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Case No: 7942 of 2008

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

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

Date: 24 August 2016

Before :

LORD JUSTICE DAVID RICHARDS

- -

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

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Between:

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

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

- and -

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

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

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

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

Tom Smith QC and **Robert Amey** (instructed by **Michelmores LLP**) for the **5th Respondent**

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Approved Judgment

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

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Lord Justice David Richards:

Introduction

1. This judgment deals with six supplemental issues arising out of two judgments that I gave in 2015: *In re Lehman Brothers International (Europe) (No 5)* [2015] EWHC 2269 (Ch); [2016] Bus LR 17 (*Waterfall IIA*) and *In re Lehman Brothers International (Europe)* [2015] EWHC 2270 (*Waterfall IIB*). Detailed written submissions on these issues were lodged by the parties but there have been no oral submissions.

2. The earlier judgments were concerned with generic issues as regards the entitlement of creditors to interest on their claims for periods after the commencement of the administration of Lehman Brothers International (Europe) (LBIE) (Waterfall IIA) and the effect of agreements made in largely standard form between LBIE (acting by its administrators) and a significant number of creditors on their claims for interest and non-provable currency conversion losses (Waterfall IIB). The existence and nature of currency conversion claims had been among the issues dealt with in an earlier judgment, upheld by the Court of Appeal: *In re Lehman Brothers International (No 4)* [2014] EWHC 704 (Ch); [2015] Ch 1, and [2015] EWCA Civ 485; [2016] Ch 50.

3. Of the supplemental issues covered in this judgment, four (supplemental issues 1b, 1c, 2 and 3) arise out of *Waterfall IIA* and concern various aspects of the entitlement to interest for periods after the commencement of the administration (post-administration interest), while the other two (supplemental issues 4 and 5) arise out of *Waterfall IIB.* One other issue (supplemental issue 1a) concerns post-administration interest under ISDA Master Agreements and other market standard agreements and was directed to be heard with other generic issues arising under those agreements at a separate hearing before Hildyard J. As with the earlier cases, all the issues are raised by the administrators on an application for directions, with various creditors with differing interests appearing as respondents and making submissions on the issues.

Post-administration interest

4. Central to some of the supplemental issues is Rule 2.88 of the Insolvency Rules 1986 which governs the payment of interest on proved debts in an administration. This was subject to detailed consideration in *Waterfall IIA* and reference should be made to that judgment.

5. It is necessary for the purposes of this judgment to set out only those parts of Rule 2.88 that deal with post-administration interest:

> *"(6) The rate of interest to be claimed under paragraphs (3) and (4) is the rate specified in section 17 of the Judgments Act 1838 on the date when the company entered administration.*
>
> *(7) … any surplus remaining after payment of the debts proved shall, before being applied for any purpose, be applied in paying interest on those debts in respect of the periods*

> *during which they have been outstanding since the company entered administration.*
>
> *(8) All interest payable under paragraph (7) ranks equally whether or not the debts on which it is payable rank equally.*
>
> *(9) The rate of interest payable under paragraph (7) is whichever is the greater of the rate specified under paragraph (6) or the rate applicable to the debt apart from the administration."*

6. Among the issues that I decided as part of *Waterfall IIA* are the following that are relevant to the supplemental issues. First, Rule 2.88 represents a complete code for the payment of post-administration interest on proved debts, leaving no room for any non-provable claim for further interest on such debts. Secondly, interest under Rule 2.88 (statutory interest) is payable on future debts and on the amount admitted to proof in respect of contingent debts from the date on which the administration commenced (the Date of Administration).

