Waterfall II Application

No 7942 of 2008

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

COMPANIES COURT

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

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

(1) ANTHONY VICTOR LOMAS

(2) STEVEN ANTHONY PEARSON

(3) PAUL DAVID COPLEY

(4) RUSSELL DOWNS

(5) JULIAN GUY PARR

(as the joint administrators of the above named company)

Applicants

- AND -

(1) BURLINGTON LOAN MANAGEMENT LIMITED

(2) CVI GVF (LUX) MASTER S.À R.L

(3) HUTCHINSON INVESTORS LLC

(4) WENTWORTH SONS SUB-DEBT S.À R.L

(5) YORK GLOBAL FINANCE BDH, LLC

Respondents

WRITTEN SUBMISSIONS ON BEHALF OF WENTWORTH ON SUPPLEMENTAL ISSUES ARISING IN WATERFALL PARTS IIA AND IIB

Capitalised terms used but not otherwise defined herein are defined in the amended application dated 9 March 2015 (the "Application"), unless the context requires otherwise.

ISSUE 1(C)

In a case where contractual interest first starts to run on a provable debt at some point after the Date of Administration, is the "rate applicable" for the period from the Date of Administration to the date when contractual interest first starts to run:

> **i. the rate of interest which is payable once the interest is running (so that such rate is treated as being applicable for the whole of the post-administration period); or**
>
> **ii. a zero rate.**

Further for the purposes of Rule 2.88(9) should Statutory Interest be calculated by assessing the greater of the "rate applicable" and Judgments Act 1838 rate separately for the periods prior to and post the commencement of contractual interest or should such assessment be performed taking the periods together.

1. The background to this issue is as follows:

   (1) Rule 2.88(9) is concerned with identifying the rate at which interest under Rule 2.88(7) is to be paid, and states that it is to be the greater of the Judgments Act rate and the rate applicable to the debt apart from administration.

   (2) According to Declaration (xi) of the Part IIA Order, the comparison required by Rule 2.88(9) is between the "*total amounts of interest that would be payable under Rule 2.88(7) of the Rules based on each method of calculation ... rather than only the numerical rates themselves.*" As the Court noted at paragraph 22 of the Part IIA Judgment, "*the expression 'rate of interest' is meaningless if expressed only as a number without taking account of the period to which the number applies.*"

   (3) This requires the total interest that would be payable at the Judgments Act Rate for the relevant period that is payable under Rule 2.88(7) to be compared with the interest that would be payable apart from administration for that same period.

(4) The Court concluded, in Declarations (xiv) and (xv) of the Part IIA Order, that interest under Rule 2.88(7) is payable in respect of both contingent and future debts from the Date of Administration. (Rule 2.88(7) itself provides that the interest is payable until the end of the period when the proved debt remains outstanding, i.e. until the date of payment of the final dividend in respect of the proved debt.)

(5) Declaration (xiii) of the Part IIA Order provides that for the purpose of establishing whichever is the greater of the Judgments Act rate and the rate applicable apart from the administration, as required by Rule 2.88(9), "*the amount of interest to be calculated based on the latter is to be calculated from the Date of Administration.*" This reflected Issue 6, which was agreed between the parties.

2. There is a potential ambiguity in the wording of Issue 6, and thus Declaration (xiii). The ambiguity is whether, when asking if (1) the Judgments Act rate, or (2) the rate applicable apart from administration, is the greater, it is necessary to calculate the total amount of interest payable under the latter limb:

(1) by reference to the amount of interest that was payable from the Date of Administration in accordance with the creditor's contractual rights apart from administration from time to time including before and after the debt fell due for payment (the "First Approach"); or

(2) on the basis that the rate applicable to the debt from the time it fell due for payment was deemed to apply to the whole of the period from the Date of Administration (the "Second Approach").

3. It is helpful in considering which approach is correct to consider in turn: (1) future debts, including those that carry a right to interest prior to the due date for payment and those that do not; and (2) contingent debts which, by definition, carry a right to interest only from the date the contingency occurred.

