IN THE COURT OF APPEAL **A2/2015/3753, 3762, 3763 and 3764**

ON APPEAL FROM

No 7942 of 2008

THE HIGH COURT OF JUSTICE

CHANCERY DIVISION (DAVID RICHARDS J)

[2015] EWHC 2269 (Ch); [2015] EWHC 2270 (Ch)

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

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

B E T W E E N :

(1) BURLINGTON LOAN MANAGEMENT LIMITED

(2) CVI GVF (LUX) MASTER S.À.R.L

(3) HUTCHINSON INVESTORS, LLC

(4) WENTWORTH SONS SUB-DEBT S.À.R.L

(5) YORK GLOBAL FINANCE BDH, LLC

Appellants

- and -

VARIOUS RESPONDENTS

Respondents

SKELETON ARGUMENT OF THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS INTERNATIONAL (EUROPE) (IN ADMINISTRATION)

Introduction and background to the appeals

1. These written submissions are filed on behalf of the joint administrators of Lehman Brothers International (Europe) (in Administration) (the "**Administrators**") ("**LBIE**") pursuant to paragraph 5 of the Court of Appeal's Order dated 4 December 2015, as most recently varied on 18 March 2016, in response to each of the Appellants' appeals, all of which are due to be heard together.

2. The orders being appealed, namely those flowing from *Waterfall Part IIA* [2015] EWHC 2269 (Ch) and *Waterfall Part IIB* [2015] EWHC 2270 (Ch), were made by David Richards J (as he then was) (the "**Judge**") in respect of the first two of the three Parts of the Administrators' Waterfall II application (the "**Waterfall II Application**").

3. The Administrators issued the Waterfall II Application with a view to obtaining the Court's guidance in respect of a variety of issues relating to the proper distribution of the substantial surplus that has arisen in LBIE's administration after all proved debts have been paid or reserved for in full.

4. The issues raised in the Waterfall II Application are, in broad terms, as follows:

    4.1. Issues concerning the entitlement of creditors to interest on their debts for periods after the commencement of LBIE's administration (Part A: see the *Waterfall Part IIA* judgment);

    4.2. The construction and effect of agreements made since the commencement of LBIE's administration between LBIE, acting by the Administrators, and certain of LBIE's creditors (Part B: see the *Waterfall Part IIB* judgment);

    4.3. Issues arising out of the construction and effect of the ISDA Master Agreement and its German law governed equivalent, in particular relating to the rate of interest capable of being claimed under those master agreements (Part C: the trial of Part C of the Waterfall II Application was heard before Hildyard J in November 2015 and, at present, judgment is awaited); and

4.4. Supplemental issues arising in respect of the *Waterfall Part IIA* judgment. One of those supplemental issues has been referred to Hildyard J whilst the remainder have been referred to the Judge. Judgments on the supplemental issues are awaited. If and to the extent that the judgments on the supplemental issues have a bearing on any of the issues or arguments in these appeals, the Administrators will provide the Court with further written submissions in due course.

5. Having sought and obtained the guidance given by the Judge in Parts A and B of the Waterfall II Application, advancing positive arguments where they considered it appropriate to do so, including so as to ensure that all available arguments were made, the Administrators were content to follow the Judge's guidance and did not seek to appeal against any of the declarations made by him. The other parties (i.e. the Respondents to the Waterfall II Application) have, however, brought appeals which, between them, cover almost all of the ground covered by the Judge.

6. The Administrators are among the Respondents to each of the appeals now before this Court. Those four appeals are as follows:

6.1 The appeal brought by the First to Third Appellants (together referred to as the Senior Creditor Group or the "**SCG**") against various Declarations made by David Richards J, which flowed from his decision in the *Waterfall Part IIA* judgment (appeal reference A2/2015/3764) (the "**SCG IIA Appeal**"). The Respondents to the SCG IIA Appeal are the Administrators, the Fourth Appellant ("**Wentworth**") and the Fifth Appellant ("**York**").

6.2 The appeal brought by York against various Declarations made by David Richards J, which flowed from his decision in the *Waterfall Part IIA* judgment (appeal reference A2/2015/3753) (the "**York IIA Appeal**"). The Respondents to the York IIA Appeal are the Administrators, the SCG and Wentworth. The York IIA Appeal is materially identical to the SCG IIA Appeal and, in light of the approach taken by York in its skeleton argument in support of the York IIA Appeal and the observations made by the Judge when York sought permission to appeal, York is expected to play only a limited role before this Court, following, but not duplicating the submissions made by, the SCG.

