IN THE HIGH COURT OF JUSTICE **No. 7942 of 2008 / CR-2008-000012**
CHANCERY DIVISION
COMPANIES COURT

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) RUSSELL DOWNS
(4) JULIAN GUY PARR
(in their capacity as the joint administrators of the above-named company)

Applicants

-and-

(1) BARCLAYS CAPITAL INC.
(2) WENTWORTH SONS SUB-DEBT SARL

Respondents

POSITION PAPER OF BARCLAYS CAPITAL INC.

Introduction

1. This position paper is filed and served on behalf of Barclays Capital Inc. ("**Barclays**") in accordance with the order of Mr Justice Hildyard made on 29 November 2016 (the "**Order**") and the consent order dated 10 March 2017. It summarises the position of Barclays in relation to the Initial Issues (as defined in the Order).

2. Barclays has sought to address the Initial Issues in the order which it considers will be most convenient for the Court. Accordingly, this position paper is structured as follows:

   (a) **Overview** of Barclays' position.

   (b) **Part A** addresses the Issues that relate to the relationship between Barclays' claims (Issues 4 to 8).

   (c) **Part B** deals with the Issues relating to the LBI Payment (Issues 10 and 11).

   (d) **Part C** considers the Issues concerning admission of the LBI Payment (Issues 12, 13 and 14).

   (e) **Part D** deals with the Issues relating to the payment of Statutory Interest (Issues 17, 18 and 19).

(f) **Part E** considers the currency issues (Issues 16 and 15).

(g) **Part F** deals with set-off (Issues 9 and 3).

3. Capitalised terms used but not defined have the meanings given to them in the Application and the tenth witness statement of Russell Downs dated 5 September 2016 ("**Downs 10**").

Overview of Barclays' Position

4. This Application concerns liabilities due to Barclays from LBIE, pursuant to two co-existing claims, an Unsecured Claim and a Client Money Claim, and the extent to which additional sums are due to Barclays from LBIE in respect of the Unsecured Claim, in particular LBIE's obligation to pay Statutory Interest to Barclays. These liabilities arise in unique circumstances, in what has been described as "*the largest, most expedited and probably the most dramatic asset sale that has ever occurred in bankruptcy history*" (*Re Lehman Bros. Holding Inc.* 445 BR 13, 148-9 (Bankr. S.D.N.Y. 2011)).

5. The factual background is set out more fully in Downs 10 and Barclays does not rehearse the factual background in this position paper. The Court's attention is drawn to the following specific points:

   (a) As a result of extensive litigation between LBI and Barclays in the United States, it is now undisputed that the ETD Trades were liabilities owed by LBIE to LBI as at the date of the Administration, and that Barclays acquired all of LBI's rights against LBIE in respect of the ETD Trades under the Asset Purchase Agreement, the First Amendment to the Asset Purchase Agreement, and the Clarification Letter. The ETD Trades transferred to Barclays included both an Unsecured Claim and a Client Money Claim.

   (b) In July 2015, pursuant to the terms of the bespoke LBI/LBIE and LBI/Barclays Settlements, LBI paid $777 million to Barclays in respect of LBIE's aggregate liabilities relating to the ETD Trades. The terms of the LBI/Barclays Settlement preserved Barclays' right to apply the payment to either its Unsecured Claim or its Client Money Claim. The LBI/Barclays Settlement also expressly preserved all of Barclays' rights to claim other assets and interest from the LBIE estate, including interest relating to the $777 million payment. The intention (and true effect) of the relevant provisions of the LBI/Barclays Settlement was to prevent any double-recovery in respect of the $777 million (by preventing Barclays from also seeking to recover that sum from LBIE), but not to affect Barclays' rights to Statutory Interest in respect of the sum paid.

   (c) Barclays has not – prior to, at, or since the time of the LBI/Barclays Settlement – taken any steps to make an election between its Unsecured Claim and its Client Money Claim. The Administrators acknowledge that Barclays has the right to elect between its claims and that it has not done so to date.

6. Notwithstanding the above, the Administrators now take the position that Barclays' Client Money Claim is its "*primary*" claim against LBIE in respect of the ETD Trades, and that the

LBI Payment reduced that primary entitlement, and *pro tanto* Barclays' Unsecured Claim, with effect from 2 July 2015. Therefore, they contend, Barclays is not entitled to Statutory Interest on the amount of the LBI Payment, because Barclays' Unsecured Claim can now only be admitted for a reduced amount.

7. Barclays' position is that this is wrong. In summary:

(a) Barclays presently has two co-existing claims (each valued on its own terms): (i) an Unsecured Claim; and (ii) a Client Money Claim (see Issues 4, 5 and 6).

(b) It has a right to elect to pursue either of those claims to the exclusion of the other. It has not yet, however, made any election to do so (and is under no obligation to do so as yet) (see Issue 7).

(c) The LBI Payment should be applied to whichever claim Barclays elects to pursue. The effect of the LBI/Barclays Settlement was to prevent double-recovery in respect of the LBI Payment, not to affect Barclays' rights to Statutory Interest in respect of the sum paid (see Issue 10).

(d) The LBI Payment does not reduce the Barclays Proof[1] because, *inter alia*:

(i) It is not a payment within the scope of Rule 2.72(3)(b)(ii) (see Issue 11).

(ii) Such a reduction would not be in accordance with the LBI/Barclays Settlement, which provided for the LBI Payment.

(e) In the event that Barclays elects to pursue its Unsecured Claim to the exclusion of its Client Money Claim, Barclays is entitled to Statutory Interest on the full Barclays Proof, including on the value of the LBI Payment. This is based on the following alternative grounds:

(i) Rule 2.88(7) provides that Statutory Interest is payable on debts proved and paid (and does not require that such debts must be admitted by the Administrators). Further, Statutory Interest is payable on debts proved and paid without regard to how, or by whom, they were paid. Accordingly, there is nothing in Rule 2.88(7) that should operate to deprive Barclays of interest on the LBI Payment (notwithstanding the fact that Barclays received the payment from LBI, rather than LBIE) (see Issue 17).

[1] The Unsecured Claim that is the subject of the Barclays Proof has been reconciled at a sum of approximately $930 million, as set out in Downs 10 at [49].

(ii) If Statutory Interest is payable only on admitted debts, insofar as the Court considers that the Administrators have not already taken steps in this regard by agreeing to the release of the $777 million to Barclays, the Administrators are in any event obliged by law to admit the Barclays Proof in full upon an election by Barclays to pursue its Unsecured Claim (see Issues 12, 13 and 19).

(iii) If the Administrators are not obliged to admit the Barclays Proof in full, the Court should direct the Administrators to pay Statutory Interest on the full Barclays Proof, because, *inter alia*, any failure to do so would be contrary to the express language of the LBI/Barclays Settlement. *Re Nortel GmbH* is no authority to the contrary (see Issue 18).

(f) To avoid double-recovery, credit would be given for the LBI Payment for the purposes of calculating further or final dividend(s), following admission (see Issue 14).

(g) As to the Unsecured Claim (if pursued):

(i) It is denominated in USD (see Issue 16).

(ii) The Sterling Equivalent (for calculating the Proof, Statutory Interest and the amount of the necessary credit) should be determined using the exchange rate as at the Time of the Administration (see Issue 15).

(h) Set-off does not operate to extinguish or reduce the amount of any of Barclays' claims (see Issues 3 and 9).

8. In any event, and particularly if (contrary to the foregoing) the Administrators' position is correct that the LBI Payment should be treated as having reduced Barclays' Client Money Claim and its Unsecured Claim, then Barclays' position is that it nevertheless remains entitled to Statutory Interest on the LBI Payment, given that the full value of Barclays' Unsecured Claim was outstanding from the date of the Administration until LBIE's "*maximum aggregate undischarged liability*" was *pro tanto* reduced by the LBI Payment on 2 July 2015.

Part A – Co-existence and Election

Issues 4 and 5

9. Issue 4 is:

> *To the extent that Barclays (i) does not have a Client Money Entitlement in respect of some or all of the ETD Trades; or (ii) has a Client Money Entitlement but is estopped or otherwise precluded from asserting such Client Money Entitlement in respect of some or all of the ETD trades, does Barclays have an Unsecured Claim in respect of such ETD Trades?*

10. Issue 5 is:

> *To the extent that Barclays has a Client Money Entitlement in respect of some or all of the ETD Trades (and is not estopped or otherwise precluded from asserting such Client Money Entitlement), does Barclays also have a Parallel Unsecured Claim?*

11. Barclays is broadly in agreement and aligned with the Administrators on these Issues, as further explained below.

12. Barclays presently possesses two distinct claims against LBIE arising from the ETD Trades:

    (a) an Unsecured Claim in the LBIE estate, arising from the contracts between LBI and LBIE in respect of the ETD Trades; and

    (b) a Client Money Claim, arising in respect of money held on trust by LBIE (by reference to the contracts between LBI and LBIE in respect of the ETD Trades) under the Financial Services and Markets Act 2000 ("**FSMA**") and the CASS client money rules ("**CASS Rules**").[2]

13. Since acquiring these claims from LBI as part of the Asset Sale, Barclays has not taken any step to elect which of the two claims to pursue, or to waive or otherwise surrender either of them (see Barclays' position on Issue 10 below).

14. Barclays agrees with the Administrators' position that the occurrence of a primary pooling event under the CASS Rules (as occurred on LBIE's entry into administration) cannot have the effect of discharging or otherwise affecting creditors' existing contractual rights (*i.e.* Barclays' Unsecured Claim).