Currency conversion claims

7. A currency conversion claim arises where a foreign currency debt is converted into sterling for the purposes of proof at the rate of exchange prevailing on the Date of Administration, as required by Rule 2.86, but sterling has depreciated against the original currency by the time that a dividend is paid. I described it in rather fuller terms in *Waterfall IIA* at [168]:

> *"A currency conversion claim arises if (a) a creditor has a claim enforceable against the company denominated in a foreign currency; (b) that claim is converted into sterling at the prevailing rate as at the date of administration under rule 2.86; (c) between that date and the date or dates of the dividends, sterling depreciates against the foreign currency, with the result; that (d) the debt due to the creditor is not fully discharged by the dividend payments. The creditor has a claim for the shortfall, payable as a non-provable debt after the payment in full of statutory interest. It is a case where the creditor is remitted to his contractual rights. His claim is for the unpaid portion of the debt due to him."*

Supplemental Issue 1b

8. This issue is as follows:

> *"How is an independent right to interest that "arises outside or other than from the administration" to be determined when calculating interest on a non-provable Currency Conversion Claim if such a rate would only accrue on a debt that was contingent or future at the Date of Administration if some action was taken after the Date of Administration? How are*

> *such rights to be assessed if the creditor did not in fact exercise such rights?"*

9. This issue was included at the request of York Global Finance BDH LLC (York). It arises out of declaration (vi) of my Order dated 16 October 2015 in *Waterfall IIA*:

> *"If and to the extent that a creditor has a non-provable claim (including but not limited to a Currency Conversion Claim) in respect of a sum on which interest is payable apart from the administration at any time during the period after the Date of Administration (as defined in the Application Notice), the creditor has a non-provable claim in respect of such interest (if any) as may have accrued on that non-provable claim in that period."*

10. York points out that this declaration does not specify what interest "may have accrued" or the applicable rate of interest for these purposes, although the words "such interest (if any)" contemplate that no interest may have accrued on at least some claims.

11. The issue postulates a debt that was contingent or future at the Date of Administration. It appears from the submissions lodged by the parties that they are focusing on liabilities under contracts, particularly under ISDA Master Agreements, that make calculation and payment of a liability, and interest on that liability, contingent on service of a close-out notice. In other words, after service of a close-out notice, an actual debt arises, and interest on that debt, at a rate determined in accordance with the agreement, starts to run.

12. The primary submission of York is that, if interest or a particular rate of interest would accrue only if some action (such as service of a close-out notice) were taken by the creditor after the Date of Administration, such interest is not interest that "may have accrued", even if the creditor has taken the necessary action. It submits that a creditor cannot improve its position after the Date of Administration by taking some step in an effort to gain a right to the payment of interest that was not payable on the Date of Administration.

13. Reliance is placed on what I said in *Waterfall IIA* at [169] that the entitlement to interest on a non-provable debt

> *"is dependent on a remission to contractual or other rights existing apart from the administration and it follows that no interest is payable on a currency conversion claim where the underlying foreign currency obligation is not itself interest-bearing."*

14. It is said that my reference to contractual and other rights existing "apart from the administration" echoes the reference in Rule 2.88(9) to the "rate applicable to the debt apart from the administration" and should be applied in the same way. Relying on my judgment at [178] - [181] it is submitted that for the purposes of Rule 2.88 a rate existing apart from the administration does not include a rate that would be applicable only if certain steps were taken by the creditor but had not in fact been taken as at the

Date of Administration. Reliance is also placed on what I said at [177] that the applicable interest rate apart from the administration does not include "a hypothetical rate which would be applicable to a debt if the creditor took certain steps."

15. The secondary, alternative submission of York is that if the words "such interest…as may have accrued" do not exclude interest which was contingent on a creditor taking some step after the Date of Administration, they should be taken to include any situation where a creditor *could* take such a step, whether or not the creditor has in fact done so. The example is given of creditors with claims under contracts subject to New York jurisdiction clauses. A judgment obtained in New York will carry interest at the rate applicable to judgments under New York law, which at all relevant times has been 9%. To allow such interest to creditors who obtain judgment in New York after the Date of Administration, but to deny it to those creditors who choose not to do so, would simply encourage a scramble for foreign judgments to the detriment of an efficient and economic administration. Further undesirable results would follow if steps were taken to impose a moratorium in some jurisdictions, for example by recognition of the administration as foreign main proceedings under the UNCITRAL Model Law on Cross-Border Insolvency in those jurisdictions that have adopted it, but were not or could not be taken in other jurisdictions where some creditors could obtain judgments.

