complex financial trading arrangements, under many of which the counterparties were permitted to formulate their claim for loss and, in any event, the valuation of loss was likely to be difficult.

41. Against this background, the administrators considered it appropriate to explore alternative processes for determining unsecured creditors' claims than those set out in the Insolvency Rules. In the absence of such alternative procedures, the administrators considered, as they informed creditors in an update posted on the website in June 2010, that there would be a time consuming and expensive adjudication process that was likely to involve extensive disputes and potential litigation, meaning that it was likely to be many years before a material interim dividend could be paid to creditors.

42. Rather than promote a scheme of arrangement as the administrators initially thought might be appropriate, they had concluded by October 2010 that a consensual approach involving bilateral agreements in a standard form would be the best solution.

43. In the fourth progress report for the six months to 14 September 2010, published in October 2010, the administrators described their proposal in the following terms:

> "The Consensual Approach is an optional claims determination process available to Street Creditors (currently estimated to be

> up to 3,490 counterparties, the claims of which LBIE currently estimates to total c.£4.8 bn), designed primarily to accelerate the agreement of creditor claims.
>
> Under the Consensual Approach, LBIE will offer to agree each eligible Street Creditor's claim using LBIE's in-house valuation methodology."

44. Under the heading "Benefits", the progress report stated:

> "The Consensual Approach will (subject to certain Client Money issues described in more detail below) benefit eligible Street Creditors directly on the basis that it is designed to:
>
> - provide finality and certainty regarding Street Creditors' financial claims against LBIE. That is, it allows creditors to agree, at this juncture, their total net claim against LBIE without the need for further substantial evidentiary documentation and interaction in support of their claim or to enter into what could become a protracted claims agreement process, especially with regard to the more complex claims;
> - materially reduce the costs of claim determination which creditors (and the estate) would otherwise incur; and
> - assist in accelerating, where possible, the distribution process on the basis that more claims should be determined sooner than if the approach was not followed.
>
> Where there are contractual restrictions on the assignability of claims against LBIE, the Administrators have received a number of enquiries regarding LBIE's willingness to permit such assignment. Although the Administrators are not in a position to advise creditors with regard to the potential assignment of their claim, creditors who avail themselves of the Consensual Approach should note that LBIE currently intends to permit agreed claims to be transferred (in whole) without requiring further consent."

45. The administrators stated that the resolution of the claims of unsecured creditors, without an accelerated consensual approach, would take many years to conclude, whereas a consensual approach would significantly shorten the life, and therefore the cost to creditors, of the administration.

46. The administrators' proposals involved LBIE and creditors entering into bilateral Claims Determinations Deeds (CDDs) in a standard form. As originally announced, it was anticipated that a determination of a creditor's claim, once accepted by the creditor and inserted in the CDD executed by it, would constitute an admitted unsecured claim in the administration. The judgment of the Court of Appeal given in August 2010 on issues relating to client money claims (*LBIE v CRC Credit Fund Ltd* [2010] EWCA Civ 917, [2011] Bus LR 277) led to material uncertainty as to which of

LBIE's creditors had client money claims, unsecured claims or both and other matters such as the value of the client money pool and the funds that might be required to top it up. This in turn created uncertainty as to the level of distribution that it would be possible to make to unsecured creditors. As a result, the administrators applied for and obtained an extension by two years, to 31 December 2012, for the last date for lodging proofs specified in the distribution notice given in December 2009.

47. Rather than wait until all these matters had been resolved, the administrators considered it to be in the interests of the administration and creditors generally to make as much progress with standard form CDDs as was possible. They therefore decided to seek agreement of the net balance due to a creditor but leave open for later determination the proportion of such balance, if any, as would constitute a client money claim, leaving the residual balance together with any shortfall on the client money portion to be admitted as an unsecured claim to rank for dividend.

48. To be effective in this approach, the administrators developed, with input from a committee of unsecured creditors, a standard form deed called an Agreed Claims Determination Deed (Agreed Claims CDD).

49. In November 2010, the administrators started the process of determining creditors' claims in accordance with standard procedures, communicating the determination to creditors and inviting them to accept it and enter into an Agreed Claims CDD on that basis. Creditors were advised that the determination was not intended to be a matter for negotiation and that they were entitled either to accept it or to reject it. The determination was intended to produce a final net figure in respect of all unsecured claims by creditors. The determination was presented as a single figure and no breakdown of the amount was recorded in the CDD if the determination was accepted. Creditors were informed that if the determination was rejected, they would be able to negotiate their claims on a bilateral basis at a later stage but that this would take a significant time to conclude and might even require court adjudication.

50. In April 2011, the administrators started to use a new form of CDD called an Admitted Claims CDD. It was used in circumstances where there was little or no possibility of the creditor having entitlements to client money. The amount of the net balance determined by LBIE, agreed by the creditor and specified in the CDD, would be the amount for which the creditor was admitted to proof in the administration.

51. Over time the drafting of the CDDs developed. Although they were generally presented on a take it or leave it basis, there were in some instances bilateral negotiations of the terms of particular CDDs. A number of variations of the standard CDDs were developed, most of which need not be described. One which should be mentioned is a form of CDD which was used between LBIE and claimants who had become parties to the CRA. There was no necessity for such creditors to enter into CDDs, because their net claims had been determined under the CRA, but the administrators requested them to do so, because they considered CDDs to be a more straightforward and less time-consuming way of documenting the unsecured claim than through the issue of notices required under the CRA. It also meant that creditors could transfer their claims using the transfer notice appended to the CDD.

52. A very significant development for present purposes occurred in early 2012. Before then, there does not appear to have been any contemplation that there would be a

surplus of assets in LBIE after the payment of proved debts. In early 2012, the possibility of a surplus started to be discussed in the market, triggering questions from some counterparties as to the impact of the releases contained in the CDDs on any entitlement to statutory interest under rule 2.88 of the Insolvency Rules 1986. The administrators took the view that the CDDs did not affect the entitlement to statutory interest but, faced with an increasing number of requests from creditors that this should be clarified, the administrators agreed, on a case by case basis, to include terms expressly preserving entitlements to statutory interest. The first such CDD was executed on 28 June 2012. From September 2012, the administrators incorporated in all standard form CDDs a provision which, expressly for the avoidance of doubt, made clear that nothing in the CDD affected the entitlement of creditors to statutory interest on their admitted claims.

53. On 26 November 2012, the administrators gave notice of their intention to pay a first interim dividend of 25.2 pence in the pound. In their ninth progress report for the six month period to 14 March 2013, published in April 2013, the administrators provided for the first time illustrative outcome estimates indicating a potential surplus on a high case. There were a number of reasons which contributed to the improvement in the outlook for creditors. Principally, there was a significant increase in anticipated asset realisations (from a range of £7.5 billion to £12.5 billion in September 2011 to a range of £15.875 billion to £18.84 billion by September 2013) and a marked reduction in the value of unsecured claims. A significant factor was the success of the administrators in negotiating settlements with other companies in the Lehman Brothers group, in particular the principal US broker dealer, Lehman Brothers Inc.

54. In or about March 2013, a creditor raised for the first time with the administrators the possibility of a currency conversion claim. As I read the administrators' evidence, this is not a possibility which had previously been considered by them, either because they were unaware of the legal basis of the claim or because they had not previously contemplated the emergence of a surplus after payment of not only all proved debts but also statutory interest in full on those debts, or perhaps both.

55. In March 2013, an unsecured creditor, Lydian Overseas Partners Master Fund Limited, was joined to the *Waterfall I* application to argue for the existence of currency conversion claims and their priority ranking behind statutory interest but ahead of the subordinated debt.

56. This prompted some creditors to raise questions concerning the impact of the releases contained in the standard form CDDs on currency conversion claims. The administrators were at first reluctant to include an express preservation of currency conversion claims because of concern that it might have the effect of discriminating between different groups of unsecured creditors who otherwise ranked together. At the pre-trial review of the *Waterfall I* application on 11 October 2013, leading counsel for a subordinated creditor specifically suggested that the release clause in the CDDs had the effect of waiving currency conversion claims. In the light of this and increasing concern on the part of creditors invited to enter into CDDs, the administrators commenced negotiations with such creditors and their advisors for an appropriately worded exclusion of such claims from the releases contained in the CDDs. Bilateral negotiations led to the inclusion of such provisions in some CDDs, and from mid-February 2014, a standard form provision to that effect was included in all CDDs executed after that time.

Principles of construction

57. There was no real dispute between the parties as to the applicable principles of construction. With commendable economy, counsel took me to a small number of the relevant authorities, largely in their written submissions. As the SCG rely heavily on the context in which the agreements were made, while Wentworth relies heavily on the terms of the agreements, there was naturally a difference in emphasis as to the passages relied on in the various judgments.

58. I have these authorities well in mind. As to the general approach to construction, I will cite just two passages.

59. First, in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900, Lord Clarke said at [21]:

> "… the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."

60. Secondly, in *Bank of Credit and Commerce International SA v Ali* [2001] UKHL 8, [2002] 1 AC 251, Lord Nicholls of Birkenhead said at [26]:

> "… The meaning to be given to the words used in a contract is the meaning which ought reasonably to be ascribed to those words having due regard to the purpose of the contract and the circumstances in which the contract was made."

61. It is worth observing at this stage that the contracts which fell to be construed in the authorities are ordinary bilateral contracts, mostly made in a commercial context, between parties with competing interests. I do not suggest that the rather different context in which the agreements in the present case were made in any way displaces the principles of construction established by those authorities, but consistently with those authorities the particular context of these agreements is a material factor.

62. Following the hearing of this application, the Supreme Court gave judgment in *Arnold v Britton* [2015] UKSC 36. I have read the judgments in that case and have borne them also in mind in preparing this judgment.

63. *Bank of Credit and Commerce International SA v Ali* concerned the construction of a release of claims contained in a settlement agreement. Releases are not the subject of special rules of construction, but as Lord Bingham of Cornhill said at [10]:

> "But a long and in my view salutary line of authority shows that, in the absence of clear language, the court will be very slow to infer that a party intended to surrender rights and claims of which he was unaware and could not have been aware."

Lord Nicholls said at [29]:

> "… Over the years different judges have used different language when referring to what is now commonly described as the context, or the matrix of facts, in which a contract was made. But, although expressed in different words, the constant theme is that the scope of general words of a release depends upon the context furnished by the surrounding circumstances in which the release was given. The generality of the wording has no greater reach than this context indicates."