Future Debts

4. In relation to future debts, most of which (as the Court noted at [215] of the Part IIA Judgment) will carry a right to interest both before and after the due date, the difference can be illustrated by an example where the creditor has a future debt of £100 payable 1 year after the Date of Administration, with contractual interest accruing at 6% up to the due date and a default rate of 9% thereafter, and where the final dividend is paid 2 years after the Date of Administration.

   (1) Under the First Approach, the rate applicable to the debt apart from administration is 6% for the first year and 9% for the second year. (Since the amount of interest to which this gives rise is lower than the amount of interest at the Judgments Act Rate, the latter is the "*greater*" under Rule 2.88(9)).

   (2) Under the Second Approach, the rate applicable to the debt apart from administration is 9% for the whole two years. (Since the amount of interest to which this gives rise is greater than the amount of interest at the Judgments Act rate for the same period, the former is the "*greater*" under Rule 2.88(9)).

5. It is difficult to see any justification for the Second Approach in such a case. The comparison intended by Rule 2.88(9) is between interest at the Judgments Act rate and "*a rate to which the creditor may otherwise be entitled under rights existing as at [the Date of Administration]*" (Part IIA Judgment, at [180]-[181]). Where the creditor otherwise had a right to interest at 6% for the first year following the Date of Administration, it is *that* right which must be used for the purposes of comparison during that period. There is no basis for using a rate of interest (9%) in relation to a period during which the creditor would otherwise have had no right to it. The mere fact that the debt is deemed to be accelerated for the purpose of proof does not provide a justification to deem, in addition, that the contractual rate of interest that would have applied upon default in payment *after the due date* should be used as the basis for calculating Statutory Interest for the period *before the due date*.

6. The position is analytically no different from the case of an actual (as opposed to a contingent) debt, but with a contractual right to interest which fluctuates from time to

time. For example, a present debt that carries a rate of interest linked to a benchmark rate which dramatically increases after the first year, resulting in a rate of 6% for the first year and 9% thereafter. When considering the rate applicable apart from administration, it is self-evidently necessary to have regard to the rate from time to time in determining whether the total amount of interest payable for the relevant period at the contractual rate is greater than the total amount of interest payable for the same period at the Judgments Act rate. There is no reason for applying a different approach just because the debt did not become due for payment at all until after the Date of Administration.

7. It follows logically from the above that where the debt carried *no* right to interest before it fell due for payment, the rate applicable to the date apart from administration for the first year following the Date of Administration (in the example referred to in paragraph 4 above) is zero. It cannot possibly be right that, although it is necessary to use (in the comparison required by Rue 2.88(9)) whatever contractual rate the creditor was entitled to prior to contractual due date, however low was that rate,[1] it is necessary to deem, in a case where the creditor had no right to interest prior to the due date, the default rate which contractually applied only from the due date to the whole of the period from the Date of Administration until that due date.

Contingent Debts

8. The same conclusion applies in the case of a contingent debt, which for these purposes is no different from a future debt which carries no right of interest until the due date. The creditor who has no contractual right to interest prior to the contingency occurring which gives rise to its debt is logically in the same position as the creditor who has no contractual right to interest prior to its future debt falling due for payment. In either case, the calculation of the rate applicable apart from administration should be undertaken on the basis that for the period up to the date on which a contractual right to interest arose, the rate was zero.

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[1] Zero or even negative interest rates were not unknown in the years since the LBIE administration.

9. The difference between the First and Second Approach can be illustrated in relation to contingent debts as follows, taking a creditor with a contingent debt of £100 that fell due for payment 1 year after the Date of Administration with a right to interest at 10%, where the final dividend was paid 2 years after the Date of Administration:

(1) Under the First Approach, the total amount of interest payable apart from administration would have been:

(a) 0% for the first year;

(b) 10% for the second year;

(c) thus a total of £10.

(2) Under the Second Approach, the total amount of interest payable apart from administration would have been 10% for two years, i.e. £20.

(3) In both cases, interest at the Judgments Act rate for the two year period would total £16.

10. Under the First Approach, therefore, the total amount of interest payable at the rate applicable apart from administration would be less than the total amount of interest payable at the Judgments Act rate, whereas under the Second Approach, it would be greater.