[2] Questions as to the precise valuation of Barclays' Client Money Claim are all reserved for later consideration by the Court, if necessary. For present purposes all parties are proceeding on the assumption that Barclays is entitled to assert a Client Money Claim (indeed, many of the Administrators' positions with regard to the Issues are expressly premised on the existence of Barclays' Client Money Claim).

15. The existence of each of Barclays' claims does not depend in any way upon (and is not affected by) the existence or non-existence of the other. It is a basic legal principle that a party may have multiple causes of action against another party on different legal bases arising out the same transaction (*e.g.* co-existing tortious and contractual claims, co-existing property and contractual claims, co-existing equitable and legal claims). The Unsecured Claim and the Client Money Claim arise under different rules of law (contract and statute), are of a different nature (personal and proprietary), are asserted in a different manner (submission of proof in the administration and exercise of a beneficial proprietary claim) and are valued on different bases (hindsight principle and time of administration).

16. That a party may have two separate and independent claims arising out of the same transaction was expressly acknowledged in the insolvency context in *Re MF Global UK Ltd (No 4)* [2014] 1 WLR 1558 (Ch) ("***MF Global Shortfall***"). In that case, David Richards J recognised (at [1]) that:

> *The same transaction between a firm and a client may give rise to an obligation on the firm to hold client money for the client and to a personal claim on the contract.*

(See also *Re MF Global UK Ltd (No 2)* [2013] Bus LR 1030 per David Richards J ("***MF Global Hindsight***") at [37]–[39]).

17. Barclays agrees with the Administrators that Wentworth's position (that if Barclays has a Client Money Claim, an Unsecured Claim cannot exist as a matter of law) is wrong.

18. Barclays' position, as a result, is that at the present time it holds the right to assert either (or both, should it so elect) an Unsecured Claim or a Client Money Claim against LBIE in the Administration. There is nothing in FSMA, the Insolvency Rules 1986, or in the CASS Rules that requires Barclays to elect to pursue and/or appropriate payments received by it from a third party to one claim in preference to, or prior to, or to the exclusion of, the other.

Issue 6

19. Issue 6 is:

> *To the extent that the answer to Issue 5 is "yes", on what basis is the Parallel Unsecured Claim to be valued?*

20. The value of each of Barclays' Unsecured Claim and its Client Money Claim is not determined or affected by the other, in circumstances where a claim is asserted against LBIE independently from the other. Thus if Barclays chose to waive its Client Money Claim (as to which see Issue 7

below), the Parallel Unsecured Claim would become an Unsecured Claim to be valued without any reference to the Client Money Claim.

21. If Barclays were not, at the appropriate stage, to take steps to waive its Client Money Claim, then Barclays accepts that the amount it would recover, or would be estimated to recover, under its Client Money Claim would reduce the amount recoverable under its Unsecured Claim to that extent. This – and no more – is the *ratio* of *MF Global Shortfall*. That decision holds that where a party has already received or is "*likely*" to receive a distribution from the Client Money Pool ("**CMP**"), any Parallel Unsecured Claim which it also pursues must be reduced by the value of the earlier or anticipated recovery. See *MF Global Shortfall* at [68]:

> *In cases where it is apparent that there will be or is likely to be a distribution from the CMP, it seems to me right that an estimate should be made of such distributions in arriving at the amount for which the client may prove and that the amount of such estimates should be revised in line with future developments, in particular actual distributions from the CMP.*

22. This is, in effect, an application of the basic legal principle that a party may not recover twice in respect of the same loss (and, as the Administrators have noted, Barclays has already expressly made clear that it is not seeking double-recovery).

23. The decision in *MF Global Shortfall* does not suggest, nor is there any authority for the proposition that, the value of an Unsecured Claim is to be reduced automatically by the estimated value of the Client Money Claim, in circumstances where a creditor has made no election and retains the right to waive its Client Money Claim. To the extent that the Administrators and/or Wentworth argue that the Administrators should value the Unsecured Claim now by automatically deducting the value of the Client Money Claim, Barclays rejects this position.

24. Barclays has not received any distribution from, nor made any recovery from, the CMP to date. In circumstances where Barclays takes steps to waive or otherwise disclaim its Client Money Claim, Barclays would not be "*likely*" to recover money from the CMP.

25. Though the Administrators argue that the LBI Payment has already reduced the value of Barclays' Client Money Claim, they acknowledge in their Position Paper that:

    (a) "*Barclays did not receive the LBI Payment from the Client Money Pool*" (at [125]); and

    (b) *"[t]here is no doubt that an estimate under Rule 2.81 can (and must) take into account future events, including future distributions from the Client Money Pool. <u>Such estimate would similarly fall to be adjusted by any subsequent decision of the client to waive its</u>*

Client Money Claim, because there would be no future distributions to take into account" (at [47], emphasis added).

26. Barclays does not accept the Administrators' assertion that the Client Money Claim is to be treated as Barclays' "*primary*" claim and the Unsecured Claim as a "*secondary*" claim (as to the wording of the Barclays Proof, see paragraph 58 below), such that the LBI Payment should be treated as constituting an existing payment towards the Client Money Claim (at [48]). This approach is without support in the language of the Insolvency Rules or the CASS Rules, contradicts the express wording of the LBI/Barclays Settlement and does not follow from the application of the rule in *MF Global Shortfall* (or indeed any other judicial precedent). It is also inconsistent with the Administrators' treatment of other creditors.

Issue 7

27. Issue 7 is:

> *If Barclays has both a Client Money Entitlement and a Parallel Unsecured Claim, is Barclays entitled to pursue the Parallel Unsecured Claim to the exclusion of the Client Money Entitlement?*

28. Barclays agrees with the Administrators on this Issue. Barclays can choose to waive either its Parallel Unsecured Claim or its Client Money Claim. Barclays agrees with the Administrators' basic position that "*[t]here can be no doubt but that a person can voluntarily agree to relinquish a legal right*" (at [50]). A person can also elect between inconsistent rights and/or alternative remedies: see *United Australia Limited v Barclays Bank Limited* [1941] AC 1. As noted above, however, Barclays has not relinquished either of its claims against LBIE to date, or otherwise made any election between the two claims.

29. Barclays is entitled to waive its Client Money Claim. The function of the CASS Rules is to create a statutory trust of client money, with LBIE holding the money as trustee for the beneficial owners – in this case Barclays, by way of assignment from LBI. It is a basic principle of property law that the owner of a proprietary interest, whether a legal interest or a beneficial interest, may freely sell, assign, abandon, or otherwise dispose of that interest at its discretion.

30. As the Administrators observe in their Position Paper at [50(4)], a beneficiary of a trust (who holds a beneficial interest in a share of trust property) may disclaim his or her beneficial interest, just as a legal interest in property can be abandoned: see *Re Paradise Motor Co* [1968] 1 WLR 1125 at 1141–1144. Barclays is a beneficiary of the trust established by the CASS Rules, and accordingly is entitled to disclaim its beneficial interest in its Client Money Claim if it so wishes.

31. The Administrators are correct that as "*a matter of law (and as a matter of logic), there is no reason why Barclays should be unable to waive its Client Money Claim whilst maintaining its Parallel Unsecured Claim*" (at [52]). The policies underlying the CASS Rules were to provide a high level of protection for clients and safeguard their rights to funds: see *Re Lehman Brothers International (Europe)* [2012] Bus LR 667, per Lord Dyson at [131] and [132]. As the Administrators state, "*there is no logical reason (based on the language of CASS 7 or the policies underlying the same) why a client should be barred from voluntarily giving up its Client Money Claim – particularly in circumstances where such an election would be economically advantageous for the client*" (at [55]).

32. Wentworth's position, indicated in correspondence, that Barclays is not entitled to waive its Client Money Claim because that claim crystallised upon the occurrence of the primary pooling event, is wrong. Given the underlying policy, it cannot have been intended that the CASS Rules would deprive creditors of their Unsecured Claims. As the Administrators state in their Position Paper at [59], such a "*prohibition would make no sense*."

33. To reiterate the point made in relation to Issue 6 above, if Barclays chooses to waive its Client Money Claim, then Barclays' ultimate recovery under its Unsecured Claim will not be reduced by the value of the Client Money Claim which it has waived. The Administrators agree with this reasoning (at [54]):

> *The result of a waiver is that no distribution of client money will thereafter be received and hence there will be nothing to deduct from the proof in respect of future distributions of client money, although past distributions will be undisturbed…*

However, and as set out in respect to Issue 10 below, no past distributions from the CMP have been made.

Sub-Issue 7(1)

34. Sub-Issue 7(1) is, if the answer to Issue 7 above is "yes":

> *(a) Is Barclays required to disclaim, surrender, abandon, assign or take any other step in relation to the Client Money Claim before the Parallel Unsecured Claim can be admitted by the Administrators; (b) If so, is Barclays entitled to disclaim, surrender, abandon, assign or take such other step in relation to the Client Money Claim?*

35. Barclays' position is that it is not <u>required</u> to disclaim, surrender, abandon, assign or take any other step in relation to its Client Money Claim before its Parallel Unsecured Claim can be admitted, but in order for the Unsecured Claim to be valued without reference to the Client Money Claim, Barclays would need to take appropriate steps to waive its Client Money Claim.