Contextual considerations applicable to the construction of the CRA and the CDDs

64. There are a number of important background factors and considerations relevant to the construction of the CRA and all the CDDs.

65. First, in proposing and entering into the CRA, the administrators were acting in accordance with their statutory duties as administrators of LBIE. They were not acting in their personal interests, nor were they acting on behalf of LBIE in dealings with third parties, such as for example purchasers of assets from LBIE. It was their duty as administrators to administer and realise the property of LBIE and to distribute the proceeds of sale, after expenses, in accordance with the statutory scheme. It was their duty to act in the interests of the general body of creditors, while their legitimate claims remained unsatisfied. In addition, it was their duty on behalf of LBIE to administer the trusts of trust assets and client money.

66. The relevant purpose of the administration of LBIE was that set out in paragraph 3(1)(b) of schedule B1 to the Insolvency Act 1986, providing:

> "The administrator of a company must perform his functions with the objective of:
>
> (a) …
>
> (b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration)."

67. Paragraph 3(2) requires the administrator to "perform his functions in the interests of the company's creditors as a whole". The administrator is also required by paragraph 4 to "perform his functions as quickly and efficiently as is reasonably practicable."

68. This puts the CRA and the CDDs in a very different position from the ordinary bilateral contract between parties with competing commercial interests. As the

administrators have themselves stressed in their own evidence, they sought to act fairly as regards creditors, as indeed it was their duty to do.

69. Secondly, the principal purposes of the CRA and the CDDs were clear. The CRA was proposed primarily as a means of simplifying and accelerating the resolution of trust asset claims and the return of trust assets to the claimants entitled to them. For that purpose, it was necessary to ascertain the financial claims as between LBIE and each trust asset claimant. That determination could be used both for the purposes of determining the trust assets to be returned and the amount of any financial claim. The purpose of the CDDs was to simplify and accelerate the ascertainment of unsecured claims against LBIE and the payment of dividends in respect of them. A release or modification of the rights of creditors to statutory interest and a release of currency conversion claims were wholly irrelevant to the achievement of these purposes. It is obvious that claims to statutory interest and currency conversion claims are unconnected to the return of trust assets. The ascertainment of unsecured claims against LBIE for the purposes of a more accelerated payment of dividends also has no connection with either statutory interest or currency conversion claims. They are payable only if there is a surplus remaining after the payment of all proved debts and, in the case of currency conversion claims, after the payment of all claims to statutory interest.

70. Thirdly, statutory interest and currency conversion claims are qualitatively different from other claims. They arise exclusively out of or in relation to the claims which are admitted to proof. I accept, as Mr Zacaroli submitted, that there is a juridical difference between them. Statutory interest is payable on a proved debt by virtue of the Rules. A currency conversion claim is essentially a claim in debt, representing that part of the original contractual claim in the relevant foreign currency which is not discharged through the payment of dividends in sterling. Nonetheless, they both share a close connection with the proved debt.

71. Fourthly, in sending out the circular containing the CRA, with its introductory letter and detailed summary, the administrators were acting in accordance with their duty to explain clearly to creditors the purposes and intended effects of the complex agreement to which they were invited to become parties. It is common ground that there is no indication in the circular that the CRA would have any effect on currency conversion claims. Nor was there any such indication when draft CDDs were sent to creditors. This is not surprising because it does not appear that until 2013 anyone was contemplating the possibility of there being a surplus of assets after the payment of all proved debts and statutory interest. Given the very large amount of LBIE's dealings in foreign currencies, currency conversion claims would clearly be of great significance if it had been anticipated that there would be assets available after the payment of proved debts and statutory interest. It is inconceivable that in those circumstances the administrators would have sent out a circular or published details of the CRA and CDDs which did not describe the effect of the CRA and CDDs on such claims or that, if asked, the court would have permitted them to do so.

72. Fifthly, so far as concerns the treatment of unsecured claims, the operation of the CRA and the CDDs would be subject to those provisions of the Insolvency Act and the Insolvency Rules that were mandatory. As Mr Pearson observes in paragraph 30 of his seventh witness statement, the effect of the order of 2 December 2009 was to bring into operation chapter 10 of the Insolvency Rules governing the way in which

debts would be valued and proved, including conversion of the amount of the debt into sterling as at the date of administration under rule 2.86.

73. Rule 2.86 provides, so far as relevant:

> "(1) For the purpose of proving a debt incurred or payable in a currency other than sterling, the amount of the debt shall be converted into sterling at the official exchange rate prevailing on the date when the company entered administration …
>
> (2) "The official exchange rate" is the middle exchange rate on the London Foreign Exchange Market at the close of business, as published for the date in question. In the absence of any such published rate, it is such rate as the court determines."

74. The effect and application of rule 2.86 had been made very clear in the progress report for the six months to 14 September 2010. In a part of the section dealing with unsecured creditors, headed "Currency Matters", reference was made to the currency-related queries which the administrators had received from creditors, after they had explained in their previous report that all unsecured claims would be proved in sterling. The report stated that for the avoidance of doubt, the comments which followed "relate to all unsecured claims, including those of any CRA signatories." It referred to the order made by Briggs J on 2 December 2009, permitting a distribution to unsecured creditors, and stating that it brought into effect the provisions of rule 2.86 which was then quoted. It continued:

> "Accordingly, applying Rule 2.86 and general principles of UK insolvency law, all unsecured creditors claims (which include any unsecured claims relating to CRA signatories) are to be converted into Sterling as at 15 September 2008 for the purposes of having a proven claim against LBIE. Specifically:
>
> - for CRA claimants, under the CRA, any claim which is not already denominated in US Dollars is converted into US Dollars using the exchange rate as at 15 September 2008. In addition, any netting of claims and set-off, including of shortfalls, is calculated in US Dollars. Once this calculation has been made, any Ascertained Claim which is so derived (defined as an unsecured claim of a CRA counterparty and denominated in US Dollars) will then be converted into Sterling also using the exchange rate as at 15 September 2008 (in accordance with the provisions of UK insolvency law for the purposes of proving); and
>
> - similarly, for all other unsecured creditors whose claims are derived from contracts in currencies other than Sterling, their unsecured claims are also converted to Sterling, using exchange rates as at 15 September 2008 (in accordance with UK insolvency law).

> To assist creditors, the Claims Portal contains relevant exchange rates as at 15 September 2008 and automatically converts non-Sterling denominations. A list of the exchange rates as at 15 September 2008 can be found at Appendix C.
>
> In order to be able to determine the entitlements of creditors to a share in the estate, all claims must be expressed in a single common currency and currency translation must be calculated at a common date. UK insolvency law requires the common date to be the date of the Administration. Although the law also prescribes that creditors' claims are to be converted into Sterling, the relative share that an individual creditor will have is unaffected either by which common currency is adopted, or the original currency denomination of the creditor's claim."

75. This important section makes clear that the conversion of foreign currency claims is to be carried out in accordance with the statutory regime contained in rule 2.86. This was the last progress report, and so far as I am aware, the last statement sent to creditors generally before the use of Agreed Claims CDDs.

76. The next progress report, for the six months to 14 March 2011, while not repeating the passage just quoted, contained nothing to suggest that it did not continue to apply. On the contrary, after referring to the commencement of the communication of determinations to creditors with a view to claims agreements, it stated:

> "In order to be eligible for receipt of a LBIE Determination, the Administrators require that the relevant creditor has submitted a Proof of Debt that is compliant with UK insolvency legislation."

The terms of the Claims Resolution Agreement

77. The CRA was proposed to eligible creditors on 24 November 2009 in a circular (the CRA Circular), comprising:

    i) a letter from the administrators with schedules setting out a summary of the background history and a Reader's Guide to the CRA;

    ii) a detailed summary of the principle provisions and effect of the CRA; and

    iii) the CRA itself.

78. The text of the CRA itself occupied 178 pages of close print. The summary of the principal provisions and effect of the CRA was spread over 63 pages while the administrators' letter was a more modest 14 pages. It was necessarily a highly complex agreement.

79. The administrators' principal objective in developing the CRA was to facilitate the return of trust assets. The administrators' letter started by referring to their proposals contained within the CRA Circular "for the basis of returning segregated trust assets held by [LBIE] to its clients". The letter continued that:

> "The Agreement is proposed by the Company for the determination of ownership claims to certain assets and other non-proprietary claims against and liabilities to the Company, as applicable, in accordance with certain contractual mechanisms."

80. The letter stated:

> "One of the primary objectives of the Administrators has been to develop a standard methodology to expedite the return of trust property held by the Company to its rightful owners."

81. After referring to the scheme and the lack of jurisdiction to sanction it, the letter continued:

> "The Administrators have worked with a sub-committee of the Creditors' Committee of the Company … to develop an approach, which incorporates a number of key provisions in order to return assets to clients. This approach is set out in the Agreement and, subject to certain acceptance thresholds, will bind those clients who pro-actively elect to sign up to its terms by accepting the Offer.
>
> The Administrators believe that, for those clients who become party to the Agreement, the Agreement establishes the most efficient available method of determining the return of segregated client assets which the Company holds on trust."

82. The letter went on to explain the two categories of eligible offerees. The first category, known as TA Offerees, were:

> "clients of the Company who, as at the date of the Circular, have ownership claims to assets which were recorded in the books and records of the Company and the relevant sub-custodian or depot as being held in a segregated manner for clients, separately from the Company's own assets, as at the time the Company entered into administration."

83. The second category, known as NTA Offerees, were:

> "clients of the Company who do not have ownership claims to segregated assets but who, at the date of the Circular, are party to Financial Contracts with the Company as at the time the Company entered into administration."

84. Financial Contract was widely defined to include any bilateral or multi-lateral contract relating to one or more transactions or positions of a financial nature.

85. Under the heading "What does the Agreement do?" the letter stated:

> "The objective of the Agreement is to establish standard methods for the termination and valuation of Financial

> Contracts and to expedite the process of asset distribution in order to bring finality to Signatories in respect of these positions."