16. York's case on this supplementary issue is opposed by the administrators and the other respondents.

17. In my judgment, neither of York's submissions is sustainable.

18. As to York's primary submission, the issue is not the proper construction of Rule 2.88(9) or of the phrase "the rate applicable to the debt apart from the administration" as it there appears. Rule 2.88 has nothing to say about claims for interest on non-provable claims. A non-provable claim is by definition a claim that exists independently of the administration and to which the creditor is remitted to the extent that the process of distribution of assets in the administration does not fully satisfy its total debt.

19. If, between the Date of Administration and the date of the final and full discharge of the creditor's non-provable debt, there occurs an event that entitles the creditor, under the terms of the contract, to interest on the non-provable debt, it appears clear to me that the creditor has thereafter an accrued right to that interest for which it can claim against the company under the terms of the contract. It is one of the rights to which the creditor is remitted. In its submissions, York relies on a citation from my judgment in *Waterfall IIA* at [169] but that paragraph is, in my view, entirely consistent with what I have just said, and is indeed a statement to the same effect.

20. As I mention above, York refers to *Waterfall IIA* at [178] - [181] where I dealt with the meaning of "the rate applicable to the debt apart from the administration" in Rule 2.88(9). York submits that I held that such a rate does not include a rate which would only be applicable if certain steps were taken by the creditor but had not in fact been taken *as at the date of the commencement of the administration.* As I have earlier said, this is irrelevant to the interest payable on a non-provable debt. It is an issue raised directly by Supplemental Issue 1a which is to be decided by Hildyard J. I will therefore say no more about it.

21. There is no principled basis for York's alternative submission. If a creditor is remitted to its contractual or other rights, it is remitted to its actual rights, not to the rights it might have had if it had taken a step open to it. There is no basis on which the law can treat a creditor as having taken a step which it has not taken, and thereby impose on the debtor a liability which does not otherwise exist.

22. As earlier mentioned, York's submissions refer to the possibility of foreign judgments being obtained against the company and interest running at the foreign judgment rate. York refers to the undesirable scramble for foreign judgments that might result if such interest was payable by the company as a non-provable debt. A judgment rate is not a rate payable by virtue of the underlying contract or the exercise of any right under the contract. It is quite distinct from a contractual right to interest. I do not regard these considerations relating to interest on foreign judgments as providing support for either of York's submissions.

23. However, I should make clear that the other parties' submissions do not, as I read them, present a consistent front on the question of foreign judgments.

24. The administrators address only contractual rights to interest: see, for example, paragraphs 2, 4, 7 and 8 and the answers that they propose in paragraph 10 which refer only to contractual interest. The same is true of Wentworth's submissions: see in particular paragraphs 1(3) and 3. By contrast, the submissions of the Senior Creditor Group (SCG) repeatedly refer to interest in fact accruing on non-provable debts in accordance with its "contractual *or other* rights". In referring to York's example of judgment interest on a New York judgment entered after the Date of Administration, the SCG submit at paragraph 10(3) that it merely illustrates the fact that the entitlement to claim interest on a currency conversion claim is dependent on whether interest in fact accrued during the period of the administration.

25. In these circumstances, in the absence of reasoned submissions by all parties, it is not appropriate for me to address or give directions regarding non-provable claims to interest on foreign judgments entered after the Date of Administration. If the administrators decide that they need directions on this question, it will have to be specifically raised by them.

Supplementary Issue 1c

26. This issue raises questions not on non-provable claims or interest but on the construction of Rule 2.88 providing for statutory interest on proved debts. The issue is:

> *"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."*

27. This issue raises two questions. I will call the question in the first paragraph "sub-issue 1" and the question in the second paragraph "sub-issue 2".