36. In respect of the form which a waiver of Barclays' Client Money Claim might take, Barclays agrees with the Administrators' position that the terminology adopted is largely irrelevant (at [51]). What matters is that – if it so chooses – Barclays would need to take an unequivocal step to waive its right to pursue its Client Money Claim. Barclays is aware that other creditors in the LBIE administration have been permitted by the Administrators to assign their Client Money Claim to Laurifer Limited ("**Laurifer**"), a company set up specifically for this purpose by LBIE, as a means of irrevocably waiving their Client Money Claim. This indicates (again, without hereby making any election) that this may be one such appropriate mechanism for Barclays to waive its right to pursue its Client Money Claim.

Sub-Issue 7(2)

37. Sub-Issue 7(2) is, if the answer to Issue 7 above is "yes":

> *If the value of the Parallel Unsecured Claim is impacted by the Client Money Entitlement, prior to the Client Money Pool being distributed are the Administrators entitled and/or obliged (a) to admit the Parallel Unsecured Claim; and/or (b) to pay a dividend in respect of the Parallel Unsecured Claim? lf so, in each case, to what extent should the Client Money Entitlement be taken into account when admitting or paying a dividend in respect of the Parallel Unsecured Claim?*

38. This Sub-Issue would arise only in the event that Barclays did not elect to waive its Client Money Claim. In such a situation, Barclays considers, in agreement with the Administrators, that the Administrators are entitled to admit Barclays' Unsecured Claim prior to the distribution of the CMP.

Sub-Issues 7(3) and 7(4)

39. Sub-Issue 7(3) is, if the answer to Issue 7 above is "yes":

> *If the Parallel Unsecured Claim should not be admitted until a particular time or event, what interim steps (if any) are the Administrators entitled and/or obliged to take to make a provision for the Parallel Unsecured Claim?*

40. Sub-Issue 7(4) is, if the answer to Issue 7 above is "yes":

> *If the Parallel Unsecured Claim may be admitted but no dividend(s) may be paid in relation thereto until a particular time or event, what interim steps (if any) are the Administrators entitled and/or obliged to take to make a provision for the Parallel Unsecured Claim?*

41. Barclays considers that Sub-Issues 7(3) and 7(4) do not arise because the condition regarding admission or payment until a particular time or event is not met for the reasons set out above.

Issue 8

42. Issue 8 is:

> *If Barclays is not entitled to elect to pursue the Parallel Unsecured Claim to the exclusion of the Client Money Entitlement:*
>
> *(1) Are the Administrators entitled and/or obliged to admit any Unsecured Claim prior to the Client Money Pool being distributed? If so, to what extent should the Client Money Entitlement be taken into account when admitting the Unsecured Claim?*
>
> *(2) lf any Unsecured Claim should not be admitted until a particular time or event, what interim steps (if any) are the Administrators entitled and/or obliged to take to provide for the Unsecured Claim?*

43. Barclays' position is that it is entitled to elect to pursue its Unsecured Claim to the exclusion of the Client Money Claim (whether it waives, rescinds or otherwise disposes of its Client Money Claim) (see Issue 7 above). Accordingly Issue 8 does not arise.

44. In view of the hypothetical nature of Issue 8 (*i.e.* the Issue does not arise in the present circumstances), Barclays makes no comments on the issue at this stage (but reserves its right to do so if necessary), other than that the decision in *MF Global Shortfall* supports the view that there is no required order in which the Administrators must admit proofs or distribute the CMP.

45. Notwithstanding the foregoing, if Issue 8 is engaged it would also be relevant to all other creditors of LBIE who presently possess and have possessed Parallel Unsecured Claims and Client Money Claims (many of whose Unsecured Claims it is likely the Administrators have already dealt with). The Administrators' treatment of those claims would need to be reviewed and/or the Administrators should be ordered to treat the Barclays Proof in a way that is not unfair to Barclays (as to which, see Issue 18).

Part B – The LBI Payment

Issue 10

46. Issue 10 is:

> *In what manner, and from what date, does the LBI Payment fall to be applied towards the discharge or reduction of:*
>
> *(1) Barclays' Client Money Entitlement (if any);*
>
> *(2) Barclays' Unsecured Claim(s) in respect of the ETD Trades (if any); and/or*
>
> *(3) Barclays' other claims (if any)?*

47. Barclays is entitled to elect how the LBI Payment is to be allocated because: (i) Barclays has the right to elect between its claims and has made no such election to date; and (ii) the LBI/Barclays Settlement provided that the LBI Payment was made towards LBIE's and/or the client money trustee's "*maximum aggregate undischarged liability*" and not a specific claim, allowing Barclays to elect between its claims at a future date. The Administrators' contention otherwise is inconsistent with the terms of the LBI/Barclays Settlement to which they expressly consented.

(i) Right to elect

48. As set out in relation to Issue 7 above, Barclays, as a matter of law, retains the right to elect to waive either of its claims.

49. Likewise, Barclays may elect to which claim the LBI Payment should be applied because, *inter alia*: (i) it has not made any election between its claims to date (whether by the LBI/Barclays Settlement, receipt of the LBI Payment or otherwise); and (ii) Barclays has not been deprived of its right to elect by operation of law (there is no provision in the CASS Rules, the Insolvency Rules or otherwise that requires a payment received by a creditor to be treated as discharging a Client Money Claim in priority to an Unsecured Claim).

(ii) The LBI/Barclays Settlement

50. It is clear from the provisions of the LBI/Barclays Settlement that: (i) no election was made as to how the LBI Payment was to be applied; and (ii) such election was reserved. The stipulation and order dated 29 June 2015 (the "**Stipulation and Order**") giving effect to the LBI/Barclays Settlement stated only that the payment of $777 million would operate to reduce the "*maximum aggregate undischarged liability of LBIE and/or the trustee of the UK statutory trust of client money*" with respect to the "*Barclays LBIE ETD Claims*" (emphasis added):

Barclays consents and agrees that upon payment by the Trustee of the $777,000,000, (i) the maximum aggregate undischarged liability of LBIE and/or the trustee of the UK statutory trust of client money arising under CASS 7 in relation to LBIE […] to BCI and/or Barclays Bank, with respect to the Barclays LBIE ETD Claims shall automatically, unconditionally and irrevocably be reduced by $777,000,000 and (ii) Barclays hereby releases LBIE (including the LBIE Client Money Trustee) with respect to the Barclays LBIE ETD Claims in such amount.

51. A "*Barclays LBIE ETD Claim*" is defined in the LBIE/LBI Settlement as follows (emphasis and paragraphing added):

> *(i) the Claim asserted by Barclays against LBIE in respect of the LBI/LBIE ETD Accounts as a contingent unsecured claim in the Barclays LBIE Proof of Debt,*
>
> *or*
>
> *(ii) any Barclays LBIE Client Money Claim,*
>
> *in the case of each of (i) and (ii), to the extent (and only to the extent) such Claim constitutes a Barclays ETD Claim.*

52. A "*Barclays ETD Claim*" is defined separately as:

> *any existing or future Claim by Barclays against LBIE (in its individual capacity or as LBIE Client Money Trustee), LBI or the LBI Trustee (including the Barclays LBIE Proof of Debt), to the extent (and only to the extent) (i) such Claim is on account of the LBI/LBIE ETD Accounts and (ii) Barclays' interest in such Claim arises under, or is asserted by Barclays to arise under, the Barclays APA or under a transfer of LBI Pre-SIPA Proceeding Transferred Property.*

53. Accordingly, both Barclays' Unsecured Claim and its Client Money Claim, having been acquired by Barclays as part of the Asset Sale, constitute a Barclays LBIE ETD Claim. Note that:

(a) The intention (and true effect) of the relevant provisions of the LBI/Barclays Settlement was to prevent any double-recovery in respect of the LBI Payment (by preventing Barclays from also seeking to recover that sum from LBIE), but not to affect Barclays' rights to Statutory Interest in respect of the sum paid.

(b) The LBI/Barclays Settlement therefore reserved any election between these claims for a future date, providing only that LBIE's (and/or the trustee's) "*maximum aggregate undischarged liability*" in respect of the Barclays LBIE ETD Claims would be reduced. The use of the word "*aggregate*" indicates that no one specific liability of LBIE and/or the trustee was reduced, supporting Barclays' position that no election or appropriation was made at the time of the LBI Payment.

(c) This is further confirmed by the statements at paragraph 5 of the LBI/Barclays Settlement that the LBI Payment would reduce the "*maximum aggregate undischarged liability*" of either LBIE itself "*and/or*" the trustee of the LBIE client money trust, as well as the references in the definition of "*Barclays ETD Claim*" to claims by Barclays against LBIE in its individual capacity or LBIE as client money trustee.

(d) Further, the LBI/Barclays Settlement expressly preserved Barclays' right to claim against LBIE for interest relating to the LBI Payment, stating that "*nothing in the Settlement Agreement or in this Order affects, waives, releases or reduces Barclays' claim against LBIE to interest relating to the $777,000,000 referenced in the previous paragraph (or LBIE's defences thereto)*" (see paragraph 5 of the LBI/Barclays Settlement).

54. Barclays' interpretation of the LBI/Barclays Settlement fully acknowledges and gives effect to: (i) the language regarding the reduction in LBIE's and/or the trustee's maximum aggregate undischarged liability by $777 million (such that LBIE would not have to pay that $777 million to Barclays once Barclays received it from LBI); (ii) the language expressly preserving Barclays' claim to interest on the $777 million; and (iii) the language providing that nothing in the Settlement affects, waives, releases or reduces LBIE's defences against Barclays' interest claim on the $777 million (such that any defences that LBIE had against that interest claim before the Settlement would remain fully intact after the settlement).

