

<p>1 Tuesday, 21 April 2015</p> <p>2 (10.30 am)</p> <p>3 Application by MR TROWER, QC</p> <p>4 MR TROWER: My Lord, this is the PTR for the trial of</p> <p>5 part B of the joint administrators' application for</p> <p>6 directions (Inaudible). It was last before your</p> <p>7 Lordship on 9 March when your Lordship made certain</p> <p>8 directions. There is not a great deal in so far as the</p> <p>9 parties are concerned on issues to trouble your Lordship</p> <p>10 with this, morning, although depending how that goes one</p> <p>11 or two of the points may take a little time to explain.</p> <p>12 Your Lordship gave directions last on 9 March and</p> <p>13 there is an order in draft in completely final form</p> <p>14 behind tab 1 PTR bundle. What your Lordship has is PTR</p> <p>15 bundle and then a whole load of trial bundles.</p> <p>16 Hopefully, this morning we will only need to look at the</p> <p>17 PTR bundle itself and bundle 1 of the trial bundles we</p> <p>18 may have to dip into. There is a draft order in there</p> <p>19 which reflects the directions which your Lordship gave</p> <p>20 on 9 March.</p> <p>21 MR JUSTICE RICHARDS: Yes.</p> <p>22 MR TROWER: We are primarily concerned, subject to one small</p> <p>23 point with the directions that were given by</p> <p>24 paragraphs 3 to 10 in the existing draft, because they</p> <p>25 deal with part B. We also will need just briefly to</p> <p style="text-align: center;">Page 1</p>	<p>1 a matter of construction of the relevant agreements,</p> <p>2 whether or not on a generic basis those releases should</p> <p>3 be enforced, whereas 36B is intended to deal with</p> <p>4 specific facts. That is the state of play in relation</p> <p>5 to that bit of the application notice.</p> <p>6 So far as part B issues themselves are concerned, in</p> <p>7 directions 3, 4, 5, 6 and 7 there were certain</p> <p>8 directions that were given in relation to the position</p> <p>9 papers and statements of agreed facts.</p> <p>10 MR JUSTICE RICHARDS: Yes.</p> <p>11 MR TROWER: My Lord, so far as the position papers are</p> <p>12 concerned, no issues arise. What has happened is that</p> <p>13 the SCG filed a position paper on 6 April and in</p> <p>14 accordance with 4(1). Wentworth filed a reply position</p> <p>15 paper on 15 April in accordance with 5(1). The only</p> <p>16 thing that has happened, the further thing that has</p> <p>17 happened is that the SCG have now amended their new</p> <p>18 position paper in order to bring in an argument in</p> <p>19 relation to paragraph 74 to be heard as part of issue</p> <p>20 36A.</p> <p>21 MR JUSTICE RICHARDS: Yes.</p> <p>22 MR TROWER: The argument is now going to be both an ex parte</p> <p>23 James/analogy with ex parte James argument, plus</p> <p>24 a generic paragraph 74 argument based on essentially the</p> <p>25 same facts.</p> <p style="text-align: center;">Page 3</p>
<p>1 look at direction one and the position in relation to</p> <p>2 part C.</p> <p>3 MR JUSTICE RICHARDS: Yes.</p> <p>4 MR TROWER: There is a listing issue in relation to part C</p> <p>5 that we would like to raise with your Lordship.</p> <p>6 If I can then deal with it in the order in which the</p> <p>7 directions were made, because I think it is convenient</p> <p>8 to explain to your Lordship how it works in the light of</p> <p>9 that. Paragraph one of the order gave directions in</p> <p>10 relation to the amendment of the application notice, and</p> <p>11 just so your Lordship knows the position if you turn on</p> <p>12 to page 10 of the draft order, 10 to 12 simply sets out</p> <p>13 those paragraphs of the application notice in extenso</p> <p>14 where permission to amend is being given and they fall</p> <p>15 into two categories. Paragraphs 11 and 12 are</p> <p>16 tranche C amendments and we can park them for the</p> <p>17 moment. They are nearly agreed but as I understand it,</p> <p>18 not finally agreed. What matters for present purposes</p> <p>19 is paragraphs 34, 35 and 36A.</p> <p>20 MR JUSTICE RICHARDS: Yes.</p> <p>21 MR TROWER: Because those are the part B amendments that are</p> <p>22 relevant. What they essentially do or the changes, they</p> <p>23 split what was 36 into two parts, 36A and 36B, so that</p> <p>24 36A is going to deal with generic questions of whether</p> <p>25 or not on the assumption that releases did occur as</p> <p style="text-align: center;">Page 2</p>	<p>1 MR JUSTICE RICHARDS: Right.</p> <p>2 MR TROWER: That is the state of play in relation to the</p> <p>3 position papers. The issue which requires a little more</p> <p>4 attention relates to the statements of agreed facts</p> <p>5 which your Lordship directed in 4(2) and 5(2) and 7 of</p> <p>6 the draft order. What was contemplated was that the SCG</p> <p>7 would file the statement referred to in 5(2) which it</p> <p>8 duly did on 6 April, particularising the relevant facts</p> <p>9 of general application to creditors on which they intend</p> <p>10 to rely on their argument on issue 36A, and that was</p> <p>11 done. Then Wentworth, in accordance with 5(2), were to</p> <p>12 file a statement setting out comments on the facts on</p> <p>13 which the SCG intended to rely in respect of issue 36A,</p> <p>14 particularising the facts they accepted and any</p> <p>15 additional facts with general application to the</p> <p>16 creditors upon which they intended to rely in respect of</p> <p>17 issue 36A.</p> <p>18 So the starting point was going to be statements of</p> <p>19 fact in relation to 36A. Then, as set out in</p> <p>20 paragraph 7, the joint administrators were going to do</p> <p>21 two things. We were going to produce a statement of</p> <p>22 agreed facts in relation to issues 34 and 35, so simply</p> <p>23 if you like the factual matrix issues for purposes of</p> <p>24 construction.</p> <p>25 MR JUSTICE RICHARDS: Yes.</p> <p style="text-align: center;">Page 4</p>