11. The conclusion that the applicable rate "*apart from administration*", under Rule 2.88(9) should be zero, for the first year following the Date of Administration, is consistent with the purpose of Rule 2.88(9). That purpose is to enable a creditor with a contractual (or other) right to interest to be able to calculate Statutory Interest on the basis of those contractual rights, if to do so would enable it to recover more than simple interest at the Judgments Act rate for the post-administration period. It does not justify, however, applying a rate of interest to the debt which has no basis under the creditor's contractual rights apart from administration. The purpose is sufficiently achieved by calculating the *rate* applicable apart from administration on the basis of

what would in fact have been paid pursuant to the contractual right to interest in the post-administration period.

12. For this reason, as a matter of principle, the First Approach is to be preferred in the case of contingent, as well as future, debts.

Practical difficulties with the Second Approach

13. The Second Approach creates particular difficulty in the case of interest at the Default Rate under an ISDA Master Agreement. As noted by the SCG in their submissions in respect of supplemental Issue 1A:[2]

(1) Where Automatic Early Termination has not been specified, following an Event of Default, the occurrence of an Early Termination Date is contingent on the Non-defaulting Party designating an Early Termination Date under Section 6(a).

(2) Upon designation of an Early Termination Date, the early termination amount becomes immediately due, although it becomes payable only following delivery of a calculation statement under Section 6(d)(i).

(3) Interest accrues on the early termination amount from the Early Termination Date.

(4) The rate at which interest accrues on an early termination amount differs depending on the period to which that interest relates (i.e. before or after the date of delivery of the calculation statement under Section 6(d)(i)) and depending on which is the paying party. The different possibilities are the Default Rate, the Non-default Rate and the Termination Rate.

14. Under both the 1992 and 2002 ISDA Master Agreement, the Default Rate is a rate per annum equal to the cost to the relevant payee if it were to fund or of funding the

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2 At paragraph 9(2).

relevant amount. Under the 1992 ISDA Master Agreement, the Non-default Rate is the cost to the Non-defaulting Party if it were to fund the relevant amount. Under the 2002 ISDA Master Agreement the Non-default Rate is the rate offered to the Non-defaulting Party by a major bank in a relevant interbank market for overnight deposits. Under both the 1992 and 2002 ISDA Master Agreement, the Termination Rate is a rate per annum equal to the arithmetic mean of the cost to each party (as certified by it) if it were to fund or of funding the relevant amount.

15. The meaning of the phrase "*cost ... if it were to fund or of funding the relevant amount*" is the subject of the pending judgment in Part IIC. It is common ground, however, that it requires the relevant party to calculate its cost of funding or if it were to fund the relevant amount as from the time it is outstanding – being the Early Termination Date.

16. It follows from the above, that a creditor of LBIE under an ISDA Master Agreement, where Automatic Early Termination has not been specified, is a contingent creditor for the early termination amount, on which interest starts to accrue only upon the designation of an Early Termination Date, at a rate or rates that may be different for different time periods after the Early Termination Date.

17. If the First Approach applies, there is no difficulty: the rate of interest applicable to the debt apart from the administration is zero prior to the Early Termination Date and then whichever rate of interest is applicable under the relevant agreement to the different time periods thereafter.

18. If the Second Approach applies, however, then there is considerable difficulty in identifying the rate applicable apart from administration. The difficulty is caused by the fact that the agreement provides no mechanism for calculating interest on the early termination amount referable to a period prior to the early termination amount becoming due.

19. In the first place, there is nothing in the Master Agreements to indicate which of the different bases of calculating interest – the Default Rate, Non-default Rate or Termination Rate – is applicable to any time prior to the Early Termination Date. In

the second place, each of those bases depends upon certification by one, other or both of the parties as to the cost of funding the relevant amount for the period it is outstanding after it has fallen due for payment. The contract (not surprisingly) does not provide a mechanism for certification of cost of funding the relevant amount for a period before it becomes due.

Conclusion

20. Both the First Approach and the Second Approach involve calculating the rate applicable to the debt apart from administration from the Date of Administration. Under the First Approach, however, the rate is calculated by reference to the contractual right to interest that would actually have applied apart from the administration from time to time. Under the Second Approach, the rate is calculated on the assumption that the contractual rate which applied *once the debt fell due for payment* had applied to the debt from the Date of Administration.