28. The background to this supplementary issue, as explained by Wentworth in its submissions, is as follows. In the Waterfall IIA order, declaration (xi) was to the effect that the comparison required by Rule 2.88(9) was 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 on the numerical rates themselves." Declarations (xiv) and (xv) provided that interest under Rule 2.88(7) was payable in respect of future and contingent debts from the Date of Administration, rather than from the date they became payable. My reasons for this conclusion were summarised in my judgment at [206] – [207]:

> *"206. … The distribution in the administration is being made to creditors pari passu in discharge of their proved debts, not their underlying claims. They are not the same thing, as clearly illustrated by the examples of an estimate of the value of a contingent debt for the purposes of proof and the admission to proof of a sterling sum in place of a debt otherwise due in a foreign currency.*
>
> *207. The purpose of rule 2.88(7), as earlier discussed in this judgment, is to provide for interest to be paid to all creditors, irrespective of whether they had any entitlement to interest apart from the administration. What they are being compensated for by the payment of interest under rule 2.88(7) is the delay since the commencement of the administration in the payment of their admitted "debts", as ascertained or estimated in accordance with the legislation. It is not, in my judgment, compensation for the non payment of the underlying debt although I accept, as I stated in Waterfall I, that the rationale for the choice of judgment rate as the minimum rate of interest payable is that the commencement of an administration or liquidation will or may prevent creditors from taking proceedings and obtaining judgment against the company."*

29. Declaration (xiii), reflecting the agreed position of all parties, provided that for the purposes of establishing the greater of the Judgments Act rate and the rate applicable

apart from the administration, "the amount of interest to be calculated based on the latter is to be calculated from the Date of Administration".

30. As applied to future and contingent debts, there is a potential ambiguity in declaration (xiii), namely whether, for that purpose, the contractual rate applies to the whole of the period from the Date of Administration (the answer in sub-paragraph (i) in the first paragraph of Issue 1c) or only from the due date for payment of the debt (the answer in sub-paragraph (ii)).

31. The SCG argues for the answer in (i) to sub-issue 1 and that, as regards sub-issue 2, the greater of the two rates should be assessed taking the periods together. Wentworth and the Administrators argue for the answer in (ii) for sub-issue 1 and agree with the SCG on sub-issue 2, albeit by reference to the different answers to sub-issue 1. York simply submits that this question does not arise because, for the reasons advanced by it on Supplemental Issue 1a, there is no rate applicable apart from the administration under Rule 2.88(9) unless it was actually applicable at the Date of Administration. For the reasons already given, I express no view on York's position and will proceed to consider this Supplemental Issue on the assumption (but no more) that York's position is wrong.

32. On sub-issue 1, the SCG submits that the contractual rate applying to contingent and future debts once they become payable should apply to the whole period from the Date of Administration. This will ensure that the creditors entitled to those debts receive compensation for the time value lost as a result of a present value being given to those debts as at the Date of Administration for the purposes of proof (in the case of contingent debts) or for the purposes of dividends (in the case of future debts).

33. I endorse this reasoning as the basis for future and contingent creditors being entitled to interest under Rule 2.88(7) from the Date of Administration, but I cannot accept that it provides a basis for those creditors receiving interest at a contractual rate for periods to which it did not apply under the contract.

34. If no interest is contractually payable on a contingent debt until the contingency occurs, I cannot see that interest at the contractual rate for any earlier period is interest at "the rate applicable apart from the administration". During that period, there was no interest payable on the debt apart from the administration. This does not leave the creditor uncompensated, because it will in any event be entitled to interest at the Judgments Act rate prevailing at the Date of Administration. As discussed in my judgment in *Waterfall IIA*, the purpose of providing the alternative of interest at the rate applicable apart from the administration is to ensure that the creditor receives what it would have received if there had been no administration, if that would be more than interest at the Judgments Act rate. It is not designed to enable the creditor to do better than it would have done if there had not been an administration.