<p>1 MR TROWER: Then we were also going to produce a document 2 which drew together the threads in relation to what had 3 been produced by the SCG and Wentworth, identifying the 4 facts agreed between the parties in relation to 36A and 5 identifying where there were issues in relation to 6 admissibility and relevance. Two things have happened. 7 The first is that there was a little bit of a spat, 8 which your Lordship will have seen reference to, between 9 Wentworth and the SCG over Wentworth's response document 10 in relation to the facts and the way that was put 11 together. That is the first point of relevance. The 12 second is that it has become apparent that there is 13 quite -- and it is inevitable when one thing about 14 it -- a material overlap between the facts which are 15 relevant for factual matrix purposes in relation to 16 issues 34 and 35 and the facts which will also be taken 17 into account for the purposes of the argument on 36A. 18 In those circumstances the joint administrators proposed 19 that what they should do is produce two documents. The 20 first document would be a statement of agreed facts 21 drawing on the documents which had already been produced 22 by both parties which set out all the necessary facts in 23 relation to factual matrix construction purposes because 24 that is the first stage. Then there will be a separate 25 document which simply dealt with material that would not</p> <p style="text-align: center;">Page 5</p>	<p>1 Mr Dicker will be able to tell your Lordship exactly how 2 they wish to reserve that position. As we understand 3 it, the process we are going through at the moment is 4 a process which everyone still regards as a useful 5 process where we will end up with narrowing some of the 6 issues in relation to the facts and having documents the 7 court will find of assistance for the purposes of trying 8 both 34 and 35, on the one hand, and 36A on the other. 9 MR JUSTICE RICHARDS: If there are disputed facts how is 10 that going to be dealt with? First of all you have to 11 identify the facts on which any party wishes to rely 12 which are disputed. I suppose only once you have 13 identified can you really decide how you are going to 14 resolve them. 15 MR TROWER: It is only when one has got to the stage of 16 working out how far you can get on putting the agreed 17 facts that you can see whether there are any relevant 18 disputed fact. In a sense there is an element here of 19 having to take this incrementally. 20 MR JUSTICE RICHARDS: Fair enough. 21 MR TROWER: That is the way we see it and that is where we 22 have got to on statement of facts. 23 MR JUSTICE RICHARDS: I know you have provided draft 24 statements of agreed facts, I think. 25 MR TROWER: Yes.</p> <p style="text-align: center;">Page 7</p>
<p>1 be strictly admissible on construction but which may be 2 taken into account for the purposes of 36A and that we 3 would produce such documents, hopefully in agreed form, 4 by the end of this week. 5 The process of trying to get to a stage where those 6 documents are in a form which can be of assistance to 7 the court started -- I think the first draft went out on 8 15 April. The parties, as we understand it, are 9 generally content with the approach that is suggested by 10 the joint administrators so that the court has these two 11 documents, although as we understand it, the SCG wish to 12 make absolutely clear that it may still be necessary to 13 look at the underlying evidence in relation to issues 14 particularly where facts are not actually agreed and so 15 the court should not proceed on the basis that the 16 documents that we produce by way of statements of agreed 17 facts, both on construction and on 36A, will be the only 18 factual material that the court will have to look at, 19 because it may be necessary to look at evidence in 20 relation to facts which are not agreed and there may be 21 some material facts where there ends up being a spat as 22 to the inferences which the court is invited to draw and 23 the form in which the inferences are invited to be 24 drawn. 25 I may not have got the SCG's consent quite clear and</p> <p style="text-align: center;">Page 6</p>	<p>1 MR JUSTICE RICHARDS: On 34 and 35 and then 36A. 2 MR TROWER: Yes. 3 MR JUSTICE RICHARDS: The process of agreeing those drafts 4 is continuing; is that right? 5 MR TROWER: Is continuing. 6 The original 34 and 35 statement of agreed facts in 7 draft form went out on, I think, 15 April. There have 8 then been amended versions that have gone out of that, 9 together with the new 36A statement of facts which went 10 out yesterday, last night, I think, and it is hoped that 11 we will get to the stage of agreed documents by the end 12 of the week. Obviously, there may be material in there 13 which cannot be agreed in which case it will have to 14 come out. 15 MR JUSTICE RICHARDS: Will you be asking me to make 16 a direction that the statements of agreed facts are 17 finalised by the end of the week? 18 MR TROWER: Yes. We have already got a direction which 19 comes close to that from 9 March but we will want to 20 look at -- 21 MR JUSTICE RICHARDS: You do, actually. It is 7. 22 MR TROWER: It is 7, yes. 23 MR JUSTICE RICHARDS: 24th is actually the end of this week. 24 MR TROWER: That is right, it is Friday. 25 MR JUSTICE RICHARDS: Then, though, what we have which this</p> <p style="text-align: center;">Page 8</p>