21. For the reasons set out above, the Second Approach is illogical, causative of practical difficulties and is not mandated by the reasoning which led the Court to its conclusions on Issues 7 & 8.

ISSUE 2

Whether and (if so) in what circumstances and in what manner a Currency Conversion Claim can arise from the discharge of a debt by way of set-off pursuant to Rule 2.85(3).

22. Wentworth contends that no Currency Conversion Claim arises from the discharge of a debt by way of set-off.

23. The set-off provisions apply in administration only where the administrator gives notice of intention to make a distribution: Rule 2.85(1). In that event, set-off applies to any creditor proving or attempting to prove in the administration: Rule 2.85(2).

24. For the purposes of set-off, any claims denominated in a foreign currency, whether by the creditor against the company, or by the company against the creditor, are converted into sterling at the exchange rate prevailing on the date the company went into administration:

    (1) any claim to prove by a creditor is in any event subject to Rule 2.86; and

    (2) Rule 2.85(6) applies (among other things) Rule 2.86 for the purposes of Rule 2.85 to any claim payable by the creditor to the company in a foreign currency.

25. The account of what is due from each party to the other is taken, in administration, as at the date of the notice of intention to make a distribution: Rule 2.85(3).

26. Set-off has substantive effect, discharging both the creditor's claim against the company and the company's claim against the creditor, with the balance payable one way or the other being the only substantive surviving debt: *Stein v Blake* [1996] AC 243, per Lord Hoffmann at p.255: "*If the set-off is mandatory and self-executing and results, as of the bankruptcy date, in only a net balance being owing, I find it impossible to understand how the cross-claims can, as choses in action, each continue to exist.*"

27. The substantive effect of set-off, and thus the substantive effect of Rule 2.86 when used in conjunction with set-off, was recognised by the Court of Appeal in *Waterfall*

I: [2015] 3 WLR 1205, per Briggs LJ at [152]: "*There is to my mind no logical reason why a provision for conversion into sterling of a foreign currency amount by reference to a historical date should necessarily operate as a substantive permanent alteration of the creditor's contractual rights,* ***except only to the extent that set-off is involved***" (emphasis added).

28. In a case where the creditor's right is based upon a contract, the substantive effect of set-off results in the permanent extinction of that contractual right, leaving only a claim to the net balance (if any) after taking the set-off account. The same is true whether the contract provides for payment to be made in sterling or in a foreign currency. Accordingly:

    (1) there no longer subsists any contractual right to which the creditor can be remitted; and

    (2) the essential foundation of a Currency Conversion Claim is missing.

29. It is true that set-off in administration operates differently to set-off in liquidation in one respect, but that difference is immaterial to the conclusion that the operation of set-off cannot give rise to Currency Conversion Claims. The difference is that:

    (1) in liquidation the date as of which the account is taken and date as of which the cross-claims are converted into sterling are the same, namely the commencement of the liquidation; whereas

    (2) in administration the account is taken as of the date upon which the administrator gives notice of intention to make a distribution to creditors, and the date as of which foreign currency claims are converted into sterling is the commencement of the administration.

30. The difference is irrelevant because it has no impact on the substantive nature of set-off, which is thus the same in liquidation or administration.

31. Moreover, there is nothing surprising in the fact that set-off, although it operates as of a later date in administration than in liquidation, has substantive effect retrospectively from the Date of Administration, in view of the fact that this is precisely the effect of the rules relating to interest. Thus, under Rule 2.88(7) interest is payable (from the Date of Administration) only on "proved debts" and in any case involving mutual debits and credits it is only the net sum after set-off that is provable. In other words, Statutory Interest is payable as from the Date of Administration only on the (lower) balance due after set-off even in respect of the period prior to the set-off having occurred.

32. It is important to note that the substantive effect of set-off (and of the conversion of foreign currency claims into sterling for the purposes of set-off) operates both ways since, as noted above, by the combination of Rules 2.85(6) and 2.86 any claim of the company against the creditor denominated in a foreign currency is also converted into sterling for the purposes of set-off. In this context, too, the exchange rate prevailing on the Date of Administration is used.