35. The difficulty in the SCG's submission is shown by those debts to which varying rates of interest apply. This is more likely in the case of present or future debts, but could also occur with contingent debts, such as guarantees of loans. Suppose a debt has an interest-free period expiring at the end of the first year of the administration and then interest at a fixed rate. The logic of the SCG's position would be that the fixed rate of interest should apply for the whole of the period from the Date of Administration to the payment of dividends on the debt. This cannot be said to be the rate of interest

applicable in the first year, apart from the administration. Similar examples are given by Wentworth in its submissions.

36. For these reasons I am satisfied that the correct answer to sub-issue 1 is that in sub-paragraph (ii). The correct answer to sub-issue 2 is that statutory interest under Rule 2.88(9) is to be calculated by comparing the two alternative rates for the whole period from the Date of Administration to the date(s) of dividend payments.

Supplemental Issue 2

37. This issue concerns the effect of insolvency set-off on currency conversion claims. It reads:

> *"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)."*

38. Rule 2.85 provides for the set-off of claims in an administration:

> *"(1) This Rule applies where the administrator, being authorised to make the distribution in question has, pursuant to Rule 2.95 given notice that he proposes to make it.*
>
> *(2) In this Rule "mutual dealings" means mutual credits, mutual debts or other mutual dealings between the company and any creditor of the company proving or claiming to prove for a debt in the administration but does not include any of the following –*
>
> *(a) any debt arising out of an obligation incurred after the company entered administration …*
>
> *(3) An account shall be taken as at the date of the notice referred to in paragraph (1) of what is due from each party to the other in respect of the mutual dealings and the sums due from one party shall be set off against the sums due from the other.*
>
> *(4) A sum shall be regarded as being due to or from the company for the purposes of paragraph (3) whether –*
>
> *(a) it is payable at present or in the future;*
>
> *(b) the obligation by virtue of which it is payable is certain or contingent; or*
>
> *(c) its amount is fixed or liquidated, or is capable of being ascertained by fixed rules or as a matter of opinion.*
>
> *(5) Rule 2.81 shall apply for the purposes of this Rule to any obligation to or from the company which, by reason if its*

> *being subject to any contingency or from any other reason, does not bear a certain value;*
>
> *(6) Rules 2.86 to 2.88 shall apply for the purposes of this Rule in relation to any sums due to the company which –*
>
> *(a) are payable in a currency other than sterling;*
>
> *(b) are of a periodical nature; or*
>
> *(c) bear interest.*
>
> *(7) Rule 2.105 shall apply for the purposes of this Rule to any sum due to or from the company which is payable in the future.*
>
> *(8) Only the balance (if any) of the account owed to the creditor is provable in the administration. Alternatively the balance (if any) owed to the company shall be paid to the administrator as part of the assets except where all or part of the balance results from a contingent or prospective debt owed by the creditor and in such a case the balance (or that part of it which results from the contingent or prospective debt) shall be paid if and when that debt becomes due and payable.*
>
> *(9) In this Rule "obligation" means an obligation however arising, whether by virtue of an agreement, rule of law or otherwise."*

39. The account required by Rule 2.85(3) for the purposes of set-off is taken as at the date of the notice given by the administrator that he proposes to make a distribution to creditors (the account date). By contrast, provable debts are ascertained as at the Date of Administration and foreign currency debts are converted into sterling for the purposes of proof at the official exchange rate prevailing on the Date of Administration (Rule 2.86). This difference in applicable dates does not arise in the case of a liquidation where the relevant date for all these purposes is the date when the company went into liquidation.