<p>1 order does not, I think, provide for is any question of</p> <p>2 disputed facts on which any of the parties represented</p> <p>3 here may wish to rely.</p> <p>4 MR TROWER: Yes. Of course, what this exercise has been</p> <p>5 designed to do is to narrow the issues, in so far as one</p> <p>6 is able to do so, on the back of the evidence that is</p> <p>7 before the court already.</p> <p>8 MR JUSTICE RICHARDS: Yes.</p> <p>9 MR TROWER: It is in that context anyway in part, as</p> <p>10 I understand it, that Mr Dicker will be saying that</p> <p>11 there may be evidence that we will have to make</p> <p>12 submissions on, where the inferences the court would be</p> <p>13 invited to draw from the evidence --</p> <p>14 MR JUSTICE RICHARDS: Inferences of fact.</p> <p>15 MR TROWER: Indeed. There may be a dispute as to what the</p> <p>16 proper inference is to draw, which is why it has not</p> <p>17 been possible to agree the fact.</p> <p>18 MR JUSTICE RICHARDS: Yes.</p> <p>19 MR TROWER: It is that kind of issue where Mr Dicker is,</p> <p>20 I think, keen to ensure he is able to rely on the</p> <p>21 underlying evidence.</p> <p>22 MR JUSTICE RICHARDS: What are the steps that are envisaged</p> <p>23 to identify the facts that are sought to be established?</p> <p>24 MR TROWER: He has already in his document served a document</p> <p>25 which is intended to particularise the relevant facts of</p> <p style="text-align: center;">Page 9</p>	<p>1 those facts. I am not sure how many facts we might be</p> <p>2 talking about. Are we talking about 2 or 4 or 8 or 20?</p> <p>3 MR TROWER: There are quite a lot of sort of facts that go</p> <p>4 into setting the scene of these agreements, I think it</p> <p>5 is fair to say.</p> <p>6 MR JUSTICE RICHARDS: Indeed, Mr Zacaroli may have his list</p> <p>7 of facts as well. I was looking at Mr Dicker but...</p> <p>8 What about the administrators? Do you have some facts</p> <p>9 that others do not agree that you want to put before the</p> <p>10 court?</p> <p>11 MR TROWER: We do not really know yet. We may.</p> <p>12 MR JUSTICE RICHARDS: See where the others are.</p> <p>13 MR TROWER: We see where the others are.</p> <p>14 MR JUSTICE RICHARDS: I think we want a degree of precision</p> <p>15 here, really, for everybody's benefit, not least mine,</p> <p>16 as to not only what those facts are but the evidence</p> <p>17 that is set to support them.</p> <p>18 MR TROWER: Would your Lordship just give me one moment?</p> <p>19 MR JUSTICE RICHARDS: Yes.</p> <p>20 MR TROWER: The only suggestion that is being made from</p> <p>21 behind me is that it may be that there is actually</p> <p>22 a two-stage process to the disputed facts, which is</p> <p>23 simply this: if each party produces its list of facts</p> <p>24 that are not agreed but on which it wishes to rely, it</p> <p>25 may well be the case that when it is articulated in that</p> <p style="text-align: center;">Page 11</p>
<p>1 general application to creditors upon which they intend</p> <p>2 to rely on their argument. That is 4.2. That is the</p> <p>3 whole purpose of his original statement.</p> <p>4 MR JUSTICE RICHARDS: I appreciate that. Yes, indeed. From</p> <p>5 that document you have extracted -- with the benefit of</p> <p>6 that document and Wentworth's document --</p> <p>7 MR TROWER: We have sought to extract the agreed material.</p> <p>8 MR JUSTICE RICHARDS: We are left with the balance.</p> <p>9 MR TROWER: The balance is apparent from that. I do not</p> <p>10 think we have specifically -- they could produce</p> <p>11 a further document which actually identifies the</p> <p>12 unagreed facts.</p> <p>13 MR JUSTICE RICHARDS: Yes.</p> <p>14 MR TROWER: Which are not actually included in the --</p> <p>15 MR JUSTICE RICHARDS: I think it would be helpful to do</p> <p>16 that.</p> <p>17 MR TROWER: One can see that.</p> <p>18 MR JUSTICE RICHARDS: It may be it is quite straightforward.</p> <p>19 Those non-agreed facts, there is evidence in the witness</p> <p>20 statements which is said to support those facts?</p> <p>21 MR TROWER: Presumably.</p> <p>22 MR JUSTICE RICHARDS: So that the document should really</p> <p>23 identify the evidence which is relied on, that is to say</p> <p>24 the particular paragraphs of particular witness</p> <p>25 statements and exhibits which are relied on for each of</p> <p style="text-align: center;">Page 10</p>	<p>1 form that some of those facts become agreed. We need to</p> <p>2 put that into the structure.</p> <p>3 MR JUSTICE RICHARDS: I mean, that is foreseeable.</p> <p>4 MR TROWER: My Lord, the only other issue that has arisen --</p> <p>5 I think I have mentioned to my Lord the point about</p> <p>6 paragraph 74.</p> <p>7 MR JUSTICE RICHARDS: I just had a query there. I was not</p> <p>8 sure about the addition of the words "by way of analogy"</p> <p>9 really catered for paragraph 74. I would prefer myself</p> <p>10 to see it stated clearly that it is an allegation of</p> <p>11 unfair harm.</p> <p>12 MR TROWER: Yes.</p> <p>13 MR JUSTICE RICHARDS: I prefer to see it that way, because</p> <p>14 otherwise one has the potential for what the</p> <p>15 relationship is between ex parte James and paragraph 74.</p> <p>16 I think something that spells it out.</p> <p>17 MR TROWER: We can easily insert that.</p> <p>18 My Lord, that was all I was intending to say. My</p> <p>19 Lord will doubtless wish to hear from my friends in</p> <p>20 relation to tranche B. There is a listing order --</p> <p>21 MR JUSTICE RICHARDS: So far as the 9 March order is</p> <p>22 concerned what is it in that order that remains</p> <p>23 unagreed?</p> <p>24 MR TROWER: The precise formulation of paragraphs 11 and 12.</p> <p>25 as I understand it is the only thing outstanding. In</p> <p style="text-align: center;">Page 12</p>