33. Accordingly, if the conclusion advocated by Wentworth was wrong then a claim equivalent to a Currency Conversion Claim would necessarily exist in favour of the company, to the extent that there was a movement in exchange rates between the Date of Administration and the date upon which notice was given of an intention to make a distribution. That is because the conversion into sterling of the *company's* foreign currency claim against the creditor is also "for the purposes of [Rule 2.85]" (Rule 2.85(6)). If set-off did not have the effect of discharging the mutual claims, then the company's right to be paid in foreign currency would remain, so as to found a claim for any shortfall arising from set-off being based on an exchange rate movements between the Date of Administration and the date of notice of intention to make a distribution. No such claim exists, however, and it does not appear that York contends that such a claim exists. The absence of such a claim reinforces the conclusion that no Currency Conversion Claim arises in favour of the creditor from the operation of set-off.

ISSUE 3

Whether, and if so to what extent, a non-provable claim to interest on a Currency Conversion Claim should be reduced by interest received by the creditor pursuant to Rule 2.88 on its proved debt.

34. Wentworth contends that the non-provable claim to interest on a Currency Conversion Claim should take account of, and be reduced by, Statutory Interest received by the creditor pursuant to Rule 2.88 on its proved debt, if and to the extent that the total interest that would be received by the creditor relating to the period between the Date of Administration and the date of the final dividend payment[3] (including Statutory Interest and interest on its Currency Conversion Claim) exceeds (when converted into the relevant foreign currency at the date received) the interest which the creditor would have been entitled to receive for that same period on its foreign currency debt had that debt not been converted into sterling at the Date of Administration.

35. In determining the inter-play between interest on a Currency Conversion Claim and Statutory Interest, it is important to keep in mind the following points:

(1) a Currency Conversion Claim is a claim for the unpaid portion of a debt where: (a) the debt has been admitted to proof, (b) the whole of the proved amount of the debt (in sterling) has been paid in full; and (c) interest at the higher of the Judgments Act rate or the rate provided for in the contract has been paid on the sterling equivalent of the proved debt for the period from the Date of Administration until the date upon which the proved debt was paid in full;

(2) no creditor is entitled to Statutory Interest on its proved debt for any period longer than the proved debt remained outstanding;

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[3] The claim to interest on a Currency Conversion Claim will continue to run beyond the date of payment of the final dividend in respect of the proved debt. The offset for which Wentworth contends is in respect of interest relating to the period for which Statutory Interest is payable.

(3) no creditor is entitled to interest on its proved debt in excess of the higher of (a) the Judgments Act rate or (b) such interest as is payable on the proved debt at the rate to which it was entitled to interest apart from the administration (e.g. at the rate provided for in its contract); and

(4) the fact that a creditor's underlying debt was payable in a foreign currency does not give it any greater right, in respect of its proof of debt, than if it were payable in sterling.

36. Most importantly, although the Currency Conversion Claim is spoken of as a distinct claim to the creditor's proved claim, there is in fact only ever one debt owed to the creditor and, therefore, any interest relating to the period after the Date of Administration, whether it be Statutory Interest pursuant to Rule 2.88 or interest on the Currency Conversion Claim, is payable in respect of the same debt from the same date.

37. Given that Statutory Interest under Rule 2.88 and interest on a Currency Conversion Claim are payable in respect of the same period and in respect of the same debt, and given that the Currency Conversion Claim is intended to compensate the creditor for a shortfall caused by the conversion of its debt into sterling for the purposes of proof, it would be wholly unjust if the foreign currency creditor obtained a greater sum by way of interest, through asserting a claim to interest on its currency conversion claim in addition to receiving Statutory Interest for the period the proved debt was outstanding, than it would have been entitled to under its contract for that same period.

38. In particular, in the absence of such offset, a creditor with a Currency Conversion Claim would by the back door be placed in a better position so far as that portion of its debt which is satisfied from dividends on its proved debt, than any other creditor, whether sterling or foreign currency.

39. The point is best illustrated by two simple examples.

40. The first example assumes a creditor with a contractual right to interest at a lower rate than the Judgments Act rate:

(1) The creditor has a claim for $100 and a contractual claim to interest at 4% per annum.

(2) As at the Date of Administration £1 = $2, so the claim is converted into a sterling sum of £50.