40. York submits that a currency conversion claim can arise from the discharge of a debt by way of set-off, where sterling has depreciated between the Date of Administration and the account date, in the same way as a currency conversion claim can arise where sterling has depreciated between the Date of Administration and the date(s) of dividend payments. It says that such a claim can arise even where the claim and cross-claim set off against each other were originally denominated in the same foreign currency. Although the SCG had made outline written submissions for the *Waterfall IIA* hearing to the same effect as York's main point (but not as regards claims and cross-claims in the same original currency), their submissions for this supplemental issue do not adopt a firm position.

41. The administrators and Wentworth submit that no currency conversion claim arises as a result of set-off under Rule 2.85.

42. In my judgment, the administrators and Wentworth are right that no currency conversion claim arises from set-off. The flaw in York's argument is to say that because the account for the purposes of set-off is taken as at the date on which the notice of an intention to make a distribution is given, that is the date on which the creditor's claim is, to the extent of the set-off, discharged. If that were the case, there would be something to be said for equating discharge by set-off with the payment of a dividend. It might be said that the creditor was receiving satisfaction in a devalued currency and therefore not receiving its full contractual entitlement.

43. The effect of the provisions in the Rules is that, although the set-off account is taken as at the date of the administrator's notice, the creditor's claim is discharged, to the extent of the set-off, as at the Date of Administration. The claims and cross-claims subject to set-off exclude any that arise out of an obligation incurred after the commencement of the administration: Rule 2.85(2)(a). The debts and liabilities (in the wide sense used in this context) due from the company to the creditor are therefore restricted to those as at the Date of Administration. Any claims in a foreign currency are converted into sterling for the purposes of set-off at the exchange rate prevailing as at the Date of Administration: Rule 2.85(6). The creditor's *provable* debt is the balance after set-off of its debt as at the Date of Administration: Rule 2.85(8).

44. Although the entire machinery for ascertaining and valuing claims is brought into operation by the giving of a notice of an intention to make a distribution, it has a retrospective effect. The creditor's claim, which must have existed even if only as a contingent claim at the Date of Administration, is reduced or extinguished by set-off against a cross-claim which likewise must have then existed. The value received by the creditor is not less because the set-off is put into effect at a later date. A simple example will illustrate the point. Assume the creditor is owed $100 by the company. That debt will be converted into sterling at the rate prevailing on the Date of Administration, resulting in a figure of, say, £70. The creditor owes £70 to the company. The two are set-off, with both parties receiving full value for the debts due to them.

45. That the legislative intention is that the discharge by way of set-off should operate as at the Date of Administration is shown by the fact that statutory interest runs only on the balance after the set-off. If the discharge were intended to take effect only at a later date, interest would logically run until that date, as it does in the case of proved debts on which dividends are paid.

46. The submissions of the administrators and Wentworth focus on the substantive effect of insolvency set-off. In *Stein v Blake* [1995] UKHL 11; [1996] 1 AC 243, the House of Lords held that set-off in a bankruptcy had the substantive effect of discharging the mutual debts to the extent of the set-off for all purposes, not just for the purposes of proof in the bankruptcy. In bankruptcy, as in liquidation, there is a single date for the set-off, the ascertainment of debts and any conversion into sterling. I agree that the effect of *Stein v Blake* provides a ground for rejecting York's submissions, but it might produce an unfair result if the set-off was deemed to take place not at the Date of Administration but at the account date.

47. York's further submission that even where the claim and cross-claim were originally denominated in the same currency, and were therefore converted into sterling and set off at the same exchange rate, the creditor could still have a currency conversion

claim arising out of the set-off is so surprising that the instinctive reaction is that it cannot possibly be right. In my judgment that instinctive reaction is correct. It is correct, both because the discharge is treated under the administration regime as having occurred on the Date of Administration and because of the effect of *Stein v Blake*. Even were that not so, I have found it impossible to understand from York's submissions how a currency conversion claim could arise.

Supplemental Issue 3

48. This issue asks:

> *"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."*

49. In my judgment in *Waterfall IIA*, I said at [169] that, if under the contract with the company the creditor was entitled to interest on its foreign currency claim, the creditor was entitled to include such interest as part of its non-provable claim.