<p>1 schedule A -- I beg your pardon. Schedule A, 2 paragraphs 11 and 12. 3 MR JUSTICE RICHARDS: I see. 4 MR TROWER: Is the primary point. As I understand it, from 5 Mr Dicker, who I think is the one -- I think Wentworth 6 are content with the existing drafting. I think 7 Mr Dicker is not saying he is not content but they have 8 not reached a final conclusion. 9 MR JUSTICE RICHARDS: So far as the directions and the order 10 are concerned, there is no disagreement? 11 MR TROWER: I think there may be some dates on expert 12 evidence that are still... 13 Apparently, there are some dates issues in relation 14 to expert evidence which came in an email this morning 15 which I had not seen. 16 MR JUSTICE RICHARDS: I was slightly concerned that here we 17 are, well over a month later, and we do not have an 18 order finalised yet. 19 MR TROWER: I agree, my Lord. 20 MR JUSTICE RICHARDS: I think that this really ought to be 21 finalised very quickly. The precise formulation of 22 11 and 12, if you are nearly there... 23 MR TROWER: We are very nearly there. I have not seen this 24 email that came in this morning in relation to dates. 25 I think Mr Zacaroli will have to tell your Lordship what</p> <p style="text-align: center;">Page 13</p>	<p>1 you know? 2 MR TROWER: I think it is a court hearing, yes, was the 3 original. Can I just check that I have got the date 4 right? I am being told 9 November was mooted as a good 5 start date when this was being discussed. 6 MR JUSTICE RICHARDS: Is that a Monday? What day of the 7 week is that? 8 MR TROWER: It is Monday. So 9 November is a Monday. 9 MR JUSTICE RICHARDS: Yes. There will certainly need to be 10 some pre-reading, no doubt. 11 MR TROWER: Yes, no doubt. 12 MR JUSTICE RICHARDS: All right, I will direct that it be 13 listed to start on 9 November with an estimate of 14 7 to 10 days. It may well be, because of the narrowing 15 of the issues that has gone on, that it will not need 16 that length of time and with a direction for two days' 17 pre-reading the previous week. 18 MR TROWER: I am grateful for that. That is all I think 19 I had to address your Lordship on. 20 MR JUSTICE RICHARDS: Mr Dicker. 21 Application by MR DICKER, QC 22 MR DICKER: My Lord, briefly just to confirm what my learned 23 friend told your Lordship, so far as statements of facts 24 are concerned, we agree that the administrators' 25 suggestion as to the way forward is a sensible one and</p> <p style="text-align: center;">Page 15</p>
<p>1 they are. There are date issues in relation to expert 2 evidence apparently. 3 MR JUSTICE RICHARDS: The other thing then was 2C, the 4 hearing in November, which is just a question of, as 5 I understand it, the time estimate. 6 MR TROWER: There is a difference of view -- 7 MR JUSTICE RICHARDS: How long should we allow? 8 MR TROWER: As to how long should be allowed. 9 Unfortunately, anyway so far as the listing office is 10 concerned, it does have a material effect on when it is 11 the court were able to fix it, unless your Lordship were 12 able to direct otherwise in the sense that what we have 13 been told is that we would get a date in November if it 14 were a five to seven day estimate but we will get a date 15 next year if it was 7 to 10 days. That is what we have 16 been told. One way of cutting through this, I do not 17 mind saying, is for your Lordship to indicate that your 18 Lordship simply to indicate that your Lordship would be 19 able to hear it whatever the estimate. 20 MR JUSTICE RICHARDS: I think I will direct it be listed 21 with an estimate of 7 to 10 days starting on, what date? 22 MR TROWER: Not before 29 October, I think. 23 MR JUSTICE RICHARDS: Probably the best thing would be to 24 have a fixed start date with -- your 7 to 10 days, is 25 that time in court or does that include pre-reading, do</p> <p style="text-align: center;">Page 14</p>	<p>1 we will see where we get to with that. Just to clarify 2 what is meant by disputes of fact, no-one is suggesting 3 the cross-examination is required. What we have is 4 underlying evidence contained in the witness statements. 5 We set out, in accordance with the order, the facts on 6 which we intend to rely and as we understand it, the 7 disputes are essentially of two kinds. The first is: 8 "Well, you have slightly mischaracterised or 9 mischaracterised the underlying evidence." In other 10 words, the contention is that we have spun it and we 11 have done so in a way that is not strictly accurate. 12 The second is it is simply not supported by the 13 underlying evidence. 14 What we did on 10 April was provide Wentworth and 15 the administrators with a copy of our statement of facts 16 which referred to the relevant parts of the evidence on 17 which we were effectively intending to rely. What we 18 had hoped that we would have got back from Wentworth 19 was, again in accordance with the order, a response 20 which said, "We agree with the following. We think the 21 following paragraphs mischaracterise the evidence. The 22 following paragraphs are not supported by the evidence". 23 and one can understand the scope of the dispute. In 24 terms of resolving that, we envisage that if the parties 25 could not, as it were, agree a resolution for the</p> <p style="text-align: center;">Page 16</p>

<p>1 purposes of the statement of fact, it would be resolved</p> <p>2 in the ordinary way at trial by your Lordship. We would</p> <p>3 each make submissions as to what the evidence amounted</p> <p>4 to and your Lordship could either say, "I find that in</p> <p>5 the evidence and it is justified by the terms of the</p> <p>6 evidence", or not.</p> <p>7 Wentworth seems to have a slightly different</p> <p>8 approach, as we understand it, which is that in some way</p> <p>9 the question of 36A facts are intended to be agreed and</p> <p>10 then effectively to replace the underlying evidence so</p> <p>11 that one never needs to refer to it. The view on this</p> <p>12 side is that is not going to be possible. It will</p> <p>13 almost inevitably be necessary to refer the evidence, at</p> <p>14 least to give some colour to what would otherwise be</p> <p>15 fairly bald facts, and as my learned friend Mr Trower</p> <p>16 indicated, so far as facts are said to be not supported</p> <p>17 by the evidence or mischaracterise the evidence, your</p> <p>18 Lordship is going to need to look at the evidence.