(3) Two years later, the proved debt (£50) is paid in full. At that point sterling has weakened against the dollar such that £1 = $1.50, and £50 is therefore worth $75.

(4) The creditor therefore has a Currency Conversion Claim of $25.

(5) The creditor is entitled to Statutory Interest at 8%, payable on the proved debt of £50, for two years, i.e. £8. Assuming no further change in exchange rate, the amount of Statutory Interest received by the creditor, once converted into dollars (at £1 = $1.50), is $12.

(6) Pursuant to its contract, the creditor, but for the administration, would have been entitled to interest at 4% on $100, relating to that two year period, namely $8.

(7) It has, therefore, already received more than the total amount of interest (in dollars) it was entitled to receive for the relevant period on its whole dollar claim.

(8) In this example, therefore, the claim for interest on the Currency Conversion Claim should be reduced to zero.

41. The second example assumes a creditor with a contractual right to interest at a rate higher than the Judgments Act Rate, but where the exchange rate movement which caused the currency conversion claim is partially reversed in the period between the date when the final dividend is paid and the date when Statutory Interest is paid:

(1) The creditor has a claim for $100 and a contractual entitlement to interest at 10% per annum.

(2) As at the Date of Administration £1 = $2, so that the claim is converted into a sterling sum of £50.

(3) Two years later, the proved debt (£50) is paid in full. At that point sterling has weakened against the dollar, so that £1= $1.50 and £50 is therefore worth $75.

(4) The creditor therefore has a Currency Conversion Claim of $25.

(5) The creditor is entitled to Statutory Interest at 10%, payable on the proved debt of £50 for two years: i.e. £10.

(6) Statutory Interest is paid six months later, by which time sterling has partially recovered against the dollar, so that £1 = $1.75, and £10 therefore equals $17.50.

(7) Pursuant to its contract, the creditor would have been entitled to interest on its debt of $100 at 10% for the two year period, i.e. $20.

(8) If it were to receive interest on its Currency Conversion Claim, such interest for the two year period up to the date on which the final dividend is paid would be 10% x $25 x 2, namely $5.

(9) Thus, the Statutory Interest received by it ($17.50) plus the interest on its currency conversion claim ($5) would total $22.50, which is *more* than its total interest entitlement for that two year period on its principal dollar debt.

(10) Accordingly, in this case the claim to interest on the currency conversion claim is reduced by $2.50, being the amount of excess (of Statutory Interest and interest on its Currency Conversion Claim) over and above its contractual interest entitlement.

ISSUE 4

Whether, to the extent that a creditor has a non-provable claim for interest, such non-provable claim has been released under the terms of the CRA and/or a CDD and, if so, whether the Administrators would be directed not to enforce such release(s).

42. In relation to this supplemental issue, the Court has requested that the parties identify the written and oral submissions already made to the Court in the context of the Part B application which addressed the issue.

Construction of the CRA and CDDs

43. On the question whether the CRA or the CDDs, on their true construction, had the effect of releasing any non-provable claim to interest, the Court viewed the issue as academic but nevertheless expressed a preliminary view. In relation to the CRA, at [116] of the Part B Judgment, the Court said:

> *"I do not therefore intend to examine the issue in detail, but I should record that I agree with the submissions of Mr Zacaroli on behalf of Wentworth that the last sentence of clause 25.1 of the CRA precludes any such claim."*

44. In relation to the Agreed Claims CDD, the Court said (at [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"."*

45. At [162] the Court noted that its conclusions in respect of non-provable claims for interest were precisely the same in respect of the Admitted Claims CDDs as in respect of the Agreed Claims CDDs.

46. Wentworth contends that the Court's preliminary conclusions, as expressed in the above paragraphs of the Part B judgment, were correct. In the following paragraphs, the submissions already made by Wentworth on the issue of construction are identified.

47. In Wentworth's principal skeleton argument, much of the broader argument relating to construction of the CRA and the CDDs was relevant both to the release of Currency Conversion Claims and the release of non-provable claims to interest. Those passages which focussed solely on the release of non-provable claims to interest are:

(1) paragraphs 16 & 26-28;

(2) paragraphs 29-54 (dealing with the CRA);

(3) paragraphs 89(2); 97-99; 101; 114-116; 122(2); 135-140; 143 and 147(2).