55. To the extent necessary, Barclays will rely on expert evidence regarding New York law to support its position in respect of the New York law documents, including the LBI/Barclays Settlement, which is expressly to be "*governed by and…interpreted in accordance with the laws of the State of New York*" (see paragraph 21 of the LBI/Barclays Settlement). In particular, expert evidence will confirm that the Administrators' interpretation of the LBI/Barclays Settlement violates the following well-established principles of contract law of the State of New York: an unambiguous contract will be given its plain meaning; a contract is to be interpreted in order to give effect to all of its terms and to ignore none; and a contract is to be interpreted, if possible, so as to render the various provisions consistent with one another.

The Administrators' position

56. The Administrators' position that "*Barclays agreed that its Client Money Entitlement would 'automatically, unconditionally and irrevocably be reduced' by USD 777m*" (at [125]) misinterprets the plain language of the LBI/Barclays Settlement and unjustifiably seeks to create a hierarchy in Barclays' claims which is contrary to the clear terms of the LBI/Barclays

Settlement. The Administrators have identified no basis for their *ex post facto* assertion that Barclays agreed that its Client Money Claim (or either claim, for that matter) would be reduced.

57. If the Administrators were correct that the parties had agreed and understood that the LBI Payment was a payment towards Barclays' Client Money Claim, then the language preserving Barclays' rights to interest would be entirely meaningless and of no effect. The Administrators' position requires the Court to accept that, in circumstances where the parties specifically negotiated a provision stipulating that all rights to interest (which could only be paid on an Unsecured Claim) were preserved, it was nevertheless the parties' mutual intention that no such interest could ever be payable because of the effect of the agreement itself.

58. In support of their position, the Administrators rely on the language of the Barclays Proof. As to that:

    (a) the mere use of the word "*contingent*" in the Barclays Proof plainly cannot be construed as an election by Barclays to pursue its Client Money Claim to the exclusion of its Unsecured Claim; and

    (b) in context, it is clear that the use of the word "*contingent*", rather than indicating that the Unsecured Claim was somehow subordinate to the Client Money Claim, reflected uncertainties at the time the Barclays Proof was submitted over the ETD Trades and Margin Assets and the extent to which these had been acquired by Barclays as part of the Asset Sale (uncertainties only later resolved through litigation between LBI and Barclays).

The treatment of other creditors

59. In addition, the Administrators' present contention as to the effect of the LBI Payment is inconsistent with their conduct to date, and in particular their treatment of other creditors. Barclays' understanding is that the Administrators' intention was to deal with all eligible counterparties under the consensual approach in the first instance (see the Administrators' seventh progress report for the period from 15 September 2011 to 14 March 2012, p. 35).

60. Accordingly, Barclays understands that the vast majority of creditors of LBIE with both an Unsecured Claim and a Client Money Claim were each offered the opportunity to enter into a Claim Determination Deed ("**CDD**"), by which the Administrators and the creditor agreed the final value of the creditor's claim (an "**Agreed Claim**"). These CDDs provided creditors with a choice regarding how their claims were to be treated. One such template, used for situations "*where a creditor has a CME and wishes to assign the CME to Laurifer so that the <u>entire claim</u>*

is admitted for dividend from the unsecured estate" (emphasis added), provided for the immediate assignment of the creditor's Client Money Claim to Laurifer and the acceptance by the Administrators of the Agreed Claim as an admitted claim (see the tenth witness statement of Anthony Lomas, dated 25 July 2014 and submitted for the purposes of Waterfall IIB ("**Lomas 10**"), at Appendix A, Template No. 1.3, and clauses 2.2.1 and 3.1.2 of Template No. 1.3 "*Client Money – Hybrid_Assignment Version Admitted unsecured and agreed Client Money claims assignment*" in Exhibit AVL10, p.719).

61. In other cases, where a creditor has elected to retain its Client Money Claim, the Administrators offered the creditor a specific Client Money Supplemental Deed ("**CMSD**") which expressly provided that the creditor "*acknowledges and agrees that pursuant to [LBIE's determination], the entire Agreed Claim constitutes a Client Money Claim to the value of the Agreed Claim Amount*" and the creditor "*irrevocably and unconditionally waives any Claims (whether arising under the CDD or otherwise) that its Client Money Claims be accepted as an Admitted Claim, including any Claims to receive any dividend in respect of, or in connection with, the Agreed Claim. The Creditor will not bring any Claim, or issue (or continue) any Proceedings against the Company and/or the Administrators (or any of them) in any jurisdiction in respect of or in connection with the Claims waived…*" (see clauses 3.1 and 3.2 of Template CM2.A *"Client Money Optionality Client Money Only Determination_Single Currency_No Admitted Claim*" in Exhibit AVL10, p.1955).

62. The evidence therefore shows that in other situations the Administrators have permitted creditors expressly to elect between their Unsecured Claims and their Client Money Claims. Such elections have always been made consensually and unambiguously. Here, in contrast, the Administrators claim Barclays made an election on the basis of provisions in the LBI/Barclays Settlement which contain no language of election at all (and, to the contrary, expressly preserve Barclays' rights in unambiguous language). [3]

Issue 11

63. Issue 11 is:

> *Rule 2.72(3)(b)(ii) provides that a proof of debt must state "the total amount of [the creditor's] claim as at the date on which the company entered administration, less any payments that have been made to [the creditor] after that date in respect of [the creditor's] claim...". On the true construction of the latter provision, does the LBI*

[3] Barclays reserves the right to request further evidence from the Administrators in relation to their treatment of other creditors with both Unsecured Claims and Client Money Claims, should there be any dispute as to the nature of this prior treatment.

Payment, or any part thereof, constitute a payment in respect of Barclays' claim within the scope of Rule 2.72(3)(b)(ii)?

64. The LBI Payment, as a part payment made to Barclays after the date of the submission of the proof, does not constitute a payment within the scope of Rule 2.72(3)(b)(ii). The entire amount of the Barclays Proof is therefore provable. Further, the Administrators are obliged and/or should be directed to admit the full Barclays Proof (see Issue 12).

(i) Insolvency Rules

65. It is well-established that to give effect to the principle of *pari passu* distribution in an administration, the realisation of assets and distribution of the proceeds are treated as notionally taking place simultaneously on the date of the commencement of the administration (see Oliver J in *Re Dynamics Corporation of America* [1976] 1 WLR 757, 774); "*the tree must lie as it falls; that it must be ascertained what are the debts as they exist at the date of the winding-up, and that all dividends in the case of an insolvent estate must be declared in respect of the debts so ascertained"* (Selwyn LJ in *Re Humber Ironworks and Shipbuilding Co*. (1868-1869) LR 4 Ch App 643, 646 to 647).

66. The Administrators state that it "*is a basic principle of insolvency law that, in calculating the amount for which a proof should be admitted, the office-holder is required to take into account the most up-to-date information available as to the status of the relevant debt*." (at [140]). However, the crucial point that their analysis omits is that the starting point for the office-holder is to use up-to-date information to value the debt as at the date of the administration. This is clear from the Rules: "*debt*" is itself defined in Rule 13.12(1) and (5) by reference to the administration date, and Rule 2.81 provides statutory recognition of the hindsight principle, which allows administrators to take into account events that occur after the date of the administration that are relevant to estimating the value of the debt as at the date of administration.

67. The only exceptions to the administration-date principle are expressly provided for in the Rules. Rule 2.72(3)(b)(ii) requires a proof to state:

> *the total amount of [the creditor's] claim as at the date on which the company entered administration, less any payments that have been made to him after that date in respect of his claim and any adjustment by way of set-off in accordance with Rule 2.85.*

It is clear from this wording that Rule 2.72(3)(b)(ii) purports only to prescribe the amount of a proof of debt that must be stated at the time that proof of debt is submitted. Thus, "*any payments that have been made to him after that date*" can refer only to payments made after the

date on which the company entered administration but before the proof is submitted (and consequently, only payments made prior to the submission of the proof can reduce the proof). This is clear from the draftsman's reference only to past payments that "*have been made*". It is also a matter of common sense – a creditor cannot deduct from its proof payments which it has not yet received, the value of which will necessarily be uncertain. Rule 2.72(3)(b)(ii) also does not contemplate that a proof can be retrospectively reduced.

68. Thus, the Administrators are required to take into account Barclays' receipt of the LBI Payment to determine the amount of further payment(s) by way of dividend pursuant to the Barclays Proof to ensure a distribution of 100 pence in the pound, but not to determine the amount of the Barclays Proof itself.

69. The Administrators cite other Rules to support their contention that an administrator can take into account the most up-to-date information available as to the status of the relevant debt (at [147]), but these fail to address the central point that it is the determination of the relevant debt as at the date of the administration for which the information is to be used. In particular:

    (a) Rule 2.79 states that a creditor's proof can be varied by agreement between the administrator and the creditor. Rule 2.80(1) provides that where an administrator considers that a proof ought to be reduced, he or she can apply to the Court to do so. These provisions confirm that a proof, once submitted, may be amended only in limited circumstances.

    (b) Rule 2.81 effectively gives statutory effect to the hindsight principle, allowing the administrator to estimate the value of an uncertain debt as at the date of the administration, for the purposes of proof. Thus the Barclays Proof was valued at $930 million by a reconciliation process between the parties. That is as far as Rule 2.81 goes; it is not intended to operate to take into account payments made towards an Unsecured Claim subsequent to the submission of a proof.

(ii) Common law

70. Two relevant common law principles support Barclays' position that its Proof should not be reduced by the LBI Payment. The first concerns the relevance of the time at which the creditor receives payment (whether before or after submission of proof). The second relates to the correct approach where a creditor receives part payment in relation to its proof (*i.e.* less than 100 pence in the pound). Both principles give further support to Barclays' position that the LBI Payment does not fall to be deducted from the Barclays Proof.