</p> <p>19 Coming back to the administrators' suggestion, we do</p> <p>20 think a sensible starting point is the process they are</p> <p>21 currently suggesting. We received their draft statement</p> <p>22 of facts on 34, 35 late last night. I have not had</p> <p>23 a chance to look at it. I gather from those beside me</p> <p>24 and behind me that it looks a useful document. Indeed,</p> <p>25 it incorporates a number of the facts that we have</p> <p style="text-align: center;">Page 17</p>	<p>1 have had a chance to look at their statement of facts.</p> <p>2 What they have effectively done is score through pretty</p> <p>3 much all of ours and provided their own alternative</p> <p>4 version of the facts. It was not what we, at least on</p> <p>5 this side, envisaged the order would require. It would</p> <p>6 be helpful for Wentworth and I would have thought for</p> <p>7 the administrators to indicate slightly more clearly</p> <p>8 which parts of our statement of facts they agree, with</p> <p>9 which they do not.</p> <p>10 MR JUSTICE RICHARDS: I have the impression that the</p> <p>11 administrators and those acting for the administrators</p> <p>12 think they can divine what is agreed and what is not.</p> <p>13 Let us see how they fair.</p> <p>14 MR DICKER: If they think they can then, obviously, we are</p> <p>15 happy. If they cannot it may be necessary for Wentworth</p> <p>16 to assist them.</p> <p>17 MR JUSTICE RICHARDS: Subject the point you made there, you</p> <p>18 would envisage that the administrators would be able to</p> <p>19 produce a document which shows agreed facts and then</p> <p>20 shows facts which are not agreed, which would identify</p> <p>21 who contends for those facts and who could state the</p> <p>22 evidence which will be relied upon to establish those</p> <p>23 facts.</p> <p>24 MR DICKER: My Lord, that is what the administrators told us</p> <p>25 hopefully they can achieve and on that basis, yes.</p> <p style="text-align: center;">Page 19</p>
<p>1 relied on in our question 36 statement of facts. On</p> <p>2 this side we would envisage continuing that process,</p> <p>3 producing a document, as the order envisaged, at the end</p> <p>4 of the week, setting out the facts to the extent they</p> <p>5 are agreed and identifying those that are not, and if</p> <p>6 there is a dispute resolving it in the way I mentioned</p> <p>7 to your Lordship at trial.</p> <p>8 MR JUSTICE RICHARDS: I was not sure whether the</p> <p>9 administrators' document would indicate those facts</p> <p>10 which were not agreed. The current order relates to</p> <p>11 agreed facts. It does not say anything about non-agreed</p> <p>12 facts.</p> <p>13 MR DICKER: We had certainly assumed that one way or another</p> <p>14 that those which were not agreed would be capable of</p> <p>15 being identified.</p> <p>16 MR JUSTICE RICHARDS: I had hoped they would. I will ask</p> <p>17 Mr Trower. Of course, we have a draft of it.</p> <p>18 MR TROWER: It does not at the moment. There is no reason</p> <p>19 why we could not take that process on board.</p> <p>20 MR JUSTICE RICHARDS: That might be very helpful.</p> <p>21 MR DICKER: My Lord, obviously, the practical difficulty</p> <p>22 that may face the administrators in doing that at the</p> <p>23 moment is that we have not seen from Wentworth a clear</p> <p>24 statement of which of our facts they agree with and</p> <p>25 which they disagree with and why. Your Lordship may not</p> <p style="text-align: center;">Page 18</p>	<p>1 My Lord the only other point is this, and it is</p> <p>2 a small one: obviously, so far as question 36A is</p> <p>3 concerned, that is effectively the Senior Creditor</p> <p>4 Group's claim. They have identified the facts on which</p> <p>5 they intend to rely for the purposes of their claim and</p> <p>6 so far as the trial is concerned your Lordship might</p> <p>7 find it helpful to see the facts on which they rely in</p> <p>8 a document. Obviously, your Lordship already has that.</p> <p>9 That is our statement of facts. We were not envisaging</p> <p>10 at the end of this process essentially throwing that</p> <p>11 document away. It will effectively provide your</p> <p>12 Lordship with an indication of the facts on which we</p> <p>13 rely and then your Lordship can see and if necessary we</p> <p>14 can across reference it just to identify which are</p> <p>15 agreed and which are not. Otherwise, we will have to do</p> <p>16 the same exercise as part of submissions.</p> <p>17 MR JUSTICE RICHARDS: Looking at paragraph 7 of the</p> <p>18 March order, what that provides for is the</p> <p>19 administrators to file documents identifying the agreed</p> <p>20 facts, first of all on issues 34 and 35 and then on 36A.</p> <p>21 36A may be, as it were, additional fact to those in</p> <p>22 34 and 35. If those documents identify the agreed and</p> <p>23 non-agreed facts in the way we have just discussed</p> <p>24 I really do wonder whether it is necessary to go back to</p> <p>25 the parties' statements of fact.</p> <p style="text-align: center;">Page 20</p>