6.3 The appeal brought by Wentworth against various Declarations made by David Richards J, which flowed from his decision in *Waterfall Part IIA* judgment (appeal reference A2/2015/3763) (the "**Wentworth IIA Appeal**"). The Respondents to the Wentworth IIA Appeal are the Administrators, the SCG and York.

6.4 The appeal brought by Wentworth against various Declarations made by David Richards J, which flowed from his decision in the *Waterfall Part IIB* judgment (appeal reference A2/2015/3762) (the "**Wentworth IIB Appeal**"). The Respondents to the Wentworth IIB Appeal are the Administrators, the SCG and York. York is a Respondent to the Wentworth IIB Appeal in name only. It did not make submissions (either written or oral) below on Waterfall Part IIB.

7. In these written submissions, the Administrators set out their position in response to the following:

7.1 The appeals brought in respect of the decision in the *Waterfall Part IIA* judgment referred to at paragraphs 6.1 to 6.3 above (the "**IIA Appeals**") (Section A); and

7.2 The Wentworth IIB Appeal (Section B).

8. In Part A, at first instance, the Administrators adopted positive positions on many of the issues and neutral positions on others. In Part B, at first instance, the Administrators advanced limited submissions on some of the issues and adopted a neutral position in respect of the others.

9. As regards the various IIA Appeals, the Administrators' position on each appeal is, on certain of the issues, aligned either with the SCG (and York) or with Wentworth. On the other issues in the IIA Appeals, and on the Wentworth IIB Appeal, the Administrators are neutral.

10. Broadly, the Administrators are content that the written submissions filed on behalf of the other parties cover the available arguments and the Administrators therefore do not propose to duplicate the written submissions already made by others.

11. Accordingly, these written submissions seek to identify and summarise the other parties' positions on the issues raised by the appeals (with a view to assisting the Court in navigating the parties' various skeleton arguments) and to state the positions that the Administrators take on each of the issues raised by the appeals. Whilst these written submissions seek to summarise the other parties' positions accurately, they are intended to provide only a brief summary and do not purport to be exhaustive in their description of the arguments advanced by the other parties.

A. The IIA Appeals

(a) Declaration (iii) of the IIA Order

12. The SCG (and York) appeal against the Judge's declaration at paragraph (iii) of the Order made by the Judge on 9 October 2015 giving effect to his decision in the *Waterfall Part IIA* judgment (the "**IIA Order**"). By paragraph (iii) of the IIA Order the Judge declared that:

> "*On the true construction of Rule 2.88(7) of the Rules, Statutory Interest is to be calculated on the basis of allocating dividends first to the reduction of the principal (i.e. the proved debt) and then to the payment of accrued Statutory Interest; and is not to be calculated on the basis of notionally allocating dividends first to the payment of accrued Statutory interest and then in reduction of the principal debt.*"

13. The SCG (and York) appeal against paragraph (iii) of the IIA Order on (*inter alia*) the grounds that the so-called 'rule' in *Bower v Marris* (1841) Cr & P 351, 41 ER 525 is a general equitable principle of justice and convenience, reflecting commercial common sense and business practice, which has applied in corporate insolvency proceedings, in the event of a surplus, at all times between 1869 and the introduction of the Insolvency Act 1986. They also contend (*inter alia*) that Rule 2.88(7) of the Insolvency Rules 1986 (the "**Rules**") should be construed to give effect to the rule in *Bower v Marris*, that Rule

2.88(7) is not incompatible with the rule in *Bower v Marris*, and that there is nothing in the report of the Cork Committee or elsewhere to indicate that Rule 2.88(7) was intended to depart from the rule in *Bower v Marris*.

14. Wentworth opposes the appeal against paragraph (iii) of the IIA Order, agreeing with the Judge's full and detailed reasons for deciding the issue against the SCG (and York) at first instance (see paragraphs [30] to [154] of the *Waterfall Part IIA* judgment), in particular on the basis that the terms of Rule 2.88 preclude the application of the rule in *Bower v Marris* in the context of payments made of dividends and Statutory Interest in an administration.

15. The Administrators' position on this issue is aligned with that of Wentworth. The Administrators agree with the written submissions filed by Wentworth in opposition to this appeal and do not propose to duplicate Wentworth's detailed arguments. Nevertheless, the Administrators emphasise the following short points:

15.1 The issue giving rise to paragraph (iii) of the IIA Order is, as the Judge identified (at paragraphs [30] to [31] of the *Waterfall Part IIA* judgment), a question of statutory construction.