50. Wentworth submits that such claim for interest should be reduced by statutory interest received by the creditor on its proved debt, if and to the extent that the total interest, both statutory on the proved debt and contractual on the non-provable claim, exceeds the contractual interest that the creditor would have been entitled to receive on its total foreign currency debt. The administrators and the SCG submit that it should not be so reduced, and York takes no position on this issue.

51. Wentworth submits that, although the currency conversion claim is spoken of as a distinct claim to the creditor's proved claim, there is in fact only one debt owed to the creditor and, therefore, any interest for the period after the Date of Administration, whether statutory or contractual, is payable in respect of the same debt. Since statutory interest and contractual interest are payable in respect of the same debt and for the same period, it would be unjust if the creditor were to receive more interest than it would have been entitled to receive under its contract.

52. I do not accept this submission. As I held in *Waterfall IIA*, Rule 2.88 is a complete code for the payment of interest on proved debts. Its purpose is to compensate creditors for the delay occasioned by the insolvency in the payment of the proved debts which are all notionally payable as at the commencement of the insolvency. It is unconnected with any right to interest under the contract or to the lack of any such contractual right, save for the purpose of determining the rate at which statutory interest is to be paid.

53. The essential point is that statutory interest is payable by law on the proved debt and is referable only to the proved debt. It follows that no interest has been paid on that part of the foreign currency debt that has not been discharged as a result of the depreciation of sterling between the Date of Administration and the payment of dividends. It therefore further follows that the creditor is entitled to the full amount of contractual interest on that part of the debt. It is a claim for a debt, not a claim for compensatory damages. I specifically reject Wentworth's submission in reply that the currency conversion claim represents that portion of the proved debt that is not

satisfied by the payment of dividends. The proved debt is the sterling sum and it has been satisfied in full by the dividends.

54. If the contract is governed by a foreign law, this issue may be governed by that law. The question is whether, in determining the amount of contractual interest payable on the remaining contractual debt, credit must be given for any part of the statutory interest. That would seem to be a question for the proper law of the contract, although no doubt having regard to the nature of statutory interest in English law. However, no party has suggested that New York law or any other applicable law would produce a different answer and, since foreign law is presumed to be the same as English law in the absence of any evidence to the contrary, my answer to this issue is not restricted to contracts governed by English law.

Supplemental Issue 4

55. Supplemental Issues 4 and 5 arise out of my judgment in *Waterfall IIB*, concerning the effect on various categories of claims by creditors of the standard form agreements made by LBIE, acting by the administrators, with a substantial number of creditors. Those agreements were the CRA, the Agreed Claims CDDs and the Admitted Claims CDDs (all as defined in the judgment). I do not propose to summarise the provisions, purposes and context of those agreements, and reference should be made to the judgment.

56. Supplemental Issue 4 is:

> *"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)."*

57. The background to this issue is briefly explained in my judgment in *Waterfall IIB* at [116]:

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

58. As can be seen, the claim related to interest on debts admitted to proof by virtue of the CRA and the other agreements. It was submitted by the SCG that they had non-provable claims for interest on such debts to the extent that they did not under Rule

2.88 recover the full amount of interest on such amount that they could have recovered outside an administration. In *Waterfall IIA,* I held that Rule 2.88 was a complete code for the payment of interest on proved debts which replaced any contractual or other rights. This supplemental issue asks, if I was wrong in that conclusion, whether the agreements preclude any such non-provable claim for interest.

59. At [116], [147] and [162], I expressed the view that the agreements did preclude any such claim, without making an actual decision to that effect. Some or all of the parties expressed the view, and I agreed, that it would be desirable to make a formal decision on this point. To this end, I have been supplied with the submissions made in *Waterfall IIB* which bear on this issue.