<p>1 MR DICKER: I am not sure I am disagreeing with your 2 Lordship. I think there are two issues here. One is 3 identifying which fact are agreed and which are not and 4 in that respect I entirely agree with your Lordship. 5 There is a slightly different exercise, which is 6 ensuring your Lordship understands at least the case 7 which the Senior Creditor Group intends to advance so 8 far as question 36A is concerned. Obviously, we will 9 set that out in our Skeleton Argument but what we had 10 envisaged was our short statement of facts was 11 effectively a document your Lordship could refer to, at 12 least to understand the factual case which we are 13 advancing. That was the only gloss I was seeking to put 14 on it. So far as agreed and non-agreed are concerned, 15 I absolutely agree with your Lordship that that should 16 be visible from the administrators' papers.</p> <p>17 MR JUSTICE RICHARDS: Your original statement is a statement 18 of facts. I am just concerned about the proliferation 19 of documents which overlap. There will be statements of 20 agreed and non-agreed facts. There will be the Skeleton 21 Arguments. I am just really am wondering what part your 22 other document will play.</p> <p>23 MR DICKER: If the point I have just made is covered 24 alternatively in the Skeleton Argument then the answer 25 is probably not much.</p> <p style="text-align: center;">Page 21</p>	<p>1 Application by MR ZACAROLI, QC</p> <p>2 MR ZACAROLI: My Lord, so far as the statement of facts is 3 concerned, I do not want to go over old ground. It 4 seems a waste of time. We are all agreed on the process 5 here on in.</p> <p>6 We would endorse my Lord's comment that the 7 statement of facts needs to across refer to the evidence 8 and needs to state the evidence accurately. Rather than 9 spinning the evidence, if the statement of facts, in so 10 far as it refers to a paragraph of the evidence should 11 say what it says in terms. As long as that happens we 12 doubt there will be much issue about it.</p> <p>13 MR JUSTICE RICHARDS: I think what I sort of envisaged is 14 that so far as unagreed facts are concerned each party 15 will state which facts for which it contends and states 16 and then references, gives references to the evidence.</p> <p>17 MR ZACAROLI: My Lord, so be it.</p> <p>18 MR JUSTICE RICHARDS: If you say that, "The fact one, for 19 which Mr Dicker contends, is simply a spin on the 20 evidence and it is not justified by the evidence", that 21 will be your submission.</p> <p>22 MR ZACAROLI: I accept that.</p> <p>23 The starting point, I have to say, is a document 24 from the administrators, both on 34, 35 and 36A, which 25 does at lease so far as we have been able to see in the</p> <p style="text-align: center;">Page 23</p>
<p>1 MR JUSTICE RICHARDS: All right. I mean, my strong 2 preference is to have fewer rather than more documents 3 to look at when there is significant overlap.</p> <p>4 MR DICKER: We will bear that in mind.</p> <p>5 That was the first. The second, very briefly so far 6 as paragraph 74 is concerned, we agree, so that your 7 Lordship knows. Your Lordship may recall I think the 8 argument was originally raised by Mr Smith's clients.</p> <p>9 MR JUSTICE RICHARDS: Right.</p> <p>10 MR DICKER: They indicated just before the last hearing they 11 did not intend to play a further part. I am not sure 12 the parties quite focused on the consequences of that. 13 We did not mention paragraph 74. It occurred to us 14 afterwards it might be sensible to deal with it as well 15 in the absence of Mr Smith for us to advance it. The 16 administrators, as I understand it, think that is a good 17 idea. Everyone is agreed, therefore, that paragraph 74 18 should be included. So far as part C is concerned, as I 19 understand it, my learned friend indicated we are very 20 close to agreeing the revised versions of 11 and 12. It 21 has not been done yet. I am sure it can be done very 22 shortly. We are grateful for your Lordship's indication 23 in relation to listing, with which we are entirely 24 content.</p> <p>25 MR ZACAROLI: Thank you very much.</p> <p style="text-align: center;">Page 22</p>	<p>1 hours that we have seen it, accurately reflect what is 2 in the evidence. That is a good starting point for 3 that. If Mr Dicker wishes to say that there are 4 additional facts it will be very helpful to have those 5 spelt out, what those are and which evidence it comes 6 from.</p> <p>7 MR JUSTICE RICHARDS: Do you envisage doing the same or do 8 you envisage at the moment being content with what the 9 administrators are producing by way of agreed facts?</p> <p>10 MR ZACAROLI: I cannot say for certain because we only saw 11 it last night, but I do not think there will be much 12 addition from us, I do not think.</p> <p>13 On that basis, the original statements of facts 14 should not need to play any further part. So far as 15 they are a mixture of facts and case, clearly they 16 should not play a part. The facts should be facts. The 17 case should be in the Skeleton. I think my learned 18 friend accepts that.</p> <p>19 That is all I need to say on statement of facts. We 20 are agreed on the process.</p> <p>21 There are two other points just to mention. We are 22 content with paragraph 74 addition to the statement of 23 case from the senior creditors.</p> <p>24 The only other point is some additions to the dates 25 for the experts. This is on the order. The order is,</p> <p style="text-align: center;">Page 24</p>

<p>1 I think, at tab 4 of the bundle.</p> <p>2 MR JUSTICE RICHARDS: I have it in tab 1 of the PTR bundle.</p> <p>3 MR ZACAROLI: At the very end of the correspondence of that</p> <p>4 PTR bundle there should be a document headed,</p> <p>5 "Waterfall 2, Part C, proposed timetable."</p> <p>6 MR JUSTICE RICHARDS: Right at the very end of tab 4, is it?</p> <p>7 MR ZACAROLI: Tab 5.</p> <p>8 MR JUSTICE RICHARDS: Proposed timetable, did you say?</p> <p>9 MR ZACAROLI: Yes.</p> <p>10 This sets out the relatively minor revisions to the</p> <p>11 date which are otherwise set out in the draft order.</p> <p>12 The reasons are specific availability issues of the</p> <p>13 German law expert and the New York lawyer expert. We</p> <p>14 have asked that the German law experts' reports be</p> <p>15 pushed back two weeks to 10 July. That is the second</p> <p>16 box. Then that time-tabling thereafter follows on from</p> <p>17 that two week shift.</p> <p>18 The other change is simply that the New York law</p> <p>19 expert is unavailable in order to file a response on</p> <p>20 7 August and we have asked for a further week, to</p> <p>21 14 August, that is the seventh/eighth box down.</p> <p>22 MR JUSTICE RICHARDS: Have all the experts been identified?