15.2 It is also a question of the true construction of one of the Rules introduced as part of the new code introduced by the 1986 insolvency legislation (see paragraphs [129] to [133] of the *Waterfall Part IIA* judgment)[1].

15.3 The terms of Rule 2.88 preclude the approach contended for by the SCG. Rule 2.88(7) is a clear and unequivocal mandatory direction as to how the surplus is to be applied, which simply means what it says.

a. The Rule proceeds on the basis that the debts proved have been paid. This premise is a reflection of the statutory waterfall (see *In re Nortel GmbH* [2014] AC 209 at para 39 per Lord Neuberger), in which

[1] See also *Smith v Braintree District Council* [1990] 2 AC 215 at 238 per Lord Jauncey ("*I feel justified in construing … the Act of 1986 as a piece of new legislation without regard to 19th century authorities or similar provisions of repealed Bankruptcy Acts*").

liabilities at each level of priority must be paid in full before anything can be paid in respect of the claims at lower levels.

b. It is concerned with the surplus remaining after the payment of the debts proved, i.e. the specific amount of money remaining in the estate after payment of the debts proved. Rule 2.88(7) does not provide any rights in respect of the application of any other sum of money or any other part of the estate. In particular, it does not provide creditors with any rights in respect of the notional re-allocation of the sums already paid in discharge of the debts proved.

c. It proceeds on the basis that interest on the debts proved has not been paid.

d. It directs that the surplus be applied in paying interest on the debts proved. Rule 2.88(7) contains a mandatory direction (the word used is "*shall*") requiring that the surplus be applied in paying interest on the debts proved. The specific amount remaining in the estate after payment in full of the debts proved must therefore be applied for the purpose of paying interest. It cannot be used for any other purpose.

15.4 The meaning of Rule 2.88(7) is therefore plain and unambiguous. This is not a provision of doubtful or ambiguous meaning and there is no justification for examining the minutiae of repealed Bankruptcy Acts or old decisions on repealed provisions which do not exist in the same form in the modern insolvency code.

15.5 The "golden rule" is that legislation should be construed in accordance with the intention of the legislature, as discerned from the words that have been used by the legislature in the statute itself: see *Grey v Pearson* (1857) 6 HLC 61 at 106 per Lord Wensleydale; and *Caledonian Railway v North British Railway* (1881) 6 App Cas 114 at 131 per Lord Blackburn.

15.6 If the statute has a clear meaning, it must be applied. It is not legitimate to stretch the language of a rule beyond the fair and ordinary meaning of its language:

London & North Eastern Ry Co v Berriman [1946] 1 All ER 255 per Lord Macmillan at 260H.

15.7 The SCG's construction of Rule 2.88(7) is inconsistent with the clear and natural meaning of the words used by the draftsman. As the Judge held (at [134] and [135] (see also [137])):

a. "*Rule 2.88(7) is a direction to the administrator as to how any surplus 'remaining after payment of the debts proved' is to be applied. The assumption, for the purposes of the rule, is that the debts proved have been paid. This is the basis on which the rule is to be operated. An application of the principle in* Bower v Marris *produces the result that the proved debts are treated as if they have not been paid, at any rate in full…*"

b. "*The direction given to the administrator is to pay* "*interest on those debts in respect of the periods during which they have been outstanding since the company entered administration." It is common ground that the plural 'periods' is used to cover the case where there is more than one distribution made in respect of proved debts. It is clear that the period in respect of which interest is to be paid commences with the start of the administration and ceases on the date or the respective dates on which the distribution or distributions is or are made. Importantly, interest is not therefore payable in respect of any period after the relevant distribution. An application of the principle in* Bower v Marris *would involve the payment of interest in respect of periods long after the distribution or distributions in question.*"

15.8 The entitlement to interest under Rule 2.88(7) is a purely statutory entitlement, arising once there is a surplus and payable only out of that surplus. The entitlement under Rule 2.88(7) does not involve any remission to contractual or other rights existing apart from the administration. Dividends paid by the administrator cannot be appropriated between the proved debts and interest accruing due under Rule 2.88(7) because at the date of the dividends no interest is payable pursuant to Rule 2.88(7); the right only arises on a surplus existing after payment of the debts proved.