86. Under the heading "Asset Claims", the letter refers to the methods established by the CRA to assist in determining Asset Claims, including the bar date for claims fixed as at 26 February 2010 or such later date as LBIE may notify. If an Asset Claim were not submitted by the bar date, the signatories' entitlement to trust assets would be determined on the basis of the information available at the time the determination is made. This part of the letter goes on to state:

> "The Agreement sets out structured procedures for the return of Trust Assets. In some circumstances, these procedures may compromise certain contractual rights of Signatories; for example, rights to potential consequential losses (if any). It is not possible to predict how the application of these procedures may affect individual Signatories at this stage because of the highly fact-dependent nature of an individual's circumstances. It is within this context that the Administrators believe the Agreement is in the overall interests of creditors as a whole."

87. The next heading is "Other claims under Financial Contracts" and the letter states:

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

88. The next section is headed "Advantages of accepting the Offer". As counsel for all the parties referred to various parts of this section, I shall set it out in full:

> "The Administrators have worked closely with the Claim Resolution Agreement Working Group to develop the Agreement in a form that balances the requirement to return certain Assets held on trust by the Company to their rightful owners quickly and efficiently with the need to ensure that the unsecured estate is not disadvantaged. The Claim Resolution Agreement Working Group includes both unsecured creditors and clients of the Company who have Asset Claims to Trust Assets.
>
> In the Administrators' view, the Agreement provides the most efficient solution for the return of Trust Assets, in terms of both time and cost to the Company and its clients. In particular, the Administrators are of the view that the Agreement will benefit

> Signatories and should be implemented on the basis that it is expected to:
>
> (i) expedite the return of Trust Assets to Signatories;
>
> (ii) provide finality and certainty regarding the financial position between Signatories and the Company;
>
> (iii) reduce costs and mitigate risks of competing claims to Trust Assets to which the Company and TA Signatories might otherwise be exposed; and
>
> (iii) expedite the release of Assets which are not held on trust and enable subsequent distributions to clients of the Company, on the basis that the Agreement will not only deal with claims to Trust Assets but also establish Signatories' unsecured claims, if any, against the Company.
>
> In seeking to achieve an effective multilateral solution to the determination of Signatories' positions, the implementation of the Agreement will progress the Administration of the Company, enabling further advances to be made in the management of the unsecured estate. For this and other reasons outlined in this letter, the Administrators are also of the opinion that the Agreement is in the best interests of the creditors of the Company as a whole.
>
> In particular, the Administrators also believe that the Agreement will benefit the unsecured clients of the Company since it is expected to:
>
> (i) speed up the agreement of unsecured claims because all unsecured claims of Signatories are determined by operation of the Agreement as described in (ii) above;
>
> (ii) expedite the distribution process for unsecured clients on the basis that the unsecured claims can be determined more quickly; and
>
> (iii) reduce the level of unsecured claims as certain claims of Signatories for consequential and indirect losses are compromised by the Agreement."

89. The next section set out the position of eligible offerees who did not accept the offer. The letter warned that their claims were likely to take longer to finalise, which might delay the return of trust assets to them. The concessions and compromises contained in the CRA which operate to the benefit of signatories were unlikely to be available to clients who chose not to accept the offer and attempted to negotiate bilateral arrangements for the return of trust assets. Non-signatories would not benefit from the mutual releases of claims by signatories, so that they would face a greater risk of

challenge by claimants with competing claims to any trust assets returned to them. They were also likely to be subject to higher costs in respect of the return of trust assets, because the standard procedures for which the CRA provided were expected to make this process more cost-efficient.

90. Under the heading "Conclusion", the letter stated:

> "The Administrators are of the opinion that the Agreement represents the most efficient method of returning Trust Assets to those clients with ownership claims to them for the reason set out in this letter. The members of the Claim Resolution Agreement Working Group have also expressed their unanimous support for the Agreement."

91. Schedule 2 to the administrators' letter contained the Reader's Guide to the CRA. It was stated to be a "plain English" summary of the CRA, the purpose of which was:

> "to provide you with an easier to read, easier to understand summary of the material provisions in the Agreement as well as some of the commercial rationale for those provisions."

It went on to warn that:

> "Before making your decision, you should review the actual Agreement and remaining parts of the Circular in consultation with your legal advisers. It is the Agreement and not this summary that will govern the disposition of your claims against the Company."

92. As regards the purpose of the CRA, it was stated:

> "The purpose of the Agreement is to allow the Company and Signatories to compromise and agree on the treatment of all the Signatories' claims relating to Trust Assets (i.e. securities) and financial contracts. While the principal focus of the Agreement is to facilitate the return of trust assets to those Signatories with ownership claims ("TA Signatories"), it also contains mechanisms to determine the claims of those Signatories with purely unsecured financial claims (for example, those with derivative positions or repurchase agreements) ("NTA Signatories"). Because of the complex issues that are being dealt with under the Agreement, it is, by necessity a very complicated document."

93. After summarising the position as regards trust assets, the Reader's Guide explained that LBIE would determine the value of any unsecured claims each signatory had against it, arising out of financial contracts. Financial contracts that had been closed out would be valued on the basis of the Close-Out amounts determined in accordance with the contracts in question, while open financial contracts would be automatically closed out on the last business day of the month in which the signatory entered into

the CRA. The CRA set out different methodologies to be used in determining the value of the Close-Out amounts under those financial contracts.

94. The Reader's Guide explained the Net Contractual Position:

> "All unsecured claims and liabilities of each Signatory arising out of the close-out amounts of their financial contracts with the Company (which, for the avoidance of doubt, includes the rehypothecated longs, shorts and cash balances other than client money) will be netted against each other to determine that Signatory's net contractual position. If the Signatory has more claims than liabilities, it will have a net financial claim against the Company (that will ultimately entitle the Signatory to a portion of the dividend to be paid by the Company to its unsecured creditors). If the Signatory has more liabilities than claims, it will owe a net financial liability to the Company. The Company will only distribute trust assets to a Signatory once that Signatory has satisfied any net financial liability owed to the Company."

95. Further explanation of the Net Contractual Position was given in paragraph 4.7 of the Reader's Guide. Close-Out amounts would all be converted to US dollars as at the date of administration, and:

> "In accordance with standard insolvency rules, trust creditors will not be entitled to any interest in respect of their claims against the Company, including with respect to close-out amounts under open financial contracts."

96. The releases contained in the CRA are specifically referred to in paragraph 4.1:

> "(v) one of the main purposes of the Agreement from the Company's perspective is to obtain a release from the Signatories to claims they might otherwise have against the Company and the Administrators, including any claims for consequential damages. The Agreement includes this release, but also includes a release whereby each Signatory will release all other Signatories from any ownership claims to assets distributed under the Agreement. The Signatories will not, however, release any claims it may have against Lehman Brothers Holdings Inc ("LBHI"), LBI or CAPCO in respect of any claims (including, but not limited to, guarantee or insurance claims). In exchange for the release being provided by the Signatories, the Signatories receive new claims against the Company;
>
> (vi) the Agreement also provides that the Company will, subject to certain exceptions, release claims it may have against Signatories under financial contracts. In

> exchange for the release provided by the Company, the Company receives the right to determine claims in accordance with the Agreement."

97. Viewed objectively, an eligible offeree who had knowledge of the background to the development of the CRA derived from information provided generally to claimants and creditors by the administrators and who had read the first 27 pages of the CRA Circular is likely to have gleaned the following principal points.

98. First, the CRA was put forward as an alternative to a scheme of arrangement as a means of returning trust assets to their owners in as expeditious and cost-effective manner as was reasonably practicable. This was its "principal focus". Entitlements to trust assets would be determined in accordance with the detailed provisions of the CRA and signatories would release all other signatories against all possible claims to trust assets returned to them respectively.

99. Secondly, the liabilities of the signatories and LBIE under financial contracts would be determined in accordance with the CRA. This would include procedures for calculating Close-Out amounts under those financial contracts which remained open at the date of the CRA but which would be automatically terminated pursuant to it. All Close-Out amounts, whether valued under the original contracts or under the process provided by the CRA, would be converted into US dollars, if that was not already the relevant currency. The Close-Out amounts on all contracts between LBIE and each signatory would be netted off, resulting in the Net Contractual Position. If that resulted in a net claim against LBIE, it would be an unascertained unsecured claim for the purposes of any future distribution from the general estate of LBIE.

100. Thirdly, the CRA contained releases. The Reader's Guide informed eligible offerees that one of the main purposes of the CRA from LBIE's perspective was:

> "to obtain a release from the Signatories to claims they might otherwise have against the Company and the Administrators, including any claims for consequential damages."

In exchange for the release, they received new claims against LBIE. The CRA also contained releases by LBIE, subject to certain exceptions, of claims against signatories under financial contracts.

101. I turn now to the terms of the CRA. It is both complicated and very long, running as I have previously mentioned to over 150 pages. It is divided into 18 parts and 97 clauses. The greater part of the CRA, reflecting its principal focus, is concerned with claims to trust assets. It is not necessary to look at most of these provisions. In the following paragraphs I refer to, and in some cases set out, the provisions relevant to the issues arising on this application.

102. The CRA is stated to be made on the Effective Date, between LBIE, acting by its administrators, and each person who has validly accepted the offer by LBIE to enter into the CRA or has otherwise become a signatory to it by operation of the CRA. It is a multi-lateral agreement. The Effective Date was the date on which the conditions, including acceptances by holders of 90 per cent in value of the relevant claims, were satisfied.

103. The purposes of the CRA are stated in the following terms in Recital (B):

> "The Company and Signatories have entered into this Agreement to release, modify and agree all Claims of the Signatories relating to the Trust Assets and Financial Contracts (other than certain specified Excluded Claims) in exchange for mechanisms to:
>
> (i) determine the Asset Claims to Trust Assets and to effect Distributions and Appropriations of Distributable Trust Assets of TA Signatories;
>
> (ii) allocate and make provision for the costs of managing Trust Assets and Allocating Distributable Trust Assets to TA Signatories;
>
> (iii) retain any Retention Amount of TA Signatories;
>
> (iv) determine, quantify and crystallise the value of unsecured claims (including any Asset Shortfall Claim, Pre-Administration Client Money Shortfall Claim and Net Financial Claim) of TA Signatories;
>
> (v) determine the Net Financial Liability, Pre-Administration Client Money Shortfall Claim and Net Financial Claim of all Signatories; and
>
> (vi) determine certain other Liabilities owed to the Company by Signatories, including Ascertained Non-Financial Contract Liabilities;
>
> (together, the "purposes")."