</p> <p>23 Does everyone know who their experts are going to be?</p> <p>24 MR ZACAROLI: We do.</p> <p>25 MR JUSTICE RICHARDS: Does everyone know who everyone else's</p> <p style="text-align: center;">Page 25</p>	<p>1 MR TROWER: That is why I was talking to my learned friend</p> <p>2 I apologise.</p> <p>3 I think the position is this: it has expanded</p> <p>4 because it has expanded into an area of identifying</p> <p>5 facts on which people rely but which are not agreed.</p> <p>6 What we were trying to ensure we got right was the</p> <p>7 process for ensuring that we do end up with a useful</p> <p>8 document, which we think we can achieve. What we do</p> <p>9 need, though, is identification from the parties pretty</p> <p>10 immediately as to which facts which are not presently</p> <p>11 within our document on agreed facts, they would still</p> <p>12 wish to rely on. They are likely to be facts which are</p> <p>13 going to be in issue. If that can be done as part of</p> <p>14 the same process of getting to the agreed document by</p> <p>15 the end of this week; if we can be told by both parties</p> <p>16 what facts which do in the fall within the present ambit</p> <p>17 of the draft agreed facts they would wish to rely on we</p> <p>18 can then get a document together during the course of</p> <p>19 next week which actually reflects that. We do need to</p> <p>20 be told by the end of this week in order to achieve</p> <p>21 that. Of course, it feeds a little bit off what we end</p> <p>22 up with is the agreed facts. The parties have had last</p> <p>23 night what we concede to be the agreed facts. It is</p> <p>24 going to be fairly evident to people what facts are</p> <p>25 likely to be in issue on which they would wish to rely.</p> <p style="text-align: center;">Page 27</p>
<p>1 experts are going to be?</p> <p>2 MR ZACAROLI: I do not think we have exchanged names of</p> <p>3 experts.</p> <p>4 MR JUSTICE RICHARDS: You are asking for those dates. This</p> <p>5 is a recent email. I do not know if people will have</p> <p>6 had an opportunity of taking instructions on that. They</p> <p>7 may or may not have done.</p> <p>8 MR ZACAROLI: That is the only thing left outstanding on the</p> <p>9 order, apart from paragraphs 11 and 12...</p> <p>10 MR TROWER: My Lord, I understand we are consent with these</p> <p>11 changes.</p> <p>12 MR DICKER: As a matter of principle but we do need to check</p> <p>13 with our experts that this does not cause them problems.</p> <p>14 We only received the email at 9.33 this morning. We</p> <p>15 have not had a chance to do that.</p> <p>16 MR ZACAROLI: It sounds like it can be resolved shortly.</p> <p>17 MR JUSTICE RICHARDS: We can finalise the 9 March order, we</p> <p>18 hope, very quickly.</p> <p>19 Mr Trower, that seems to complete everything. So</p> <p>20 I would really like that 9 March order completed and</p> <p>21 sealed and also really today the order for today</p> <p>22 following today's hearing.</p> <p>23 Just going back, the scope of your document does</p> <p>24 seem to have been expanded. It I am anxious to hear</p> <p>25 your comments on that.</p> <p style="text-align: center;">Page 26</p>	<p>1 What we would suggest is there should be a direction</p> <p>2 for us to be told by close of play on Friday as to what</p> <p>3 those facts which are disputed, or may be disputed, on</p> <p>4 which the parties wish to rely are.</p> <p>5 MR JUSTICE RICHARDS: Do you think it is going to be more</p> <p>6 helpful to have -- I know we have separate documents for</p> <p>7 issues 34 and 35, on the one hand, and issue 36A, on the</p> <p>8 other. Taking those two categories, is it going to be</p> <p>9 as easy to have two documents: one is agreed facts which</p> <p>10 you can do by the end of this week, and on the basis</p> <p>11 that you are notified about the non-agreed facts on</p> <p>12 which each party relies, in addition to the agreed</p> <p>13 facts, together with the evidence said to support</p> <p>14 them -- that you are notified of that by four o'clock on</p> <p>15 Friday and then by some time next week you should be</p> <p>16 able to see the non-agreed.</p> <p>17 MR TROWER: The non-agreed facts and pull them into the</p> <p>18 equation, yes.</p> <p>19 MR JUSTICE RICHARDS: That sounds a sensible way forward.</p> <p>20 Mr Dicker and Mr Zacaroli, does that sound sensible?</p> <p>21 MR DICKER: In principle.</p> <p>22 MR JUSTICE RICHARDS: You say in principle. I am going to</p> <p>23 make an order at the hearing.</p> <p>24 MR DICKER: My only potential concern is there is quite</p> <p>25 a lot that may need to be done between now and Friday.</p> <p style="text-align: center;">Page 28</p>

<p>1 If we are, as it were, commenting on the administrators'</p> <p>2 suggested facts and identifying which we disagree with</p> <p>3 and commenting on Wentworths and identifying which of</p> <p>4 their facts, and if everybody is doing the same for each</p> <p>5 three there is quite a lot of exchanges that need to</p> <p>6 take place before Friday. That was the only concern</p> <p>7 I had, one of timing, rather than anything else.</p> <p>8 MR JUSTICE RICHARDS: We do need to have a time. If you are</p> <p>9 saying, "We need an extra day or so", I think now is the</p> <p>10 time to say that so that we can fix the time and date by</p> <p>11 which things are done.</p> <p>12 MR DICKER: As I understand it, from those behind me, they</p> <p>13 hope to be able to achieve it by this Friday.</p> <p>14 MR ZACAROLI: Can I clarify precisely what we are doing? By</p> <p>15 tomorrow, which was the original date, both parties are</p> <p>16 providing such additional facts as they wish to rely</p> <p>17 upon which are not already in the administrators'</p> <p>18 documents?</p> <p>19 MR JUSTICE RICHARDS: I overlooked what the previous order</p> <p>20 said.</p> <p>21 MR ZACAROLI: I am not sure that was previous order. That</p> <p>22 was suggested during this hearing.