48. It will be clear from the above paragraphs that on Wentworth's case each of the relevant CDDs has the effect of releasing non-provable claims to interest and in this respect there is no question of discrimination between creditors.

49. In Wentworth's reply skeleton, the release of non-provable claims to interest is also referred to specifically at paragraphs 11-12.

50. Similarly, in the transcript of the hearing Wentworth's submissions focussing specifically on the release of non-provable claims to interest are on:

(1) Day 1: at p.107/11-19; p.109/10-12; p.110/7-16; and pp.111-112/23-2.

(2) Day 2: at p.5/12-18; p.10/9-11; p.18/3-6; p.18/11-24; p.23/13-20; pp.43-44/20-6; pp.52-53/18-13; pp.68-69/25-3; pp.71-73/5-21; p.78/3-20; p.80/12-20; p.84/22-24; pp.89-90/11-2; and pp.90-92/22-6.

(3) Day 3: at pp.30-31/24-7; and pp.144-146/14-23.

(4) Day 4: at pp.3-6/16-12.

Ex parte James/Paragraph 74

51. The Court did not express any view in the Part B judgment as to whether the Joint Administrators should be directed not to enforce the release of non-provable claims to interest, on the basis of either *ex parte Jame*s or paragraph 74 of Schedule B1.

52. In its skeleton arguments for the Part B hearing, Wentworth dealt compositely, so far as the *ex parte James* and paragraph 75 points were concerned, with non-provable claims to interest and Currency Conversion Claims: see paragraphs 186-219 of its principal skeleton.

53. Similarly, in the transcript of the hearing Wentworth's composite submissions on *ex parte James* and paragraph 74 are on Day 4 at pp.96-127/14-15.

54. The Court's principal considerations in concluding that the Joint Administrators would have been directed not to enforce the release of Currency Conversion Claims were that: (1) the release of Currency Conversion Claims would have been an entirely unintended effect of the CRA and CDDs; (2) if the Joint Administrators had considered that the CRA and CDDs would have that effect, they would have drawn attention to it in the circular which accompanied the CRA and in their website postings concerning the CDDs; and ("*above all*") (3) the enforcement of the 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, including the discrimination between those who entered into a CDD before, and those who entered into a CDD after, the inclusion of language preserving Currency Conversion Claims: see [184].

55. None of these points applies to the release of non-provable claims to interest.

56. First, the release of non-provable claims to interest is not an unintended effect of the CRA or the CDDs:

    (1) the release of any claim to interest other than that payable pursuant to Rule 2.88 is an expressly stated effect of the CRA (clause 25.1);

(2) the release of any and all claims to interest is an expressly stated effect of each CDD (clause 2.3 of the Admitted Claims CDD; clause 2.1.1 of the Agreed Claims CDD);

(3) although an express carve-out was included for Statutory Interest in later CDDs, that had no effect on the release of any claim for interest *other* than that payable pursuant to Rule 2.88; on the contrary, it clarified and reinforced the release of any claim to interest apart from that payable pursuant to Rule 2.88.

57. Second, the effect of the proposed resolution of creditors' claims on claims to interest had been made clear from the outset of the Joint Administrators' efforts to reach a resolution in respect of creditors' claims. In the draft explanatory statement for the proposed scheme, which had been prepared in conjunction with representatives of the creditors, it was clearly stated that "*no interest will accrue on any unpaid liability of LBIE from the Administration Date, save to the extent that such interest would accrue under Rule 2.88 of the Insolvency Rules.*"[4] The circular for the CRA similarly noted that trust creditors would not be entitled to any interest on their claims against the company, including with respect to close-out amounts under open financial contracts.[5] The statement within each of the CDDs that any claim to interest would be released was clear in itself and needed no further explanation.

58. Third, there is no discrimination involved in enforcing the release of non-provable claims to interest, since every creditor that entered into the CRA or any version of a CDD will have released such claims. Moreover (as noted above) the introduction of language into the later CDDs preserving claims to Statutory Interest creates no discrimination similar to that which the Court found was caused by the introduction of language into the later CDDs preserving Currency Conversion Claims. That is because the language preserving claims to Statutory Interest merely confirms and

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4 See paragraph 9.8.7 of the draft Explanatory Statement at Vol 6, p.257 of the Part B trial bundles.