104. The term "Claim" is defined in wide terms as being:

> "a claim in law or in equity of whatsoever nature:
>
> (i) including for (but not limited to) breach of contract, tort, restitutionary claims and breach of trust;
>
> (ii) whether arising by, amongst other things reason of insolvency or the termination, whether voluntary or for cause, of any contractual obligation or for any failure of a person to perform any contractual, legal or regulatory obligation or otherwise; and
>
> (iii) for, amongst other things, the enforcement of any right to, or any liability in respect of a right to:
>
> (a) seek or enforce judgment;

> (b) exercise any remedy (for damages or otherwise), indemnity and contribution, whether for losses (including consequential loss, economic loss, loss of bargain, loss of value, or other losses computed by reference to value which may have been available had an obligation been duly performed in a timely manner, or otherwise), costs, and expenses of any nature; or
>
> (c) apply any set-off, netting, withholding, combination of accounts or retention or similar rights in respect of any claim or liability whatsoever,
>
> and "Claimant", "to Claim" and "Claiming" shall be construed accordingly."

105. Clause 4 contains the provisions for modifying or releasing claims by signatories. Claims in respect of trust assets are by clause 4.1:

> "modified and amended (together, the "Modified Claims") so they constitute the New Claims described in Clause 4.4."

106. Clause 4.2 provides for the release of claims by each signatory:

> "With effect from its Accession Date, each Signatory shall waive and release the following Claims against the Released Parties (to the extent that they are not Excluded Claims, and subject to Clause 4.3):
>
> 4.2.1 all Claims for or in respect of any payment for or on account of any Asset which is or was at any time the subject of any Asset Claim;
>
> 4.2.2 all Claims for consequential or economic loss (including Claims for loss of bargain, loss of value or other losses computed by reference to the value which may have been available to a Signatory had any obligation of the Company to the Signatory been duly performed in a timely manner in accordance with its terms) in respect of any Asset which is or was at any time the subject of any Asset Claim; and
>
> 4.2.3 all Claims (apart from, for the avoidance of doubt, Modified Claims) in respect of any Financial Contract,
>
> (together, the "Released Claims").

107. Clause 4.3 contains exclusions of certain claims from both the Modified Claims and the Released Claims, but nothing turns on these exclusions. Clause 4.4 deals with

the effect of distributions and retentions of assets under the CRA on the Modified Claims and is not directly relevant to the issues on this application.

108. Clause 4.4.2 deals with Released Claims and provides:

> "All Signatories shall have their Released Claims exchanged for the following, as appropriate:
>
> (i) the right to have their Net Contractual Position, Allocations, Distributions and Appropriations determined on the basis set out in this Agreement;
>
> (ii) the right to claim as a new obligation of the Company their Net Financial Claim (if any); and
>
> (iii) an Ascertained Claim (if any) for such amount as is determined under this Agreement,
>
> (together with the Modified Claims as modified by Clause 4.4.1, the "New Claims")."

"Ascertained Claim" is defined as:

> "an ascertained, unsecured claim in the winding-up of the Company or any distribution of the Company's assets generally to its unsecured creditors."

109. Clause 5 contains releases by LBIE against signatories. Subject to certain exclusions specified in clause 5.1.2, LBIE by clause 5.1.1 agrees to "release the Claims against the relevant Signatory for, or in respect of, all rights in respect of any Financial Contracts." These are defined as Company Released Claims and, by clause 5.2, they are exchanged for rights against each signatory in terms which, partly but not wholly, mirror those set out in clause 4.4.2. The detail is not relevant.

110. The other important provisions of the CRA for present purposes are set out in Part 7, headed "Net Contractual Position". Clause 19 provides for the automatic termination of all open contracts. Clause 20 provides for the determination of the Close-Out amount in respect of each Financial Contract. It sets out a series of methodologies which are to apply to the determination of the Close-Out amounts. The prime position is that the determination should take place in accordance with the provisions of the terminated contract, as modified and supplemented by what are called the Overriding Valuation Provisions. In certain circumstances, the details of which are not relevant, two alternative methodologies may be applied in the following order: the Agreed Valuation Methodology and the Fallback Valuation Methodology. Each of these methodologies is also subject to the Overriding Valuation Provisions. Again it is not necessary to look at the details of these methodologies.

111. Clause 24.1 provides that all Close-Out amounts shall be denominated in US dollars and that, to the extent that a Close-Out amount is denominated in another currency, it shall be converted by LBIE into US dollars using the Spot Rate as of the close of

business in London on 15 September 2008. The Spot Rate is the rate at which US dollars could then be purchased with the relevant converted currency.

112. Clause 24.2 provides for the determination of the Net Contractual Position. If there was only one Financial Contract between LBIE and a signatory the Close-Out amount in respect of that contract would be the Net Contractual Position of the signatory. If there was more than one Financial Contract, the Close-Out amounts were to be aggregated and the resulting figure would be the Net Contractual Position in respect of that signatory. If the resulting number were positive it would represent an amount due and owing by LBIE to the signatory which, as provided by clause 25.1, "shall constitute an ascertained unsecured claim of that Signatory in the winding-up of the Company or any distribution of the Company's assets to its unsecured creditors." It was defined as a Net Financial Claim. If the amount was a negative number, it would, as provided by clause 25.2, represent an amount due and owing by the signatory to LBIE. The Net Financial Claims of signatories with trust claims could be reduced to cover costs and liabilities arising under non-financial contracts and other specified liabilities, in accordance with Part 11. The amount so reduced would be the Ascertained Claim of such signatory: clause 62.4.

113. There are provisions dealing with interest. First, one of the Overriding Valuation Provisions, applicable to the determination of Close-Out amounts, is:

> "In determining the Close-Out amount in respect of a Financial Contract, no interest shall accrue on any unpaid Liability of the Company from the Administration Date save to the extent that such interest would accrue under Rule 2.88 of the Insolvency Rules."

Secondly, clause 25.1, dealing with a Signatory's Net Financial Claim against LBIE, provides:

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

The effect of the CRA on the entitlement to statutory interest

114. The SCG and Wentworth are agreed that the CRA had no effect on the entitlement of claimants to statutory interest under rule 2.88, so that all such claimants were entitled to the payment of interest out of any surplus remaining after the payment of proved debts for the period from the date of administration, at whichever was the greater of Judgments Act rate (judgment rate) or the rate applicable to their debt apart from the administration. Accordingly, if the rate payable to a claimant pursuant to its contract with LBIE was in excess of judgment rate, it would be entitled to the payment of interest at the higher contractual rate.

115. The administrators submit that a signatory to the CRA is entitled to interest under rule 2.88 only at judgment rate, because the CRA had the effect of releasing the creditor's contractual rights, including its entitlement to interest at the contractual rate, and substituted for those rights a right to the Net Financial Claim. There being no contractual rate of interest applicable to the Net Financial Claim under the CRA,

interest can be payable only at judgment rate. I do not accept this submission. First, as later discussed, I do not consider that the CRA substituted an entirely new right for the rights of a creditor under its original contract. The CRA had the effect of compromising those rights. Secondly, interest at a contractual rate under rule 2.88 does not involve the performance of a contractual right but is the creditor's statutory entitlement. The reference in rule 2.88 to the rate to which the creditor is entitled apart from the administration does no more than identify one of the two alternative rates at which interest is payable under the statutory provision. The key words for present purposes are "apart from the administration" in rule 2.88. That directs attention to the contractual entitlement of the creditor if there were no administration. If there were no administration of LBIE, there would be no CRA.

The effect of the CRA on non-provable claims for interest

116. In *Waterfall IIA*, the SCG submitted that, if their primary submission that they were entitled to appropriate receipts to interest under rule 2.88 before principal was rejected, they had a non-provable claim for the payment of interest to the extent that they had not made a full recovery of their contractual right to interest under rule 2.88. On the present application, the SCG submitted that such non-provable claims were unaffected by the CRA. In the light of my decision that no such non-provable claim is in any event available, this is an academic issue. I do not therefore intend to examine the issue in detail, but I should record that I agree with the submission of Mr Zacaroli on behalf of Wentworth that the last sentence of clause 25.1 of the CRA precludes any such claim.

The effect of the CRA on currency conversion claims

117. There are substantial differences between each of the parties in respect of this issue.

118. The SCG advance two alternative submissions. First, the effect of the CRA is to substitute for the signatories' existing claims a new obligation on LBIE set out in clause 4.4.2, including the right to be paid the Ascertained Claim which, by virtue of clause 24.1, had to be denominated in US dollars. An Ascertained Claim was defined as an unsecured claim in the winding-up of LBIE or in any distribution of its assets generally to its unsecured creditors and accordingly signatories had a right to the payment of a sum in US dollars which, for the purposes of proof, would be converted into sterling pursuant to rule 2.86 of the Insolvency Rules. It follows from the decision in *Waterfall I* that the signatories would have a non-provable currency conversion claim in respect of the exchange losses resulting from the depreciation of sterling against US dollars between 15 September 2008 and the dates of payment of distributions on the Ascertained Claims, even if their underlying contractual claims were in a different foreign currency. The effect, therefore, is to substitute a currency conversion claim based on a claim in US dollars for a currency conversion claim based on a contractual claim in, say, Japanese yen.

119. As the dates as at which the various currencies are deemed to be converted (either the commencement of the administration or the dates on which dividends are paid) are the same, it might be thought that a conversion from yen to US dollars to sterling would produce the same amount as a conversion from yen to sterling. This is, however, very unlikely to be the case because of minor differences at any one time. It appears that a conversion, based on close of business spot rates in London on 15 September 2008,

of €1 million into US dollars followed by a conversion into sterling would produce a sum of £791,279, whereas a conversion of €1 million directly into sterling would produce a figure of £793,800. With claims measured in billions of dollars, apparently small differences like this can become very significant, as every trader knows.

120. Alternatively, if the effect of the CRA was not to create a new obligation in this sense, those signatories whose claims under financial contracts were in a currency other than sterling would have non-provable currency claims in respect of exchange losses resulting from the depreciation of sterling against the relevant contractual currency after 15 September 2008. In particular, as the great majority of debts under financial contracts were in US dollars, the CRA did not have the effect of releasing non-provable currency conversion losses arising for those creditors. Mr Dicker presented these alternative submissions in that order, not because the first was necessarily their primary submission, but because it appeared to be the more logical order in which to present the submissions.