(A) Payments received after proof

71. Rule 2.72(3)(b)(ii) accords with the well-established common law principle that sums that a creditor receives from a third-party source (such as a principal debtor, a guarantor or by way of a realisation of security) after the date on which it submitted a proof of debt cannot be deducted from the amount of the debt thereby proved: see *Re Amalgamated Investment & Property Company Limited* [1985] Ch 349.

72. *In Re Amalgamated Investment*, Vinelott J reviewed the history of the process of proving for a debt under English law, stating "*it had come to be accepted in practice that the creditor was only bound to deduct payments made or dividends declared before the submission of his proof*" (at 383E). Vinelott J noted that this principle had been "*followed in bankruptcy for over 100 years*" (at 379E), was "*settled practice*" (at 385E) and refused to depart from it. This position is now reflected in the express wording of Rule 2.72(3)(b)(ii) and remains good law (and must be applied here).

73. The reason why the amount proved for is not impacted by subsequent third-party payments is based on considerations of fairness and convenience:

    (a) using any other time would leave "*a great deal too much open to the caprice or arbitrary discretion of the liquidator*" and thus "*the balance of convenience and inconvenience inclines strongly to the view…that the debt is to be taken as it stood when the creditor sent in his claim.*" (*Re Barned's Banking Co, Kellock's Case* (1868) 3 Ch App 769, 780 and 784); and

    (b) it is simply "*more convenient and more fair*" to do so (see *Re Amalgamated Investment* per Vinelott J at 384).

74. The case law relating to guarantees thus consistently supports Barclays' position on this Issue, and upholds the principle that no deduction should be made from a proof for payments received by the creditor after the submission of that proof (see *Re Barned's Banking Co, Kellock's Case* (1868) 3 Ch App 769; *Re Blakeley* (1892) 9 Morr 173; *Re Amalgamated Investment & Property Co Ltd* [1985] Ch 349). The Administrators are incorrect in suggesting otherwise.

75. While this principle has been most commonly considered in the context of guarantee cases (the surety relationship being the most common situation in which a creditor might receive payment from a source other than the insolvent estate), the existence of a surety relationship is plainly not a prerequisite for the principle to apply.

76. The Administrators are correct to observe that in *MF Global Shortfall*, David Richards J held that the Client Money Pool and the debtor's house estate were not separate estates, and accordingly the *Re Amalgamated Investments* principle did not apply (see *MF Global Shortfall* at [64]). However, the LBI Dedicated Reserve and the LBIE House Estate clearly are separate estates, making the present situation closely analogous to the position in *Re Amalgamated Investments*.

(B) Part payment

77. It is also established law that where a creditor receives only part payment from a surety or a third party in respect of the debtor's liability, this sum should not be deducted by the creditor from the amount of his proof, regardless of the time at which the creditor received the payment (whether before or after bankruptcy or before or after proof): see *Re Sass* [1896] 2 QB 12; *Re Houlder* [1929] 1 Ch 205; *Ulster Bank Ltd v Lambe* [1968] NI 161; *Re Fitness Centre (South East) Ltd* [1986] BCLC 518 at 521; and *Westpac Banking Corp v Gollin & Co Ltd* [1988] V.R. 397. Professor Goode explains this as follows (in *Goode on Legal Problems of Credit and Security*, 5th Edn., para.8-18) (emphasis added):

> ***Receipts from surety or third party: the general rule***
>
> *The general rule is that sums received from the surety, or from the realisation of security taken from the surety, do not have to be deducted by the creditor from the amount of his proof, whether received before or after the bankruptcy has occurred…and, in the latter case, whether before or after proof, so long as the creditor does not receive in total more than 100 pence in the pound.*
>
> *[…]*
>
> *The same is true where the creditor receives payment from a complete stranger. There is thus a general rule that only a payment by or on behalf of the party primarily liable (in the case under discussion, the bankrupt) has to be taken into account; payments from other sources are disregarded.*

78. The two cases referred to by the Administrators that might support a narrower view than that of Professor Goode are not relevant here, because they deal with pre-liquidation payments (*i.e.* before any proof had been submitted) and in any event did not involve English law.[4]

(C) Wight v Eckhardt

79. To support their argument against Barclays' position, the Administrators rely on *Wight v Eckhardt Marine GmbH* [2004] 1 AC 147. This case is not relevant and does not apply here:

[4] *MacKinnon's Trustee v Bank of Scotland* [1915] SC 411; *Stotter v Equiticorp Australia Ltd (In Liquidation)* [2002] 2 N.Z.L.R. 686.

(a) It concerned a debt that had been fully discharged under the laws governing the debt (stripping the party of its status as creditor), rather than (as here) part payment of a debt. As a result, the case was not concerned with the effect of payment on a proof but was argued on a technical conflict of laws basis.

(b) Part payment of a debt was not considered in the case (either in principle or by reference to the case law cited above) and therefore the decision cannot be taken as applicable to the issues in front of the Court here.

(c) It is wrong to extend the reasoning in that case to part payment (as the Administrators seek to do), since this would run contrary to the established authority considered above. Nor is there any indication in *Wight v Eckhardt* that the Court considered its *ratio* should extend to situations involving part payment.

(d) Still less would it be appropriate to regard *Wight v Eckhardt* as authority in relation to the right of an (undisputed) creditor to Statutory Interest in the context of a solvent estate.

(iii) Public policy

80. Barclays' position regarding the true construction of Rule 2.72(3)(b)(ii) is supported by public policy and commercial practice. Acceptance of payments from third parties, such as guarantors or through the enforcement of security, is to be encouraged in an insolvency. Nor is there any public policy reason why creditors who accept full or partial payments of their debts should be prevented from participating in an estate's surplus; settlement and compromise is generally to be encouraged where possible in corporate insolvency situations. It would be an unsatisfactory state of affairs and contrary to public policy if a creditor had to refuse to settle with a third party in order to ensure it did not deprive itself of future rights to share in an estate's surplus, including Statutory Interest.

Part C - Admission

Issues 12

81. Issue 12 is:

> *Are the Administrators entitled and/or obliged to admit the Barclays Proof for a reduced amount deducting an amount in respect of the LBI Payment (or any part thereof)?*

82. Barclays' primary position is that it is not necessary for the Court to consider the issue of admission, because under the Insolvency Rules Statutory Interest is payable on debts proved (and paid), rather than on admitted debts (see Issue 11 above and Issue 17 below).

83. If that construction is wrong, then Barclays' position regarding admission is that if Barclays were to elect that the LBI Payment be allocated as payment towards Barclays' Unsecured Claim (see Issue 10):

    (a) in the first instance, the Administrators are obliged to admit the full Barclays Proof as a matter of insolvency law; or alternatively

    (b) the Administrators should be directed by the Court (under the rule in *Ex parte James* and/or paragraph 74 of Schedule B1), and/or are estopped from refusing, to admit the full Barclays Proof,

    and in either event, to avoid double-recovery, appropriate credit should be given for the LBI Payment (see Issue 14 below).

Insolvency Law

84. Barclays' position is that the Administrators should admit the full Barclays Proof, because it has not been reduced by the LBI Payment, for reasons explained at Issue 11 above. Barclays accepts, however, that it is entitled to receive a dividend only on the balance of the Barclays Proof once the value of the LBI Payment is deducted.

85. The Administrators assert that Rule 2.77(1) means that a proof can only be admitted for the purpose of paying a dividend, and go so far as to state that there "*is no mechanism known to English law whereby a proof can be admitted for any purpose other than the payment of dividends on the admitted amount*" (at [139] of the Administrators' Position Paper). This is incorrect:

(a) The Rule does not in any way indicate that payment of dividends is the exclusive purpose of admission.

(b) In fact, the Rules expressly provide for admission of creditors' proofs for a purpose other than the payment of dividends, such as voting in creditors' meetings under Rule 2.39.

(c) The Court has ordered admission of a creditor's proof for the full amount of the proof even where a creditor has previously received a payment in respect of that proof (see *Re Sass* [1896] 2 Q.B. 12). A creditor in such a situation might not necessarily, therefore, receive a dividend for the full admitted amount.

86. Accordingly, there is nothing provided for in the Rules, nor any other reason, why the Barclays Proof should not be admitted for the full amount. As to this:

(a) It is not disputed by the Administrators that the Barclays Proof represents liabilities owed by LBIE at the date of the Administration.

(b) It cannot be disputed by the Administrators that the Dedicated Reserve was created in respect of, and in contemplation of, those liabilities, or that the LBI Payment was made from the Dedicated Reserve in satisfaction of those liabilities.

(c) The payment mechanism by which the LBI Payment was made was simply a result of LBIE having made premature payment on the ETD Claim to the wrong party by effectively paying LBI under the LBI/LBIE Settlement. The LBI/LBIE Settlement provided for the creation of the Dedicated Reserve and subsequent LBI Payment in satisfaction of LBIE's liabilities owed to Barclays. This cannot have any impact on the Barclays Proof, nor the amount for which Barclays' claim should be admitted, nor Barclays' entitlement to Statutory Interest. Nor should the LBIE estate (in reality, Wentworth as subordinated creditor) receive a windfall benefit at Barclays' expense. The mechanism adopted as a result of a prior payment to a party, who (as later established) was never the rightful creditor, should not operate to prejudice the claims of the rightful creditor, and in particular the rightful creditor's claim to Statutory Interest.