</p> <p>23 MR JUSTICE RICHARDS: I think not. I think what Mr Trower</p> <p>24 has in mind is by four o'clock on Friday the</p> <p>25 administrators will produce their documents setting out</p> <p style="text-align: center;">Page 29</p>	<p>1 MR ZACAROLI: The trouble is if both parties in the</p> <p>2 essential issue here only provide such additional facts</p> <p>3 they now wish to rely upon which are not in the</p> <p>4 administrators' document by Friday, then we obviously</p> <p>5 both have to have an opportunity to comment on whether</p> <p>6 we agree or disagree with what the other side has then</p> <p>7 produced. It makes more sense that the parties identify</p> <p>8 the additional facts they wish to rely upon before</p> <p>9 Friday, so the administrators can then produce the</p> <p>10 document which shows both agreed and non-agreed facts.</p> <p>11 They can produce the agreed document by Friday and then</p> <p>12 they have more time to deal with the non-agreed facts</p> <p>13 because obviously we will then have had a chance to</p> <p>14 reply to each other's new facts delivered tomorrow by</p> <p>15 the end of the week.</p> <p>16 MR JUSTICE RICHARDS: Mr Trower, I am not going to</p> <p>17 micro-manage this process in that sense.</p> <p>18 MR ZACAROLI: What is important is such additional facts as</p> <p>19 the senior creditors do want to rely upon over and above</p> <p>20 that which the administrators have already identified</p> <p>21 that they think they want to rely upon, that is made</p> <p>22 known to everybody as soon as possible.</p> <p>23 MR JUSTICE RICHARDS: The way this was meant to work was</p> <p>24 that each side would produce the facts on which they</p> <p>25 rely and then the administrators produce a document</p> <p style="text-align: center;">Page 31</p>
<p>1 the agreed facts. By the same time -- this is what</p> <p>2 Mr Trower suggests -- you and Mr Dicker's clients should</p> <p>3 let the administrators know the other facts, by</p> <p>4 definition not agreed, on which you will rely, together</p> <p>5 with the evidence references said to support them. Your</p> <p>6 stance at the moment is you may have none or very few of</p> <p>7 those facts. That is what is suggested. Are you with</p> <p>8 me?</p> <p>9 MR TROWER: I think what Mr Zacaroli may have in mind was</p> <p>10 that as part of the process of agreeing the documents</p> <p>11 that are already in process we had asked both parties to</p> <p>12 produce their response to our draft by close of play</p> <p>13 tomorrow. I think that is what Mr Zacaroli -- which we</p> <p>14 still need.</p> <p>15 MR JUSTICE RICHARDS: Yes.</p> <p>16 MR ZACAROLI: That response to the document, I would</p> <p>17 envisage is identifying which facts either side would</p> <p>18 like to rely upon which are not in there.</p> <p>19 MR TROWER: It may be we get an answer quicker than close of</p> <p>20 play on Friday if that is the case.</p> <p>21 MR JUSTICE RICHARDS: Unless both sides are relying on</p> <p>22 particular facts they cannot go into the agreed facts;</p> <p>23 they will go into the non-agreed facts and it may be</p> <p>24 that in due course there transpires to be some agreement</p> <p>25 on the non-agreed facts.</p> <p style="text-align: center;">Page 30</p>	<p>1 based on those documents as to what was agreed or not</p> <p>2 agreed. In the process of doing that document the</p> <p>3 administrators, very sensibly, may be seeking comments</p> <p>4 from each side. I think I must leave it to the</p> <p>5 administrators exactly how they go about this task.</p> <p>6 I think I am inclined simply to say, as I said before,</p> <p>7 that we have the existing order, which so far as the</p> <p>8 administrators' statement of facts is concerned, and</p> <p>9 I will today make orders for each of the other parties</p> <p>10 to notify the administrators, and no doubt each other,</p> <p>11 as to the additional facts on which they wish to rely</p> <p>12 and the evidence on which those facts are based, and</p> <p>13 then by some time next week the administrators will</p> <p>14 produce further documents setting out the non-agreed</p> <p>15 facts.</p> <p>16 MR ZACAROLI: So be it.</p> <p>17 MR JUSTICE RICHARDS: Within that framework the</p> <p>18 administrators can proceed as they think best with the</p> <p>19 parties as to arriving at the best possible document.</p> <p>20 MR ZACAROLI: So be it.</p> <p>21 MR JUSTICE RICHARDS: What day would you like next week</p> <p>22 Mr Trower, for that?</p> <p>23 MR TROWER: Thursday next week.</p> <p>24 Just to make absolutely clear, we are expecting</p> <p>25 a response to help us get to this final document for</p> <p style="text-align: center;">Page 32</p>

<p>1 Friday by close of play tomorrow in relation to --</p> <p>2 MR JUSTICE RICHARDS: That is a matter as between you. I am</p> <p>3 not making directions. Everyone must co-operate on</p> <p>4 that.</p> <p>5 MR TROWER: I think that is all.</p> <p>6 MR JUSTICE RICHARDS: What I would ask is that a draft order</p> <p>7 be sent to my clerk for this hearing, hopefully agreed,</p> <p>8 by -- I want to set a short time. If it can be done by</p> <p>9 4 o'clock today -- I do not mind whether it is today or</p> <p>10 noon tomorrow. I will say noon tomorrow, draft order.</p> <p>11 If it is not agreed we will come back to court at</p> <p>12 10.30 on Thursday and we iron out any disagreement.</p> <p>13 MR TROWER: That will provide a great incentive.</p> <p>14 MR JUSTICE RICHARDS: Actually, I will say 10 o'clock on</p> <p>15 Thursday if the parties are not agreed.</p> <p>16 (11.25 am)</p> <p>17</p> <p>18 Application by MR TROWER, QC1</p> <p>19</p> <p>20 Application by MR DICKER, QC15</p> <p>21</p> <p>22 Application by MR ZACAROLI, QC23</p> <p>23</p> <p>24</p> <p>25</p> <p>Page 33</p>	

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