121. Wentworth submitted that, in substituting the new obligations set out in clause 4.4.2, the CRA did not create a currency conversion claim where none had existed before. Accordingly, a signatory whose contractual claim was denominated in euros would not acquire a currency conversion claim in respect of exchange losses for the depreciation of sterling against US dollars from 15 September 2008. Further, any signatory whose contractual claim was in a currency other than US dollars, for example euros or Japanese yen, would lose any currency conversion claims in respect of the depreciation of sterling against their respective contractual currencies from 15 September 2008. In Wentworth's submission, this did not apply to signatories whose contractual claims were in US dollars. Their currency conversion claims were unaffected by the CRA. Alternatively, and consistently with the SCG's alternative submission, Wentworth submitted that all original foreign currency claims survived for the purposes of making currency conversion claims.

122. This is the only issue on the present application on which the administrators advanced a separate submission. They do so because they consider that the submission is arguable on the terms of the CRA and no other party is advancing it. In particular, Wentworth does not advance the submission, although it might have been expected to do so. The submission is that the effect of the CRA is to release all claims in respect of any financial contract under clause 4.2.3, including any entitlement under the contract to be paid in a foreign currency, and it grants in exchange the right to claim, as a new obligation of LBIE, an Ascertained Claim, which is denominated in US dollars but only for the purposes of payment as an unsecured claim of LBIE which therefore must in accordance with rule 2.86 be converted into sterling. US dollars is used as a currency of account but not a currency of payment. All rights to payments in any foreign currency, including US dollars, are released and replaced by rights to payment in sterling through the combination of the provisions of the CRA and the effect of the Insolvency Rules.

123. I can quickly reject Wentworth's submission that the effect of the CRA is to preserve the contractual rights of signatories with original claims in US dollars but to release the contractual claims of other signatories with original rights to be paid in euros, yen or other foreign currencies other than US dollars. It is a result which would introduce a distinction between creditors with foreign currency claims, discriminating against those whose foreign currency claims were not in US dollars, in a way which would be contrary to all commercial common sense and contrary to all the notions of fairness among

creditors which underpin insolvency law and practice. Only the clearest and most explicit terms of an agreement could produce this result, and such terms are not to be found in the CRA.

124. The first submission made on behalf of the SCG, that the CRA created in favour of all signatories a right to be paid in US dollars, derives from the express terms of clause 4.4.2. The submission made on behalf of the administrators also, to an extent, relies on that provision having created a new obligation. The objection, in my judgment, to this construction is that it conflicts with the statutory regime applicable to distributions among creditors. One of the fundamental features of a distribution among the creditors of a company in administration is that it is made rateably in accordance with their admitted claims as at the date on which the company entered administration. The same principle applies to distributions in all other insolvency processes, including winding-up and personal bankruptcy. The choice of a single date as at which to ascertain and value or estimate the claims of creditors is essential to a pari passu distribution: see *Wight v Eckhardt Marine GmbH* [2004] 1 AC 147 at [28]-[29] per Lord Hoffmann.

125. The relevant statutory provisions are as follows. Chapter 10 of Part 2 of the Insolvency Rules applies to any proposed distribution to creditors in an administration. Rule 2.69 provides that debts other than preferential debts rank equally between themselves in the administration. Debt is defined in rule 13.12 in terms which were the subject of detailed scrutiny by the Supreme Court in *Re Nortel GmbH* [2014] AC 209 to mean: (a) any debt or liability to which the company is subject at the date on which it goes into administration; and (b) any debt or liability to which the company may become subject after that date by reason of any obligation incurred before that date. Rule 2.72, (in the form applicable to the administration of LBIE), dealing with proofs of debt by creditors, required a proof to state, among other things "the total amount of his claim as at the date on which the company entered administration."

126. A wholly new obligation arising after the company entered administration would not therefore be a provable debt. Clearly the CRA does not provide for a new obligation in that sense. The CRA compromises existing claims. There is therefore no difficulty in saying that the debt represented by the Ascertained Claim arising under the CRA is a provable debt. To this, however, must be added rule 2.86 providing for the proving of debts incurred or payable in a currency other than sterling.

127. All parties are agreed that rule 2.86 is mandatory in its effect. Accordingly, if a creditor has a claim denominated under its contract in euros as at the date of administration, that claim must for the purposes of proof be converted from euros into sterling at the specified rate of exchange. It is not open to an administrator to agree that a debt which was incurred or payable in one currency should be payable in another currency. History cannot be re-written. Similarly, the administrator could not agree that a debt incurred or payable at the date of administration in sterling should be for all purposes a debt incurred or payable in a foreign currency, thereby giving rise to a potential currency conversion claim in the event of a depreciation of sterling against the US dollar following the commencement of the administration. The first submission made by the SCG cannot therefore in my judgment be accepted. It would give all creditors whose debts were denominated in a currency other than the US dollar a potential currency conversion claim by reference to the depreciation of sterling against the US dollar after 15 September 2008.

128. This leaves as the two contending submissions, on the one hand the alternative submission made on behalf of both the SCG and Wentworth that the CRA has no effect on any currency conversion claims that would otherwise exist. Any signatory whose contractual right was to payment in a currency other than sterling, will have a claim for the exchange loss arising from the depreciation of sterling against that currency between 15 September 2008 and the dates on which distributions in respect of its claim, as determined in accordance with the CRA, were paid. On the other hand, there is the submission put forward by the administrators that the CRA has the effect of releasing the signatory's contractual right to be paid in any currency other than sterling and substitutes a right to be paid, as part of a distribution to unsecured creditors, a sterling sum equivalent to the Ascertained Claim which is expressed in US dollars.

129. It is important to appreciate that the submission put forward by the administrators on this basis is not the extreme position that the contractual rights have been completely terminated and replaced by an entirely new obligation. This submission accepts that the CRA goes no further than compromising the signatory's contractual claim but involves the proposition that it does so by releasing existing contractual entitlements, in particular the entitlement to payment in a currency other than sterling.

130. In the light of the general contextual considerations which I have earlier discussed, it would be surprising if the effect of the CRA was as submitted by the administrators. Moreover, it would produce a significant discrimination between different categories of creditor in a way which was, for the reasons given earlier, unconnected with the purposes of the CRA. Creditors who did not enter into the CRA, either because they chose not to or because they did not have possible trust property claims, would retain their currency conversion claims, while signatories would lose them. There is no justification either in the interests of creditors generally or in the purposes of the CRA why this discrimination should occur. It is of course the case that signatories to the CRA would obtain the benefit of earlier distributions of trust assets but the quid pro quo given by them was that their claims were to be valued in accordance with the methodology set out in the CRA, which might in some circumstances work to their disadvantage. Further, as Mr Dicker for the SCG remarked, it would be an extraordinary result if a creditor with a contractual claim in US dollars would, by having his provable claim determined in accordance with the CRA and expressed in US dollars, lose a currency conversion claim arising in respect of its Ascertained Claim.

131. In all these circumstances, it would in my judgment require clear words in the CRA to have the effect of releasing currency conversion claims. No such words are included in it.

132. By clause 4.2, each signatory waived and released "all Claims … in respect of any Financial Contract". "Claim" is defined in very wide terms, and clearly includes any claim in contract arising out of a Financial Contract, which encompasses all the contracts relevant to the present application. Such Claims, waived and released under clause 4.2, are included in the definition of "Released Claims". Although clause 4.4.2 provides for Released Claims to be "exchanged" for the rights and claims set out in that sub-clause, the word "exchanged" is for the reasons that I have already given, to be understood as setting out the terms of compromise of the Released Claims rather than the introduction of entirely new claims.

133. The entitlements of signatories are, first, "the right to have their Net Contractual Position, Allocations, Distributions and Appropriations determined on the basis set out in this Agreement". Net Contractual Positions are determined in accordance with clause 24.2. As earlier set out, this means the Close-Out Amount where there is only one Financial Contract or the aggregate of positive and negative Close-Out Amounts if there is more than one Financial Contract. These then are the claims arising out of the relevant contracts, determined in accordance with those contracts or, where applicable, the provisions of the CRA. Allocations, Distributions and Appropriations are relevant to trust asset claims. Secondly, signatories receive "the right to claim as a new obligation of the Company their Net Financial Claim (if any)". This means any Net Contractual Position which is expressed as a positive number and therefore represents an amount due and owing by LBIE to the signatory "which shall constitute an ascertained unsecured claim of that Signatory in the winding-up of the Company or any distribution of the Company's assets to its unsecured creditors". Thirdly, signatories receive "an Ascertained Claim (if any) for such amount as is determined under this Agreement." An Ascertained Claim is "an ascertained, unsecured claim in the winding-up of the Company or any distribution of the Company's assets generally to its unsecured creditors".

134. Until converted into sterling in accordance with rule 2.86 of the Insolvency Rules, all these figures could be expressed in their original contractual currency were it not for the provisions of clause 24.1 of the CRA. This requires that "all Close-Out Amounts shall be denominated in US dollars" and, if denominated in a currency other than US dollars, are to be converted into US dollars as at the close of business in London on the date of the commencement of the administration of LBIE. This step had to be taken, as Steven Pearson, one of the administrators, explained in paragraph 29 of his seventh witness statement:

> "In order to facilitate claim valuation (e.g. for the purposes of calculating votes in the Scheme or CRA) and to enable an account to be taken of all positions and claims arising between LBIE and a signatory (i.e. for set-off purposes), conversion into a single currency was necessary. The US dollar was chosen as the reference currency for administrative convenience as it minimised the conversion exercise (the majority of Trust Asset claims being denominated in US dollars)."

135. While the language used in clause 4.4.2 and the related clauses could, and in quite different circumstances might well, be construed as resulting in liabilities *payable* in US dollars, the context of the CRA leads me to conclude that this would not be the correct interpretation. The terms of these provisions are well capable of being read on the basis that the conversion of Close-Out Amounts into US dollars, in those cases where the contractual liability was not in US dollars, was intended to do no more than produce a common currency of account. It should not be construed as denying creditors with contractual claims in a foreign currency that existed as at the date of the administration their right to prove for those claims determined on the basis set out in the CRA. In this way, neither US dollar creditors nor creditors with contractual claims in any other foreign currency lose their contractual right for payment in that currency. For the purposes of admission to proof, all such claims must be converted into sterling in accordance with rule 2.86, but to the extent of depreciation of sterling

against the relevant currency after the date of administration, the unsatisfied balance of the foreign currency obligation remains outstanding as a debt and can be claimed out of the surplus after the payment of proved debts and statutory interest.