15.9 Moreover, the Insolvency Act 1986 and the Rules did not serve to repeal or abolish (whether expressly or impliedly) the application of the rule in *Bower v*

Marris to the payment of post-liquidation or post-administration interest. Rather, the *Bower v Marris* line of authorities is simply inapplicable to a statutory provision for the payment of post-liquidation or post-administration interest which does not remit creditors to their pre-liquidation or pre-administration rights (save that Rule 2.88(9) provides that Statutory Interest is payable at the rate applicable to the debt apart from the administration where that rate exceeds the Judgments Act rate).

15.10 The Judge's decision on this issue is supported by sound policy reasons, and in particular the policy choice (as reflected in the Cork Report) in favour of creating a simplified and harmonised basis for compensating all creditors for the delay in administration of an insolvent estate (see paragraphs [143], [149] and [152] of the *Waterfall Part IIA* judgment).

(b) Declaration (iv) of the IIA Order

16. The SCG (and York) appeal against the Judge's declaration at paragraph (iv) of the IIA Order. By paragraph (iv) of the IIA Order the Judge declared that:

> "*A creditor entitled to Statutory Interest is not entitled to any further interest or damages or any other form of compensation in respect of the time taken for Statutory Interest to be paid.*"

17. The SCG (and York) appeal against this on (*inter alia*) the grounds that no creditor should be prejudiced by the delay in paying Statutory Interest and that damages for late payment of Statutory Interest should be available to compensate creditors for losses arising from any delay. They also say that there is no policy justification for creditors to suffer prejudice where there is a surplus available in the estate which could be used to pay such compensation.

18. Wentworth opposes the appeal against Declaration (iv) of the IIA Order, agreeing with the Judge's conclusions at paragraphs [166] to [167] of the *Waterfall Part IIA* judgment, in particular on the basis that: (a) there is no right to interest on Statutory Interest in the insolvency legislation; (b) there is no date provided by the insolvency

legislation by which Statutory Interest should be paid; and (c) there is no suggestion that the Administrators have acted in breach of duty in not having paid Statutory Interest to date.

19. The Administrators' position in opposing this appeal is aligned with Wentworth. The Administrators agree with the written submissions filed by Wentworth in opposition to this appeal and do not propose to duplicate those submissions. The Administrators will, at the hearing, be in a position to update the Court as to the payment of debts proved and as to whether they have been able to make any interim distribution of Statutory Interest. As matters stand, all debts proved (in the sense of having been admitted by the Administrators) have been paid in full. There remain some disputed proofs which have been provided for in full but which remain outstanding. The Administrators have not made any distributions from the surplus, whether in paying Statutory Interest or otherwise.

(c) Declaration (v), (xviii) and (xix) of the IIA Order

20. The SCG (and York) appeal against the Judge's declarations at paragraph (v), (xviii) and (xix) of the IIA Order. By those paragraphs, the Judge declared that:

> "*(v) If and to the extent that Statutory Interest paid to a creditor on a proved debt under Rule 2.88(7) is less than the amount of interest to which that creditor would otherwise have been entitled in respect of that debt, the creditor does not have a non-provable claim for the difference.*
>
> *…*
>
> *(xviii) Where a creditor with a claim originally denominated in a foreign currency receives Statutory Interest on a Sterling admitted claim at the Judgments Act Rate and such Statutory Interest is less than the amount of interest at the Judgments Act Rate which the creditor would have received on his claim in the original foreign currency, the creditor has no non-provable claim in respect of the difference (without prejudice to any non-provable claim to interest that such creditor may have pursuant to paragraph (vi)).*
>
> *(xix) Where a creditor with a claim originally denominated in a foreign currency receives Statutory Interest on a Sterling admitted claim at the 'rate applicable to the debt apart from the administration' and such Statutory Interest is less than the amount of contractual interest which the creditor would have received on his claim in the original foreign currency, the creditor has no non-provable claim for the difference (without prejudice to any non-*

provable claim to interest that such creditor may have pursuant to paragraph (vi))."