60. Having reviewed those submissions, I am satisfied, and I hold, that the express provisions relating to interest in the agreements have the effect of releasing any such putative claims to interest. As I held in *Waterfall IIB*, the effect and purpose of the agreements was to deal fully and finally with provable claims. This was achieved by agreeing the amount of such claims and (as all parties agree) expressly or implicitly providing for the payment of interest on those claims under Rule 2.88. No further interest on such claims was to be payable, being waived by the terms of the agreements to which I referred in the relevant paragraphs of my judgment mentioned above.

61. The administrators would not, in my judgment, be directed to pay such interest, whether by application of the principle in *Ex parte James* or under paragraph 74 of Schedule B to the Insolvency Act 1986. A clear purpose, as reflected in the terms of the agreements, was to compromise the provable claims of creditors and interest on those claims. There is nothing unfair or improper in giving effect to those terms.

Supplemental Issue 5

62. This concerns possible claims for contractual interest on the non-provable claims for currency conversion losses. No submissions on such claims were made in *Waterfall IIB* and they are not referred to in the judgment. The issue asks:

> *"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)."*

63. I held in *Waterfall IIB* that claims for currency conversion losses were not released by any of the standard form agreements under consideration in that case. The existence of such losses meant that creditors had not received their full rights arising under pre-administration contracts and, in the event of a surplus after the payment of proved debts and statutory interest, they were remitted to their rights under the contracts and could claim for the unpaid part of the debt due to them. It would not be surprising if they were also remitted to their contractual rights to interest on that part of their debts. The issue is whether the right to such interest was nonetheless released by the agreements or any of them.

64. Part 7 of the CRA made provision for the determination of claims under financial contracts. Clause 20.1 provided that the Close-Out Amount in respect of each Financial Contract should be determined in accordance with the relevant methodology of which the "Overriding Valuation Provisions" formed part. Where the relevant methodology was that contained in the contract, those Provisions would prevail in the event of inconsistency. They were set out in clause 20.4 and included

> "20.4.7 **Accrual of interest**: in determining the Close-Out Amount in respect of a Financial Contract, no interest shall accrue on any unpaid Liability of the Company from the Administration Date save to the extent that such interest would accrue under Rule 2.88 of the Insolvency Rules;"

65. If there was only one financial contract, the Close-Out Amount (which in all cases was to be denominated in US dollars) would constitute the "Net Contractual Position". If there was more than one financial contract, the Net Contractual Position would be the aggregate of the Close-Out Amounts. Clause 25.1 provided that if the Net Contractual Position was in the creditor's favour, it "represented an amount due and owing by the Company to that Signatory, which shall constitute an ascertained unsecured claim of that Signatory" in any distribution of assets. It continued:

> *"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. The effect of these provisions is that the entire amount determined as due under a financial contract is calculated on the basis that it will not attract interest save in accordance with Rule 2.88. In my judgment, this leaves no room for contractual interest to be claimed on a currency conversion claim.

67. Under the CDDs, the only relevant provisions relied on by Wentworth for its submission that no contractual interest is payable on currency conversion claims are clause 2.3 of the Admitted Claim CDD and clause 2.1.1 of the Agreed Claim CDD which are in the same terms and are quoted in the *Waterfall IIB* judgment. I have held that those provisions do not release currency conversion claims and, if that is right, it is not a plausible construction to read the general words "including all Claims for interest" as extending to contractual interest on the currency conversion claims. As I have held under Supplemental Issue 4, they are by contrast effective to release contractual interest on claims that are subject to the CDDs.

68. The administrators would not be directed to pay interest on currency conversion claims arising out of claims subject to the CRA, because the evident intention was to release any purely contractual right to interest, leaving creditors only with their rights to statutory interest. However, they would be directed to do so, if the CDDs on their true construction released any claim to contractual interest on currency conversion claims, for the same reasons as I held that they would in such circumstances be directed to pay the currency conversion claims themselves.

Conclusion

69. I will ask the parties to prepare and, so far as possible, to agree the terms of an order to give effect to this judgment.