Claims determination deeds

136. I have earlier set out a brief account of the development of the CDDs. They were designed to deal with unsecured claims arising out of financial trading contracts, which represented the great majority of the claims of unsecured creditors of LBIE. Like the CRA as regards claims under Financial Contracts, the principal objective of the CDDs was to simplify and accelerate the claims determination and distribution process through the use of an alternative mechanism to the statutory regime for proof of debts in chapter 10 of part 2 of the Insolvency Rules. The administrators would offer a creditor a single number representing their determination of the creditor's claim, taking account of the positions under all financial contracts between LBIE and that creditor. The determination was usually made in the currency of a creditor's entitlement or, where its underlying entitlements were denominated in more than one currency, in the currency in which the largest element of the aggregate claim was denominated.

Agreed Claims CDDs

137. As earlier set out, the Agreed Claims CDDs were the first type of CDD to be used and were drafted in a way which left for later determination or agreement the existence and amount of any client money claim.

138. The Agreed Claims CDD on which the submissions primarily focussed was a CDD dated 1 February 2011 in which the Agreed Claim Amount was expressed in the underlying foreign currency of the relevant contract. The amount and the details of the creditor with whom this CDD was made have been redacted, as have certain other specific details. Their redaction does not hamper the construction of the CDD.

139. The principal operative clause is clause 2.1 which provides:

> "2.1 The Company and the Creditor irrevocably and unconditionally agree that, notwithstanding the terms of any contract (including the Creditor Agreement and the Other Agreements) to which the Creditor and the Company are party, the Agreed Claim shall be limited to the Agreed Claim Amount and shall constitute the Creditor's entire Claim against the Company and save in respect thereof:
>
> 2.1.1 the Creditor and (i) the Company and (ii) the Administrators, are hereby each irrevocably and unconditionally released and forever discharged from any and all losses, costs, charges, expenses, Claims (including all Claims for interest, costs and orders for costs and any and all Trust Asset Claims and Client Money Claims (if any)), demands, actions, causes of action, liabilities,

> rights and obligations (including those which arise hereafter upon a change in the relevant law) to or against each other and howsoever arising, whether known or unknown, whether arising in equity or under common law or statute or by reason of breach of contract or in respect of any tortious or negligent act or omission (whether or not loss or damage caused thereby has yet been suffered) or otherwise, whether arising under the Creditor Agreement the Other Agreements, or not, whether in existence now or coming into existence at some time in the future, and whether or not in the contemplation of the Creditor and/or the Company and/or the Administrators on the date hereof; and
>
> 2.1.2 the Creditor will not take any steps to prove for, or to Claim for, any debt in the Administration (or other insolvency process) of the Company, or otherwise bring any Claim, action, demand or issue (or continue) any Proceedings against the Company and/or the Administrators (or any of them) in any jurisdiction in respect of any and all Claims and matters as are referred to in Clause 2.1.1 above."

140. In broad terms, the effect of this provision is to release all claims save in respect of the Agreed Claim, which has a value equal to the Agreed Claim Amount.

141. Clause 3 makes provision for the acceptance of the Agreed Claim as an Admitted Claim, conditionally upon the resolution of any client money claims. To the extent that the Agreed Claim does not constitute a client money claim, it is to be converted to pounds sterling at the Exchange Rate and accepted as an Admitted Claim.

142. Clause 4 makes provision for the creditor to be able to transfer the whole but not part of its Agreed Claim, notwithstanding any provision to the contrary in the underlying creditor agreement.

143. The relevant defined terms are set out in clause 1.1:

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

> "The Creditor's Claim (or Claims, as the case may be) against the Company under and in connection with the Creditor Agreement, including for the avoidance of doubt any Client Money Claim arising under or in connection with the Creditor Agreement, but excluding any Trust Asset Claims (if any)."
>
> Exchange Rate:
>
> "The "official exchange rate" set out in Rule 2.86(2) of the Insolvency Rules which for the purpose of converting US dollars to pounds sterling shall mean the following exchange rates [redacted] and, for the purpose of converting the currencies specified in Appendix C of the Administrators' fourth statutory progress report (dated 14 October 2010) to pounds sterling shall mean the rate set out in Appendix C thereof."

144. Other relevant defined terms are as follows. "Agreed Claim Amount" is a specific sum, in the underlying contractual currency. "Claim" is defined in the same way as in the CRA and included all contractual claims. "Creditor Agreement" is defined as a specific ISDA Master Agreement between LBIE and the creditor. "Other Agreements" are further specified market standard agreements between LBIE and the creditor.

145. Recital (B) states:

> "In consideration of the Company and the Creditor agreeing that the Creditor's Claim(s) against the Company under the Creditor Agreement are limited to the Agreed Claim Amount, the Company and the Creditor wish to release and discharge each other in respect of any and all other losses, costs, charges, expenses, Claims, demands, actions, causes of action, liabilities, rights and obligations to or against each other and howsoever arising (including those arising under the Other Agreements)."

The effect of the Agreed Claims CDD on entitlements to interest

146. As regards statutory interest, the SCG and the administrators are agreed that the Agreed Claims CDD had no effect on the entitlement of creditors to statutory interest, either at judgment rate or at the rate applicable apart from the administration. Wentworth accepts that creditors were entitled to statutory interest at judgment rate but submits that the release of contractual rights contained in the CDD removes the basis for interest at the rate provided by the contract. I do not accept Wentworth's submission. For the same reasons as discussed in relation to the administrators' submission on the CRA, in my judgment the effect of the words "apart from the administration" entitles creditors who entered into Agreed Claims CDDs to the payment of interest at the rate applicable under their contract with LBIE if it is higher than judgment rate.

147. As regards non-provable claims for interest, this issue does not arise for the same reason as given earlier in respect of the CRA, namely that I rejected any such claim in *Waterfall IIA*. In any event, it would be difficult to argue that such claims survived the express release in clause 2.1.1 of "all Claims for interest".

The effect of the Agreed Claims CDDs on currency conversion claims

148. As regards currency conversion claims, Wentworth submits that such claims were not released by virtue of an Agreed Claims CDD if, and to the extent that, the Agreed Claim Amount was stated in the same foreign currency as the creditor's underlying contractual claim. In those cases where the creditor had claims in more than one currency, Wentworth submits that it would lose any currency conversion claim in respect of those claims converted into a different currency for the purposes of the Agreed Claim Amount. For example, if a creditor had claims in US dollars and euros but the claims in euros were converted into US dollars for the purposes of the Agreed Claim Amount, the effect of the Agreed Claims CDD would be to release any currency conversion claims in respect of the euro claims. Likewise, in any case in which sterling was used as the currency for the Agreed Claim Amount, all currency conversion claims would be released.

149. Wentworth's submission on the terms of the CDD was straightforward. Clause 2.1 provides that the Agreed Claim is limited to the Agreed Claim Amount and shall constitute the creditor's entire claim against LBIE and the Agreed Claim, at the Agreed Claim Amount, will be accepted as an Admitted Claim in a sterling amount following conversion at the Exchange Rate.

150. On behalf of the SCG, Mr Dicker drew attention to the process which led to the making of an Agreed Claims CDD. First, a creditor was required to submit a proof of debt on LBIE's claims portal, complying with the Insolvency Rules. Such proofs were submitted in the underlying contractual currency or currencies. The next stage was the administrators made an offer of a single amount which, if accepted by the creditor, became the Agreed Claim Amount. As earlier stated, this offer would be made in the currency of the underlying entitlement, save in those cases where the creditor had claims in more than one currency.

151. In large part, the submission of Wentworth as to the construction of Agreed Claims CDDs is consistent with the application of the statutory regime for the conversion of foreign currency claims. Their construction departs from it only in those circumstances where a creditor had claims in more than one currency, in which case a single currency was used in the Agreed Claims CDD. On Wentworth's submission, in that circumstance, the creditor loses a foreign currency claim in relation to the relative performance of the contractual currency and sterling.

152. This construction runs counter to all the general contextual considerations to which I have earlier referred and which I do not repeat here.

153. There are further objections to this construction. First, it discriminates in an unprincipled way between creditors with foreign currency claims. Those with claims in more than one foreign currency are treated differently from those with claims in one foreign currency. How those creditors are treated depends on the happenstance of which currency applies to their largest claim or claims. Secondly, there is no

possible commercial justification for this different treatment of creditors with claims in more than one foreign currency. I find it impossible to understand why the administrators would have intended such a result or why any relevant creditor would have agreed to it. Thirdly, it is contrary to the explanations previously given to creditors, for example in the progress report for the period to 14 September 2010, that foreign currency claims would be treated in accordance with rule 2.86.

154. There are no clear words in the Agreed Claims CDD requiring this frankly absurd result. To restate a claim in, say, Japanese yen as a claim in US dollars would be a peculiarly inept way of giving effect to an intention to deprive the Japanese yen creditor of its currency conversion claim in respect of its contractual claim in Japanese yen. In my judgment, the Agreed Claim Amount, expressed in one currency, was not intended to be the claim of the creditor for admission to proof and conversion into sterling. It was instead intended to use one currency of account for arriving at a net position, which could then be used in relation to the determination of client money claims.

Admitted Claims CDDs

155. The principal difference between Agreed Claims CDDs and Admitted Claims CDDs is that the Agreed Claim Amount in the latter CDDs was invariably expressed in sterling, rather than the currency or principal currency of the creditor's claims against LBIE. This is the principal basis on which Wentworth submits that creditors who entered into Admitted Claims CDDs released their currency conversion claims in respect of their admitted claims.

156. The example of an Admitted Claims CDD used in argument was one made in February 2012 and again the identity of the creditor has been redacted. The Agreed Claim Amount is stated as £18,070,281. The terms of this CDD are in large part the same as the terms of the earlier Agreed Claims CDD on which submissions were based, although the drafting of the CDDs continually evolved, and there are some differences.