87. Barclays, as a creditor of the LBIE estate, is entitled to receive its proper distribution of LBIE's assets, including Statutory Interest. If admission is necessary to achieve this, then the Administrators are required to admit the Barclays Proof in full.

(b) Court direction

88. In the alternative, if the Barclays Proof should not be admitted for the full sum on the basis of the Insolvency Rules, then the Court should nevertheless direct the Administrators to make this admission (and/or to treat the entirety of the Barclays Proof as falling within "*those debts*" – *i.e.* "*debts proved*" which have been paid – for the purposes of Rule 2.88(7)) and pay Statutory Interest on the full Barclays Proof on the basis of *Ex parte James* and/or paragraph 74 of Schedule B1, and/or declare that the Administrators are estopped from admitting the Barclays Proof for any lesser sum.

89. This position is based on the LBI/Barclays Settlement and the LBI Payment, and the Administrators' consent and involvement in these events. The Administrators state that "*Barclays' acceptance of the LBI Payment and agreement to apply it towards the reduction of its claims against LBIE had the effect of reducing the amount of Statutory Interest which Barclays is entitled to receive*" (at [228]). This claim misconstrues and runs expressly contrary to the unambiguous language of the LBI/Barclays Settlement, and the Administrators should be estopped or otherwise precluded from asserting it.

    (a) First, as noted above, the intention and true effect of the LBI/Barclays Settlement was to prevent any double-recovery in respect of the LBI Payment, and not to affect Barclays' rights to Statutory Interest in respect of the LBI Payment.

    (b) Second, the parties, with the consent of the Administrators, agreed in the LBI/Barclays Settlement that they did not intend the making of the LBI Payment to reduce the Barclays Proof. The LBI Payment was agreed, under paragraph 5, to have the effect only of reducing LBIE's and/or the trustee's "*maximum aggregate undischarged liability*" towards Barclays. If the intention had been that the LBI Payment would reduce the Barclays Proof, the parties could have readily included language to that effect. They did not; Barclays relied on the express language of the LBI/Barclays Settlement and the Administrators should not now be permitted to resile from the agreed position.

    (c) Finally, the parties, with the consent of the Administrators, expressly made clear in paragraph 5 of the LBI/Barclays Settlement that "*nothing herein affects, waives, releases or reduces Barclays' claim against LBIE to interest relating to the $777,000,000 referenced in this Paragraph (or LBIE's defenses thereto)*".

90. The Administrators now take the position that Barclays' receipt of the LBI Payment reduced its claim for Statutory Interest by reducing its Proof. Again, Barclays entered into the LBI/Barclays Settlement in reliance on the parties' express agreement that its right to claim

Statutory Interest on the full sum of its Proof would be unaffected by its receipt of the LBI Payment. There is no basis on which the Administrators should now be permitted to resile from this agreed and unambiguous position. They should instead be directed to admit the full Barclays Proof in order to give effect to their agreement to preserve Barclays' claim to Statutory Interest.

91. The requested relief is in accordance with, and gives effect to, the statutory structure by ensuring that all creditors with proved and paid debts (including Unsecured Claims) are treated equally, and that a creditor is not penalised because of an arbitrary distinction based on how a payment was effected. Such relief is also consistent with the broad scope of the Administrators' powers to compromise claims and dispose of LBIE's property. The Administrators themselves acknowledge in their Position Paper that they possess broad powers under paragraph 18 of Schedule 1 of the Insolvency Act 1986 to "*make any arrangement or compromise on behalf of the company"*, and under paragraph 59(1) of Schedule B1 to "*do anything necessary or expedient for the management of the affairs, business and property of the company*" (at [94]).

92. Barclays accepts, and has always accepted, that admission of its Proof in a manner that preserves its legitimate claim to Statutory Interest should not result in any unjust enrichment to Barclays at the expense of the estate as a whole, and there are a variety of mechanisms available to achieve that end. In fact, admission of the Barclays Proof in full would merely ensure that Barclays received its legitimate entitlement to share in the LBIE estate surplus along with other creditors, and avoid enrichment of the estate (ultimately Wentworth as a subordinated creditor) at Barclays' expense.

93. Accordingly, the Court should direct the Administrators to admit the Barclays Proof in full (and/or to treat the entirety of the Barclays Proof as falling within the meaning of "*those debts*" – *i.e.* "*debts proved*" which have been paid – for the purposes of Rule 2.88(7)) to ensure that Barclays receives Statutory Interest on the LBI Payment as well as the outstanding principal, and make appropriate directions to avoid any double-recovery (see Issue 14). In the alternative, the Court should declare that the Administrators are estopped from refusing to admit the Barclays Proof in full.

Statutory Interest

94. In relation to Statutory Interest, if the Barclays Proof is admitted for its full sum then it is uncontroversial that Statutory Interest should be payable on the amounts outstanding for the periods during which they remained outstanding (see Issue 19 below).

Issue 13

95. Issue 13 is:

> *Does (i) creation of the Dedicated Reserve; and/or (ii) the LBI Payment; and/or (iii) the Administrators' consent thereto; and/or (iv) any other action relating to the creation of the Dedicated Reserve and payment therefrom, itself constitute (a) an admission to proof; and/or (b) payment of a dividend by the Administrators of part of the Barclays Proof in an amount equal to such payment?*

96. This Issue arises due to the following facts, which are unusual in the context of an administration:

(a) It was determined by the US courts that the liabilities under the ETD Trades were owed to Barclays after LBIE had already erroneously credited LBI as the claimant.

(b) The LBI Payment was contemplated and agreed by the Administrators as capable of being payable to Barclays, and Barclays received part payment of this claim from LBI (as a result of arrangements previously made between the Administrators and LBI) before the Administrators purported expressly to admit, reject or otherwise deal with the Barclays Proof.

(c) Barclays received the LBI Payment before it had made an election as to whether or to what extent it would pursue (or waive) its Client Money Claim and/or Unsecured Claim.

97. These facts should neither function to deprive Barclays of its right to have the Barclays Proof admitted for an amount including the LBI Payment, nor cause the Barclays Payment to be treated as anything other than a payment of "*proved debts*" for the purpose of Rule 2.88(7).

98. Barclays' position is that, in the event that it elects to pursue its Unsecured Claim, the Court should deem the Administrators' actions as constituting an admission of at least the amount of the LBI Payment. The Administrators agreed to the LBI Payment being made to Barclays on the terms of the LBI/Barclays Settlement, which preserved Barclays' right to elect whether to apply that sum towards its Unsecured Claim or its Client Money Claim. Accordingly, if Barclays chooses to allocate the payment towards the Unsecured Claim, the Court should deem that: (i) the Administrators' actions constitute admission of the Barclays Proof; and/or (ii) the LBI Payment falls within the meaning of "*those debts*" (*i.e.* "*debts proved*" which have been paid) for the purposes of Rule 2.88(7)).

Issue 14

99. Issue 14 is:

> *If the Barclays Proof should be admitted without deducting an amount in respect of the LBI Payment (or any part thereof), are the Administrators entitled and/or obliged to give credit for the Sterling Equivalent of the LBI Payment (or any part thereof) when paying dividends in respect of the Barclays Proof?*

100. Barclays does not take the position that it should be entitled to any double-recovery. Therefore, Barclays contends that the Barclays Proof should be admitted in full and credit given for the Sterling Equivalent of the LBI Payment (as determined by Issue 15). The admission of the Proof at the full amount would serve to preserve Barclays' rights to Statutory Interest and thus ensure a *pari passu* distribution of LBIE's assets (including the estate surplus) to its creditors.

101. There are a number of mechanisms whereby credit may be given to take into account the LBI Payment. One such mechanism might be an undertaking by Barclays, as a term of an order directing the Administrators to admit the Barclays Proof in full, that Barclays will acknowledge that it has already received $777 million from LBI in respect of the principal amount of its Proof.

Part D – Statutory Interest

Issue 17

102. Issue 17 is:

> *On the true construction of Rule 2.88(7), if the Barclays Proof should be admitted for a reduced amount by deducting an amount in respect of the LBI Payment (or any part thereof), is the debt on which Statutory Interest is payable: (i) the amount admitted to proof; or (ii) the amount that would have been admitted to proof but for such deduction?*

103. Barclays' primary position is that on the true construction of Rule 2.88(7), Statutory Interest is payable on debts eligible for and submitted for proof in relation to which payment has been received. The question of admission is therefore not engaged on Barclays' primary position (Barclays addresses the question of admission with regards to Issues 12 to 14 above and 19 below as an alternative to this position). As a result, if the Barclays Proof were admitted for a reduced amount, the debt on which Statutory Interest is payable would be the amount that would have been admitted but for the deduction.

104. The purpose of Statutory Interest under Rule 2.88(7) is to compensate creditors for the delay since the commencement of the administration in the payment of their debts. It is undisputed that at the commencement of the administration LBIE owed the liabilities represented by the Barclays Proof. It is equally undisputed that this full liability remained unpaid by LBIE from 15 September 2008 until 2 July 2015, when the LBI Payment was made, while the balance remains outstanding. Thus the compensatory principle underlying Rule 2.88(7) supports Barclays' entitlement to Statutory Interest on the amount of the LBI Payment for that period.