5 Paragraph 4.7 of Reader's Guide to the CRA, at Vol 3, p.229 of the Part B trial bundles.

reinforces the release of any other claim to interest that had been a part of the CDDs all along.

59. If and to the extent that it is suggested that there is discrimination between (1) all those creditors who entered into either or both of the CRA and a CDD, and (2) all those creditors that entered into no bi-lateral agreement at all, then such suggestion should be rejected. While it is true that there would be different treatment as between those two groups of creditors, that is solely the product of the fact that the first group chose to take the material advantages of certainty, speedier resolution and distribution, and release of any other possible claims against them by LBIE, offered by entering into the CRA and/or a CDD and, as part of the price of those advantages, agreed to the wide-ranging release, including of any claims to interest, that was an express and integral part of the CRA and each CDD.

60. Accordingly, Wentworth contends that the Court ought not to direct the Joint Administrators not to enforce any release of non-provable claims to interest in the CRA or CDDs, whether on the basis of *ex parte James* or paragraph 74 of Schedule B1.

61. For the avoidance of doubt, and as developed in response to the next issue, the above points apply equally to a non-provable claim to interest on a Currency Conversion Claim.

ISSUE 5

Whether, to the extent that a creditor has a non-provable claim for interest on a Currency Conversion Claim, such non-provable claim has been released under the terms of the CRA and/or CDD and if so, whether the Administrators would be directed not to enforce such release(s).

62. Wentworth contends that the answer to this supplemental issue must be the same as the Court's conclusions in respect of non-provable claims to interest generally, i.e. the answer to the issue of construction considered under C above.

63. The Currency Conversion Claim is not a new, distinct, claim, but is merely the unpaid portion of its debt (see above). Interest on a Currency Conversion Claim is thus merely interest on a portion of the underlying contractual claim.

64. In order for a creditor to be entitled to interest on a Currency Conversion Claim, it must have an entitlement to interest under its contract with the company, and the non-provable claim to interest is based on the remission to that contractual right: see *Waterfall IIA* judgment [2015] EWHC 2269 (Ch) at [169].

65. Any contractual claim of a creditor who entered into a CRA is subject to the terms of the CRA. Clause 25.1 of the CRA states: "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."

66. A "Net Financial Claim" is defined as any positive Net Contractual Position. The Net Contractual Position is either (in the case of only one Financial Contract between LBIE and the creditor) the close-out amount under that contract or (in the case of more than one Financial Contract between LBIE and the creditor) the aggregate of the close-out amounts under each such contract. (See clause 24.2 of the CRA, and [112] of the *Waterfall IIB* judgment [2015] EWHC 2270 (Ch).)

67. By clause 24.1 of the CRA, all close-out amounts shall be denominated in US dollars. Any Net Financial Claim would therefore similarly be denominated in US dollars.

68. The prohibition on interest accruing on any Net Financial Claim, save to the extent provided in Rule 2.88, clearly precludes any non-provable claim for interest in respect of the US dollar denominated contractual claim. Accordingly, there is no subsisting contractual right to interest (on the dollar denominated contractual claim) to which the creditor could be remitted, following the entry by it into the CRA.

69. The analysis is materially the same if the creditor's claim arises under an Admitted Claim CDD or an Agreed Claim CDD. By clause 2.3 of the Admitted Claim CDD the mutual release of all claims between LBIE and the creditor expressly includes "all Claims for interest". The wording of the relevant part of the release in clause 2.1.1 of the Agreed Claim CDD is the same.

70. If, as Wentworth contends, the release is effective to cover any non-provable claim to interest on a sterling denominated debt, then it must also be effective to cover any non-provable interest on a foreign currency denominated debt.

71. It can make no difference that the foreign currency creditor has a non-provable claim to the shortfall between the principal amount of its debt and the foreign currency equivalent of the dividends received in respect of that principal debt.

72. Given that the claim to interest on that non-provable Currency Conversion Claim is premised upon the underlying contractual right to interest, and that no matter which of the post-administration contracts was entered into that contractual right to interest has been released, the non-provable claim to interest on the Currency Conversion Claim is also necessarily released.

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