157. Much of clause 2 dealing with the admitted and released claims is similar to clause 2 of the Agreed Claims CDD but the differences are sufficient that it makes it appropriate to set out the whole of this clause:

> "The Company and the Creditor irrevocably and unconditionally agree that notwithstanding the terms of any contract to which the Creditor and the Company are party (including the Creditor Agreement):
>
> 2.1 the Creditor shall have an Admitted Claim in an amount equal to the Agreed Claim Amount;
>
> 2.2 the Admitted Claim, shall be fixed at the Agreed Claim Amount, and shall constitute the Creditor's entire claim against the Company;
>
> 2.3 save solely for the Admitted Claim, the Creditor and the Company and the Administrators, are hereby each

> irrevocably and unconditionally released and forever discharged from any and all losses, costs, charges, expenses, Claims (including all Claims for interest, costs and orders for costs), demands, actions, causes of action, liabilities, rights and obligations (including those which arise hereafter upon a change in the relevant law) to or against each other and howsoever arising, whether known or unknown, whether arising in equity or under common law or statute or by reason of breach of contract or in respect of any tortious or negligent act or omission (whether or not loss or damage caused thereby has yet been suffered) or otherwise, whether arising under the Creditor Agreement or not, whether in existence now or coming into existence at some time in the future, and whether or not in the contemplation of the Creditor and/or the Company and/or the Administrators on the date hereof; and
>
> 2.4 the Creditor will not take any steps to prove for, or to Claim for, any debt in the Administration (or other insolvency process) of the Company, or otherwise bring any Claim, action, demand or issue (or continue) any Proceedings against the Company and/or the Administrators (or any of them) in any jurisdiction in respect of any and all Claims and matters as are referred to in Clause 2.3 above."

158. Because the basis of the Admitted Claims CDDs was that the claims covered by it did not include any client money claim, there is no provision equivalent to clause 3 of the Agreed Claims CDD. Like the Agreed Claims CDD, the Admitted Claims CDD includes a provision for transfer by the creditor of "its entire legal and beneficial interest in the Admitted Claim" and "its entire right to receive, and its entire legal and beneficial interest in, any and all dividends in respect of, or in connection with, the Admitted Claim".

159. Recital (B) is in slightly different terms and provides:

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

160. "Claim" and "Creditor Agreement" are defined in similar terms to the definitions in the Agreed Claims CDDs. "Admitted Claim" is defined as:

> "An unsecured claim of a creditor of the Company which qualifies for dividends from the estate of the Company available to its unsecured creditors pursuant to the Insolvency Rules and the Insolvency Act (or, if applicable, as amended or replaced pursuant to the terms of, inter alia, a scheme of arrangement or a company voluntary arrangement)."

161. Clause 8.2 contains a provision to similar effect as clause 9.2 of the Agreed Claims CDD, whereby the creditor agrees that it is not relying on any communication or announcement from the administrators or others.

The effect of the Admitted Claims CDDs on interest

162. My conclusions in respect of both statutory interest and non-provable claims for interest are precisely the same in respect of these CDDs as they are in respect of the Agreed Claims CDDs.

The effect of the Admitted Claims CDDs on currency conversion claims

163. The principal submission of Wentworth is that the Admitted Claims CDDs release all currency conversion claims which creditors would otherwise enjoy. A currency conversion claim is, as I have earlier discussed, a claim to that part of the creditor's contractual claim, payable in a foreign currency, which is not discharged through the payment of dividends in sterling. Wentworth points to the very broad definition of "Claim", being a claim in law in equity or otherwise and of whatsoever nature, including any claim arising under a contract. The opening words of clause 2 show that the agreement is deliberately departing from and to some extent varying the rights under existing contracts: "notwithstanding the terms of any contract to which the Creditor and the Company are party (including the Creditor Agreement)". While 2.1 provides that the creditor "shall have an Admitted Claim in an amount equal to the Agreed Claim Amount", clause 2.2 provides that the admitted claim shall be fixed at the Agreed Claim Amount "and shall constitute the Creditor's entire claim against the Company". Clause 2.3 contains an irrevocable and unconditional release of all Claims in very broad terms, "save solely for the Admitted Claim". The release in clause 2.3 is mutual, applying to claims by the Creditor and LBIE against each other. Given that the Admitted Claim is fixed at the Agreed Claim Amount, which is a sum in sterling, the result of these provisions is that it is the entire claim of the creditor and leaves no room for a currency conversion claim.

164. Wentworth does however accept that clause 2 of the Admitted Claims CDD cannot be read entirely literally. It accepts that the provision in clause 2.2 that the Admitted Claim constitutes the creditor's entire claim against LBIE and the release in clause 2.3 of any and all Claims "including all Claims for interest" does not extend to a release of a creditor's claim for statutory interest under rule 2.88. This is said to be because the right to statutory interest is an incident or attribute of the Admitted Claim. It carries with it the right given by statute to interest. This is the case even though it would be open to a creditor to release its claim to statutory interest by suitable express words. Likewise, clause 2.4 does not prevent a creditor taking steps to claim or enforce its right to statutory interest and, although payments of interest under rule 2.88 are not obviously within the words "any and all dividends in respect of, or in connection with, the Admitted Claim", clause 3.2 does permit the transfer not only of

the Admitted Claim but also of the right to receive statutory interest in respect of it. By contrast a non-provable currency conversion claim is not an incident or attribute of the claim which is agreed and admitted proof but is an incident or attribute of the underlying contractual claim, which is the subject of the express waiver.

165. In considering the proper construction of the Admitted Claims CDDs, it is once again important to have regard to the context in which they were made. All the considerations which I earlier listed in respect of the CRA are equally applicable to the CDDs. I will refer to just one. The purpose of the CDDs was, as agreed, to accelerate the payment of dividends on proved debts. This was achieved by the application of standard methodologies to the quantification of claims and to a speedier procedure than would be the case if complete or partial rejections of proofs were subject to court challenge in the ordinary way under the Insolvency Rules. Clearly this was of great benefit both to the unsecured creditors and generally to the administration of LBIE. An important part of this process is that the Admitted Claim should not be the subject of such challenge and that it should not be subsequently supplemented by further claims which could be the subject of proof. A release of currency conversion claims arising from the contractual claims accepted as Admitted Claims is wholly irrelevant to these considerations. This is so for two principal reasons. First, currency conversion claims are payable as non-provable claims out of any surplus remaining after the payment of all proved claims and statutory interest on them. By definition, it will not delay or impede the payment of dividends on admitted claims. Secondly, the calculation of currency conversion claims is a mechanical matter, flowing simply out of a comparison of the underlying contractual claim admitted as an Admitted Claim and the foreign currency equivalent of the sterling dividends received in respect of it. The only complication would arise in a case of Admitted Claims which comprise underlying contractual claims in more than one currency but, as in other contexts where this has been agreed, there should be no difficulty in disaggregating the relevant admitted claim into its constituent foreign currency parts.

166. The construction for which Wentworth contends would result in discrimination between the claims of creditors to an extraordinary extent without any principled justification and, at least until a late stage, without any understanding or appreciation by any party, creditor or administrator, that this could be their effect. I have already referred to the distinctions made by Wentworth in the effect of the CRA and the Agreed Claim CDDs to different groups of creditors. Creditors whose underlying contractual claims were in a foreign currency – a significant majority overall of the creditors – would be divided into at least the following categories:

    i) those signatories of the CRA whose currency conversion claims were entirely unaffected by it;

    ii) those signatories of the CRA whose currency conversion claims were wholly or partially released by the CRA (depending on whether some of their foreign currency claims were converted into sterling or into another foreign currency);

    iii) those signatories of the Agreed Claims CDDs whose currency conversion claims were entirely unaffected;

iv) those signatories of the Agreed Claims CDDs whose currency conversion claims were wholly or partially released by the CDDs (in the same way as in (ii));

v) the signatories of Admitted Claims CDDs, whose currency conversion claims would be wholly released; and

vi) those creditors who did not enter into the CRA or a CDD.

167. The inconsistencies of treatment between creditors does not stop there. Some signatories of the CRA were invited by the administrators, and accepted the invitation, to enter into Admitted Claims CDDs. This was on the basis that it would be administratively easier. It was never contemplated or suggested that the effect of doing so would be to release the currency conversion claim which were, Wentworth agrees, preserved by the CRA. A significant distinction would therefore be introduced between different categories of signatories of the CRA. Mr Dicker points out that there was a period during which both Agreed Claims CDDs and Admitted Claims CDDs were both being used, depending on whether the creditor in question might have a client money claim.

168. Such distinctions may properly be made with the knowledge and consent of the affected parties. If it were intended to achieve this on a class basis, by means of a scheme of arrangement, it would be necessary to constitute the differently affected creditors into different classes for the purposes of meetings and voting. The effects of the proposals would need to be fully explained to creditors.

169. In the light of all the relevant contextual considerations, and in particular in the light of the mandatory application of rule 2.86, the correct approach to construction of the Admitted Claims CDDs is, as Mr Dicker submitted, to have regard to the process by which the Agreed Claim Amount is agreed and converted into sterling. Creditors were required to submit proofs of debt in the currency of their underlying claims. The administrators communicated their determination of the proof in the currency of the underlying claim. The Agreed Claim Amount in the CDD which follows, is the foreign currency figure converted into sterling pursuant to rule 2.86. It cannot be converted otherwise than in accordance with rule 2.86. The Admitted Claim, stated in the CDD to be admitted in an amount equal to the Agreed Claim Amount which is a sterling figure, is properly read as a reference to the creditor's agreed claim, converted into sterling under rule 2.86. This will necessarily lead to a currency conversion claim, if the sterling dividends do not fully discharge the underlying agreed claim, and the terms of the CDD do not necessitate the unintended and unprincipled conclusion that such currency conversion claims are lost.

170. There are a number of other forms of CDD which were from time to time in use, in particular those which were used for signatories to the CRA. I did not understand any party to suggest that different conclusions could arise in respect of any of those CDDs from the conclusions on the principal forms of Agreed and Admitted Claims CDDs, particularly if the conclusions were those which I have reached.

Should the administrators be directed not to enforce any release of currency conversion claims under the CRA and the CDDs?