The true construction of Rule 2.88(7)

105. The Administrators' argument to the contrary is based on the contention that "*debts proved*" in Rule 2.88(7) means (contrary to its express wording) admitted debts. Rule 2.88(7) provides (emphasis added):

> *Any surplus remaining <u>after payment of the debts proved shall</u>, before being applied for any purpose, be applied in paying <u>interest on those debts</u> in respect of the periods during which they have been outstanding since the company entered administration.*

106. After "*payment of debts proved*", interest must be paid "*on those debts*". Thus this Issue turns on the correct interpretation of the words "*debts proved*":

(a) As a starting point, it is plainly necessary to consider the meaning of "*debts proved*" in the context of the Rules as whole (see, for example, the *dicta* of the Court in *A-G v Prince Ernest Augustus of Hanover* [1957] AC 436, 461 that "*words, and particularly general words, cannot be read in isolation; their colour and their content are derived from their context*").

(b) Moreover, it should be noted that Rule 2.88(7) does not specify any particular manner in which (or by whom) the payment of debts proved must be made.

(c) Subject to exceptions not relevant here, all claims by creditors are provable as debts against the company (Rule 12.3). A debt must be a debt or liability to which the company is subject at the date it enters into administration, or to which the company may become subject after that date by reason of any obligation incurred before that date (Rule 13.12(1) and (5)).

(d) Rule 2.72 deals with proving for a debt in an administration.[5] It is undisputed that the Barclays Proof accurately reflects its claims against LBIE as at the date of administration.

(e) Rule 2.88(7) provides that Statutory Interest is payable on paid "*debts proved*". It is clear from the Rules and case law that (as would be expected from its natural meaning) "*proved*" does not mean "*admitted*". Submission and admission of a proof are two separate steps and "*proved*" refers only to the former. The draftsman could, of course, have referred to "*admitted debts*", had that been intended.

(f) There are sound policy reasons why Rule 2.88(7) refers to "*debts proved*" rather than "*admitted debts*", including ensuring that creditors who receive payments from third parties after submission of a proof but before admission do not lose their right to Statutory Interest.

(g) Further, Rule 2.88(7) states that interest is only payable on "*debts proved*" in respect of which payment has been received; payment would be made only regarding proofs that represent debts truly owed at the date of administration. Thus there is no risk of unmeritorious proofs receiving Statutory Interest, since payments would not be made on

[5] Rule 2.72(1) states that "a person claiming to be a creditor of the company and wishing to recover his debt in whole or [in] part must … submit his claim in writing to the administrator". Rule 2.72(2) states that a "creditor who claims is referred to as 'proving' for his debt and a document by which he seeks to establish his claim is his 'proof'".

unjustifiable or questionable proofs, and accordingly no Statutory Interest would become payable.

107. The Administrators' argument that *"as a matter of construction, the 'debts proved' are the amounts which have been admitted for dividend*" (at [211]) relies on David Richards J's judgment in Waterfall IIA. However, that reliance is misplaced. In this part of Waterfall IIA the issue was whether the period for which Statutory Interest on a contingent debt should run from either: (i) commencement of the administration; or (ii) the date when the contingency occurred. It was not concerned with the question of the effect on a creditor's entitlement to Statutory Interest of a payment in respect of an undisputed (but not yet admitted) debt. Accordingly, this judgment does not stand as authority on the distinction between "*admitted*" and "*proved*" debts for the purpose of Rule 2.88(7), and the learned judge did not make the finding that the Administrators seek to ascribe to him (and nor is his reasoning analogous to the instant situation). This is evident from the judge's use of the terms interchangeably in his statement that the "*surplus arises not after the underlying debts and claims have been paid but after the admitted or proved debts have been paid*" (emphasis added) (Waterfall IIA at [208]).

Payment by a third party

108. The fact that the LBI Payment was made by LBI, a third party, does not change the above interpretation of the Rule. Rule 2.88(7) refers only to "*payment of the debts proved*" – the plain language does not limit its meaning to payments made only by the debtor, or payments made directly to the rightful claimant. Had it been the intention of the draftsman to limit payments in this matter, it would again have been open to him to have included wording to that effect. But, as written, Rule 2.88(7) permits interest to be payable on debts paid to a rightful claimant through an intermediary third party, as was the case when the LBIE Administrators approved LBI's pass-through payment of $777 million out of the Dedicated Reserve to Barclays.

109. This construction of Rule 2.88(7) is also supported by principles of commercial common sense. To read "*payment*" as relating only to payments made by the administrator/debtor would mean that any recovery from a guarantor or through the enforcement of security (as in the case of a secured creditor) would remove any entitlement to Statutory Interest.

110. There is no substantive difference between the present case and a situation in which Barclays had refused payment from LBI in 2015 and instead waited for the Administrators to admit its Proof and pay Barclays the full value of its claim (in which case LBIE would no doubt have had to pay interest on the Sterling Equivalent of the LBI Payment, and moreover, LBIE would have had to pursue a reimbursement claim against the LBI Trustee in order to recoup the $777

million with which LBI had been credited pursuant to the terms of the LBI/LBIE Settlement). On the Administrators' position, however, the fact that Barclays agreed to follow the expressly contemplated alternative procedure of accepting the LBI Payment – in circumstances where the parties expressly contracted that Barclays' right to interest would be preserved – would disqualify Barclays from its right to claim Statutory Interest on the full amount. This is unsustainable.

Public policy

111. Following submission of a proof of debt, whether a creditor receives payment before or after admission should not (and on Barclays' position, does not) affect a creditor's right to Statutory Interest. The underlying purpose of Statutory Interest still applies and thus interest should be payable to compensate a creditor for the period during which its debt is unpaid.

112. In addition, there is no public policy reason to preclude Statutory Interest where undisputed debts have been paid by third parties.

Issue 18

113. Issue 18 is:

> *If the Administrators admit the Barclays Proof for a reduced amount by deducting an amount in respect of the LBI Payment (or any part thereof):*
>
> *(1) Should the Administrators be directed under the rule in Re Condon; ex. p James (1873-74) LR 9 Ch App 609; and/or*
>
> *(2) Should the Administrators be directed under paragraph 74 of Schedule B1; and/or*
>
> *(3) Are the Administrators estopped from refusing*
>
> *to pay Statutory Interest on some amount other than the sum admitted to proof? If so, how should such amount be calculated, and from what date should Statutory Interest be paid thereon?*

114. Barclays' position is that the Court has jurisdiction, and the tests are satisfied, to direct the Administrators under the rule in *Ex parte James* and/or paragraph 74 of Schedule B1 to pay Statutory Interest on the full value of Barclays' claim against LBIE. Alternatively, Barclays considers that the Administrators are estopped from refusing to pay Statutory Interest on the full Barclays Proof.

Jurisdiction

115. The Administrators contend that the Court does not have jurisdiction to order them to pay Statutory Interest on any amount other than the sum admitted for dividend, because neither the rule in *Ex parte James*, paragraph 74 of Schedule B1 nor any estoppel permits the Court to modify the statutory scheme for the payment of Statutory Interest.

116. This contention is based primarily on Lord Neuberger's comments from *Re Nortel GmbH* [2014] AC 209, in which he stated that the statutory ranking could not be overridden by the Courts. From this observation the Administrators contend that a direction to the effect requested would constitute a variation or an overriding of the statutory ranking. Barclays' position is that this is incorrect:

    (a) First, the variation of the size of debts within each tier of the statutory ranking is self-evidently not the same as alteration of the order of that ranking. Were this the case, every time the Administrators made a decision on, for instance, a creditors' agreed claim in a CDD they would be overriding the statutory ranking. A step which varies the amount of money that flows down the waterfall from one ranking to the next is not the same as an action which alters the structure of the waterfall itself.

    (b) Second, the Court has previously recognised just such a jurisdiction. In *Re Lehman Brothers International (Europe) (in administration)* [2015] EWHC 2270 (Ch) ("**Waterfall IIB**") (at [171 to [189]), David Richards J expressed an *obiter* view that if he had held that the post-Administration contracts between creditors and LBIE had the effect of releasing currency conversion claims, he would have directed the Administrators not to enforce such releases, under the principle in *ex parte James* (for which he cited the judgment of Lord Neuberger in *Re Nortel GmbH* [2014] AC 209) and under paragraph 74 of Schedule B1. Though the judge was clearly aware that such a direction would affect the amount of funds flowing down the waterfall, he evidently did not share the Administrators' view that this constituted a modification of the statutory priority.

Court direction

117. In these circumstances, the tests for a Court direction on the basis of either *Ex parte James* or paragraph 74 of Schedule B1 are satisfied. It would plainly be inequitable for Barclays to be deprived of the Statutory Interest on its full Proof, when the accuracy of that Proof is uncontested and doing so would harm the interests of Barclays. This unfairness results from the fact that:

(a) The Administrators would be affecting a creditor's substantive rights purely based on form (*i.e.* the manner and timing of the LBI Payment) in circumstances where: (i) Barclays had a valid Unsecured Claim; (ii) there was a surplus in the estate; and (iii) Barclays lost the use of the money represented by the LBI Payment for almost seven years.

(b) The Administrators would be depriving Barclays of its right to Statutory Interest with regard to the LBI Payment in circumstances where: (i) Barclays has not waived or agreed to waive its right to Statutory Interest; (ii) in fact, the parties expressly agreed to preserve Barclays' right to Statutory Interest in the LBI/Barclays Settlement, which was agreed with the involvement of the Administrators; and (iii) the Administrators have allowed a large number of other creditors to give up their Client Money Claims in such a way as to entitle them to Statutory Interest.