171. This issue would arise if I had held that the effect of the CRA or any of the CDDs had been to waive or release the currency conversion claims of the creditors entering into them. The issue was fully argued and I will express my views on it.

172. The SCG submits that, if the effect of the CRA or any of the CDDs was to release or waive currency conversion claims, the administrators should be directed not to enforce such waiver or release but should instead, to the extent that funds become available, meet those claims. They submit that such direction should be given either in exercise of the power of the court to control its own officers, developed in *Ex parte James* and subsequent cases, or under paragraph 74 of Schedule B1 to the Insolvency Act. Wentworth submits that the circumstances do not engage either the principle in *Ex parte James* or paragraph 74.

173. The administrators have not made any submissions on this issue, because the SCG and Wentworth between them are making all the available arguments. It is important to emphasise that neither the SCG nor Wentworth have at any stage suggested that the conduct of the administrators should or could be the subject of any criticism. In particular, Mr Dicker for the SCG repeated in his oral submissions that this was the case.

174. The principle in *Ex parte James* has been described as anomalous but it is a well-established principle providing a means by which the court can control the conduct of its officers. Administrators, liquidators in a compulsory winding-up and trustees in bankruptcy are all officers of the court and subject to this jurisdiction. The case to which the principle owes its name, like a number of cases immediately following it, concerned the retention by a liquidator or trustee in bankruptcy of money paid under a mistake of law. At that time, money paid under a mistake of law was not recoverable, but the court directed that its officer should not stand on his strict legal rights but should return the funds, notwithstanding that the effect was to deprive the creditors of funds which would otherwise be available for distribution among them. The rationale for the principle was that, although irrecoverable at law, the officer of the court could not in all conscience retain the money, given the circumstances in which it had been paid. It would amount to an unjust enrichment of the estate. Although the principle was first developed and exercised in these circumstances, subsequent cases applied it in other circumstances and it cannot now be said to be confined to particular categories of case.

175. The touchstone for the application of the principle has been expressed in different terms over the years. In *Ex parte James* itself, James LJ said that the trustee:

> "ought to set an example to the world by paying it [the money paid under a mistake of law] to the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as honest as other people."

176. In *Re Wigzell* [1921] 2 KB 835, Salter J, in a judgment which was strongly endorsed by the Court of Appeal in that and subsequent cases, said that the "jurisdiction should

be exercised wherever the enforcement of legal right would, in the opinion of the Court, be contrary to natural justice." He went on to say:

> "The effect of exercising the jurisdiction which these decisions have asserted and defined is to deprive the creditors of money which is divisible among them by law. I feel sure that such a power should not be used unless the result of enforcing the law is such that, in the opinion of the Court, it would be pronounced to be obviously unjust by all right-minded men."

177. In the same case in the Court of Appeal, Lord Sterndale MR said that the court would not allow its officer to do "something which in its opinion is dishonourable and not high-minded." Younger LJ considered that it applied where it would be "unconscionable" for the officer to stand on his strict legal rights.

178. Walton J reviewed the authorities in *Re Clark* [1975] 1 WLR 559. He repeatedly in his judgment expressed the relevant test as one of unfairness. So, for example, at p.563, he said:

> "Stating the matter in very broad terms indeed for the moment, and deliberately using for the purpose "unemotive language", the rule provides that where it would be unfair for a trustee to take full advantage of his legal rights as such, the court will order him not to do so …"

179. When applying the principle to the facts of the case before him, namely whether the trustee should recover the amount of two cheques paid to a supplier to the bankrupt, he said at p.567:

> "The question as I feel it ought to be posed is simply: "Is it fair that the trustee should recover the amount of these two cheques from Texaco*?*""

He said that he had no hesitation in answering that it was not.

180. It might be said that Walton J used the word "unfair" as synonymous with dishonourable or even dishonest, but I very much doubt it. Walton J was not a judge known for a lack of precision in his use of language and his repeated use of the word unfair in his judgment demonstrates in my view the concept which he had in mind.

181. *Re Clark* was cited to the Court of Appeal in *Re T.H. Knitwear (Wholesale) Ltd* [1988] Ch 275 but not referred to in the judgments. The decision in that case was that the principle does not apply to a liquidator in a voluntary liquidation because he is not an officer of the court. Slade LJ went on to consider whether, if that was wrong, it was a case for the application of the principle. He said at p.290 that:

> "… for the principle to apply, there must be dishonourable behaviour or a threat of dishonourable behaviour on the part of the relevant court officer, by taking an unfair advantage of someone."

182. The latest and most authoritative word on the subject is in the judgment of Lord Neuberger in *Re Nortel GmbH* [2013] UKSC 52, [2014] AC 209. He said at [122]:

> "As to the common law, there are a number of cases, starting with *Ex p James*; *In re Condon* (1874) LR 9 Ch App 609, in which a principle has been developed and applied to the effect that "where it would be unfair" for a trustee in bankruptcy "to take full advantage of his legal rights as such, the court will order him not to do so", to quote Walton J in *In re Clark* (*a bankrupt), Ex p The Trustee v Texaco Ltd* [1975] 1 WLR 559, 563. The same point was made by Slade LJ in *In re TH Knitwear (Wholesale) Ltd* [1988] Ch 275, 287, quoting Salter J in *In re Wigzell, Ex p Hart* [1921] 2 KB 835, 845: "where a bankrupt's estate is being administered … under the supervision of a court, that court has a discretionary jurisdiction to disregard legal right", which "should be exercised wherever the enforcement of legal right would … be contrary to natural justice". The principle obviously applies to administrators and liquidators: see *In re Lune Metal Products Ltd* [2007] Bus LR 589, para 34."

183. I take it that unfairness is a sufficient ground for the application of the principle in *Ex parte James* if the court thinks that, in all the circumstances, it is right to apply the principle. This is not a surprising development. While in some of the earlier cases the judges refer to the difficulty in applying the principle in *Ex parte James* because it involved moral rather than legal judgments, unfairness as a substantive legal concept is now well embedded in our law. It is directly applicable to the conduct of administrators, by virtue of paragraph 74 to which I refer below. What constitutes unfairness will, just like what constitutes dishonourable conduct, depend on the circumstances of the case.

184. In my judgment, it would be grossly unfair to the creditors who have entered into the CRA or any CDD to enforce any waiver or release of their currency conversion claims that may, on the construction of any such agreement, exist. All of the background circumstances which I have taken into account in construing these agreements are relevant in this context. These agreements were not ordinary commercial bilateral agreements but were made by the administrators in pursuance of their statutory duty to act in the interests of the creditors as a whole, many of whom were of course the counterparties to these agreements. The release of currency conversion claims was entirely irrelevant to the purposes for which the CRA and the CDDs were proposed. The release of currency conversion claims would be an entirely unintended effect of these agreements. If the administrators had considered that the CRA and the CDDs could have this effect, they would have drawn attention to it in the circular which accompanied the CRA and in their website postings concerning the CDDs. Above all, the enforcement of any releases of currency conversion claims would involve significant and unintended discrimination between different creditors for no reason in any way connected with the purposes of the administration or the best interests of the creditors as a whole. I have earlier highlighted a number of the features of this discrimination, but a further feature, not relevant to the construction of the agreements, but in my view relevant to the present issue, is that there would be

further discrimination between those creditors who entered into CDDs before the inclusion of terms which made clear that currency conversion claims were not waived and those who entered into CDDs containing such terms.

185. Turning to paragraph 74 of Schedule B1 to the Insolvency Act, the court may grant relief where:

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

186. Although Mr Dicker kept open the submission that the administrators had by entering into the CRA and the CDDs containing the releases of currency conversion claims, acted so as unfairly to harm the interests of the creditors who signed them, the main focus of the submissions, rightly in my view, was on paragraph (b), whether in seeking to enforce the releases the administrators would be acting in a way which would unfairly harm the interests of those creditors.

187. It is trite that an applicant under paragraph 74 must show that the conduct of the administrator has or will harm its interests and also show that acting in that way would be unfair. As Blackburne J held in *Re Lehman Brothers International (Europe), Four Private Investment Funds v Lomas* [2008] EWHC 2869 (Ch), [2009] BCC 632, at [34], the requirement of harm is shown if the applicant establishes that the action of the administrator in question will be causative of harm to its interests. There can in my view be no question but that the enforcement of releases of currency conversion claims will harm the interests of the creditors concerned.

188. As regards the requirement for unfairness, there is I think nothing to add to the earlier discussion on the principle in *Ex parte James.* All the factors to which I have pointed as relevant to a conclusion that enforcement of the releases would be unfair in that context apply equally to an application under paragraph 74. I do not accept the submission of Mr Zacaroli that it cannot be unfair to enforce a term of a contract freely entered into. Whether it is unfair to do so will depend on all the circumstances in which the contract was made. Nor do I think it relevant either to the principle in *Ex parte James* or to paragraph 74 that the various agreements contained clauses by which the creditors agreed that they had not relied on communications from the administrators in entering into the agreements and that they had taken their own view on the merits of the agreements. Such provisions are no doubt relevant to whether any claim based on misrepresentation can be brought, but such general, almost boilerplate, terms have in my view little or no bearing on whether it would in these contexts be unfair if the administrators enforced any releases.

189. I therefore conclude that, if I had held that properly construed the CRA or any of the CDDs had the effect of releasing currency conversion claims in respect of the debts submitted to proof, I would have held that the circumstances would make it

appropriate to give a direction to the administrators not to enforce those releases, exercising the jurisdiction either under the principle in *Ex parte James* or under paragraph 74 of Schedule B1 to the Insolvency Act.

Conclusion

190. My conclusions on the issues dealt with in this judgment are therefore as follows:

i) Neither the CRA nor any of the CDDs, as a matter of construction, have the effect of releasing currency conversion claims.

ii) Neither the CRA nor any CDD has, as a matter of construction, the effect of releasing in whole or in part claims to statutory interest under rule 2.88. In all cases, creditors are entitled to the payment of statutory interest at the higher of judgment rate or the rate otherwise applicable apart from the administration.

iii) The CRA does not, as a matter of construction, itself create or give rise to any currency conversion claim.

iv) If, as a matter of construction, the CRA or any of the CDDs had the effect of releasing currency conversion claims, the administrators would have been directed, under the principle in *Ex parte James* and under paragraph 74 of schedule B1 to the Insolvency Act, not to enforce such releases.