LBI/Barclays Settlement

118. A direction to the Administrators to pay Statutory Interest to Barclays on the full value of its Unsecured Claim would also accord with the parties' agreement under the LBI/Barclays Settlement. The LBI/Barclays Settlement, as noted above, expressly preserved Barclays' rights as regards interest on the LBI Payment by providing in paragraph 5 as follows:

> *For the avoidance of doubt, nothing herein affects, waives, releases or reduces Barclays' claim against LBIE to interest relating to the $777,000,000 referenced in this Paragraph (or LBIE's defences thereto), and nothing herein affects, waives, releases or reduces Barclays' LBIE ETD Claim against LBIE with respect to assets (and interest with respect thereto) in excess of the $777,000,000 referenced in this Paragraph (or LBIE's defenses thereto).*

119. The Administrators state that "*Barclays' acceptance of the LBI Payment and agreement to apply it towards the reduction of its claims against LBIE had the effect of reducing the amount of Statutory Interest which Barclays is entitled to receive*" and that paragraph 5 does not allow Barclays to contract out of the mandatory effect of Rule 2.88(7) (at [228(3)-(4)]). However:

(a) As the Administrators also state, without the LBI/Barclays Settlement "*the LBI Payment would not have been made to Barclays and would have had no effect whatsoever on Barclays' claims against LBIE*" (at [228(1)]). Thus on the Administrators' own position, absent the LBI/Barclays Settlement, Barclays would have been able to elect to choose which claim to pursue.

(b) The effect of the express language in paragraph 5 of the LBI/Barclays Settlement is to leave unchanged the position regarding interest that existed prior to the LBI/Barclays

Settlement. In other words, Barclays was entitled to Statutory Interest prior to the LBI/Barclays Settlement and the terms of the Settlement did not affect that entitlement.

(c) The Administrators, as noted above, were directly involved in the negotiation of this contractual language and consented to the Stipulation and Order comprising the LBI/Barclays Settlement and the Order entered by the court approving that settlement. Indeed, negotiations between Barclays and the Administrators were prompted by the Administrators' threatened objection to the LBI/Barclays Settlement in the proceedings before the Bankruptcy Court for the Southern District of New York (the "**SDNY Bankruptcy Court**"). The Administrators sought assurance that Barclays would not double-recover the $777 million by also seeking that sum from LBIE, and Barclays, in turn, required the Administrators to agree that nothing in the LBI/Barclays Settlement (including the LBI Payment) would reduce or affect Barclays' claim to interest on the $777 million. The parties made that agreement, and the Administrators should now be bound by that agreement.

(d) The language preserving LBIE's defences does not assist the Administrators, since such defences must plainly pre-date the LBI/Barclays Settlement. The Administrators' reliance on the LBI/Barclays Settlement and the LBI Payment as themselves constituting a defence to the claim for Statutory Interest is precluded by the language of paragraph 5.

120. A creditor's right to Statutory Interest cannot be removed without a clear intention by the creditor to waive such a right. In the present situation, far from expressing such an intention, Barclays requested – and both the LBI Trustee and the LBIE Administrators agreed – to include clear language in the LBI/Barclays Settlement, preserving Barclays' rights to Statutory Interest on the LBI Payment.

121. Thus, in short, Barclays expressly made clear in the LBI/Barclays Settlement that it did not intend to waive its right to Statutory Interest by accepting the LBI Payment, and the parties, with the consent of the Administrators, agreed that nothing in the LBI/Barclays Settlement would affect Barclays' claim to interest on the LBI Payment. In such circumstances, the Administrators should be directed by the Court and/or are estopped from refusing, to pay Statutory Interest on the LBI Payment.

United States Bankruptcy Court Order

122. Finally, it is worth noting that the provisions of the LBI/Barclays Settlement Agreement have not only the legal force of a contractual agreement between the parties, but of the Order approving the settlement (which, under US law, has been held to have the same effect as a

judgment) of the SDNY Bankruptcy Court: *In re Lehman Brothers Inc*, Case No. 08-01420 (SCC) SIPA, Order dated 29 June 2015. The Administrators, as noted above, had the opportunity – as did all other creditors in the LBI bankruptcy – to object to the terms of that Order before it was made, to actively participate and raise any issues or arguments in the hearing held to consider the approval of the Order, and to appeal the Order. The Administrators elected not to take any such steps.

123. The SDNY Bankruptcy Court has thus already ruled that the LBI/Barclays Settlement has no effect on Barclays' right to claim Statutory Interest from LBIE, a legal ruling directly contrary to the argument the Administrators now seek to advance in this proceeding. Whether by application of estoppel, *res judicata* or the rule in *Henderson v Henderson* (1843) 3 Hare 100, the Administrators should be precluded from re-litigating a point already decided in a foreign proceeding in which they participated.

Issue 19

124. Issue 19 is:

> *If the Barclays Proof should be admitted without deducting an amount in respect of the LBI Payment (or any part thereof), on the true construction of Rule 2.88(7), in calculating the principal sum on which Statutory Interest is payable in respect of the Barclays Proof, should such principal sum be reduced by the Sterling Equivalent of the LBI Payment from the date when Barclays received the LBI Payment (or any other date)?*

125. Barclays' position is that Statutory Interest is payable on the amount equivalent to the LBI Payment from the date of the Administration to the date that payment was made (*i.e.* on or around 2 July 2015), and on the outstanding balance of the Barclays Proof from the date of the Administration to the date of payment.

Part E – Currency Issues

Issue 16

126. Issue 16 is:

> *If Barclays has an Unsecured Claim in respect of the ETD Trades, in what currency (or currencies) is such Unsecured Claim denominated (prior to any conversion under Rule 2.86)*

127. Barclays' position is that the Unsecured Claim is denominated in USD prior to conversion under Rule 2.86. On this Issue, Barclays agrees with the Administrators and the facts set out at [205] of their Position Paper.

Issue 15

130. Issue 15 is:

> *In relation to Issues 10 to 14 and Issue 19, how is the amount in respect of the LBI Payment to be calculated? In particular, if it is the Sterling Equivalent that is to be taken into account, should the Sterling Equivalent of the LBI Payment be calculated based on the exchange rates prevailing at:*
>
> *(a) The Time of Administration;*
>
> *(b) The time when Barclays received the LBI Payment; or*
>
> *(c) Some other time?*

128. Barclays' position is that, in the event that Statutory Interest is payable on the LBI Payment and Barclays elects to pursue its Unsecured Claim:

(a) the Sterling Equivalent of the LBI Payment is required to calculate Statutory Interest on that sum and the outstanding balance; and

(b) to calculate this, and ensure consistency in approach, the exchange rate prevailing at the Time of the Administration should be used.

129. All distributions are treated as notionally taking place simultaneously on the date of the commencement of the insolvency proceedings: see *Re Dynamics Corporation of America (In Liquidation)* [1976] 1 W.L.R. 757 at 774. That Barclays received payment from a third party in a foreign currency should not alter this; payments from third parties and/or payments in foreign currency must be treated as being paid at the same time and using the same exchange rate for the purposes of calculating the amount due to be paid by the insolvent company by way of dividend.

130. Barclays' approach is therefore as follows:

(a) The Unsecured Claim in respect of the ETD Trades is denominated in USD and was converted into GBP under Rule 2.86 using the exchange rate at the Time of the Administration for the purposes of proof.

(b) The LBI Payment was made in USD. The Unsecured Claim was proved in GBP and Statutory Interest must necessarily be calculated in GBP. The LBI Payment should therefore be converted into GBP using the exchange rate prevailing at the Time of the Administration (giving the "**Sterling Equivalent of the LBI Payment**").

(c) Statutory Interest is payable on the Sterling Equivalent of the LBI Payment for the period from the Time of the Administration to the date the payment was received by Barclays (*i.e.* 2 July 2015).

(d) The Sterling Equivalent of the LBI Payment should be deducted from the total GBP amount of the Barclays Proof to give the outstanding principal sum (the "**Outstanding Principal**").

(e) The Outstanding Principal should be paid as a dividend to Barclays (the "**Final Dividend**").

(f) Statutory Interest is payable on the Outstanding Principal for the period from the Time of the Administration to the future date on which the Final Dividend is paid.

131. Barclays notes that the Administrators' position appears to apply different principles depending on whether the Unsecured Claim is in USD or any other currency (with their approach being the same as that of Barclays if the Unsecured Claim is denominated in USD). Barclays' approach would apply one consistent principle regardless of currency.

Part F – Set-off

Issue 9

132. Issue 9 is:

> *If Barclays has an Unsecured Claim (whether a Parallel Unsecured Claim, a Shortfall Unsecured Claim or any other Unsecured Claim):*
>
> *(1) Is such Unsecured Claim subject to a mandatory set-off under Rule 2.85 against any sums owing by LBI to LBIE?*
>
> *(2) Is such Unsecured Claim subject to a mandatory set-off under Rule 2.85 against any sums owing by Barclays to LBIE?*
>
> *(3) Does LBIE have an equitable right to set off such Unsecured Claim against any sums owing by Barclays and/or LBI to LBIE?*
>
> *(4) Does LBIE have a common law right to set off such Unsecured Claim against any sums owing by Barclays and/or LBI to LBIE?*

133. Barclays' position is the same as that of the Administrators on Issue 9. The Unsecured Claim is not subject to any type of set-off.

Issue 3

134. Issue 3 is:

> *lf Barclays has a Client Money Entitlement and a Parallel Unsecured Claim, and the Parallel Unsecured Claim is reduced by any set-off (whether under Rule 2.85 or otherwise), does the Client Money Entitlement fall to be reduced by the same (or any other) amount?*

135. As a result of Barclays' position on Issue 9, Issue 3 does not arise.

Martin Pascoe QC

Boies Schiller Flexner (UK) LLP

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