21. The SCG (and York) appeal against these paragraphs on (*inter alia*) the grounds that: (a) creditors' rights should be satisfied in full from any surplus before the balance is returned to shareholders; (b) there is nothing in Rule 2.88 to extinguish any underlying right or entitlement to interest which is not fully satisfied by the payment of Statutory Interest under Rule 2.88(7); and (c) consequently, if Statutory Interest paid is less than the amount of interest a creditor would otherwise have been entitled to in respect of that debt, the creditor has a non-provable claim for the difference. (It had, in fact, been common ground at first instance that if the Statutory Interest paid to a creditor was less than the amount of interest the creditor would have been entitled to in respect of its debt apart from the administration, the creditor would have a non-provable claim for the difference. Paragraph (xix) of the IIA Order reflects the Judge's reasoning that Rule 2.88 is a complete code for post-administration interest which replaces all pre-administration rights to interest and therefore his rejection of the position agreed by the parties before the hearing of Waterfall Part IIA. The Administrators and Wentworth consider that the declaration made paragraph (xix) of the IIA Order was correctly made. The SCG and York seek to appeal against paragraph (xix) of the IIA Order.)

22. Wentworth opposes these appeals against these declarations, contending that the Judge was right to make them for the reasons he gave (see paragraphs [160] to [164] of the *Waterfall Part IIA* judgment), and for certain other additional reasons, including that the rights conferred by Rule 2.88 cut across the contractual rights of certain creditors and that Rule 2.88 imposes obligations on the company in administration that are substantially different from its obligations apart from the administration.

23. The Administrators' position in opposing these appeals is aligned with Wentworth. The Administrators agree with the written submissions filed by Wentworth in opposition to these appeals and do not propose to duplicate those submissions.

(d) Declaration (vi) of the IIA Order

24. Wentworth appeals against the Judge's declaration at paragraph (vi) of the IIA Order. By paragraph (vi) of the IIA Order the Judge declared that:

> "*If and to the extent that a creditor has a non-provable claim (including but not limited to a currency conversion claim* [as defined]*) 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.*"

25. Wentworth appeals against this on (*inter alia*) the grounds that (a) Rule 2.88 is a complete code for post-administration interest which replaces all pre-administration rights to interest; (b) the Judge failed to take account of the fact that a currency conversion claim is not a separate claim independent from the process of proof, but is merely part of the creditor's underlying contractual claim submitted to proof which remains unpaid; and (c) it is unprincipled that a foreign currency creditor should be able to enforce a contractual right to interest whereas a Sterling creditor may not. Alternatively, Wentworth contends that, if a claim to interest on a Currency Conversion Claim exists, the Judge erred in concluding that interest runs from the Date of Administration and that he should have found that the interest runs from the date of the payment of the final dividend in respect of the proved debt.

26. The SCG oppose the appeal against paragraph (vi) of the IIA Order, contending that the Judge reached the correct conclusion for the reasons that he gave (see paragraphs [168] to [169] of the *Waterfall Part IIA* judgment). The SCG also contend, in any event (and consistently with the SCG's position on its appeal against declarations (iii) and (iv) of the IIA Order), that, on the basis that creditors are entitled to have their underlying claims in respect of principal and interest satisfied in full before any distributions are made to shareholders, paragraph (vi) of the IIA Order was correct for this additional reason also.

27. The Administrators take a neutral position on this issue, save in one respect, which is to disagree with Wentworth's argument in the alternative.

28. In the Administrators' submission, Wentworth's argument in the alternative proceeds on the basis of a false premise. The Judge did not hold that the non-provable claim for interest "*runs from the Date of Administration*" (as Wentworth contends). Rather, he held that the non-provable claim to interest runs during any period in which interest was payable contractually apart from the administration. The Judge's conclusion on this point is clear from paragraph [169] of the *Waterfall Part IIA* judgment, in which the Judge held in relation to Rule 2.88: "*Neither explicitly nor implicitly does it interfere with a creditor's contractual right to interest on a non-provable debt*".

29. The issue as to the precise terms of the Judge's conclusion on this point arose during the drafting of the IIA Order, when there was a disagreement as to the wording of declaration (vi). The Administrators, the SCG and York took the view that declaration (vi) should refer to a non-provable claim for "*such interest (if any) as may have accrued on that non-provable claim in that period*" (i.e. for interest accruing during any period in which interest was payable contractually apart from the administration), whereas Wentworth contended that it should refer to a non-provable claim for interest accruing from the date of the final dividend in respect of the proved debt. At a hearing on 9 October 2015, the Judge confirmed that, in his view, the non-provable claim for interest would run during any period in which interest was payable contractually apart from the administration. After hearing oral submissions on this point, the Judge held:

> "*As far as the period during which interest should be payable on non-provable claims is concerned, this interest will be payable if at all only if it arises outside or other than from the administration, so if taking the example of the foreign currency claim it is only if there is an independent right to interest, typically under the contract itself, that any interest will be paid. The basis of the claim for the payment of currency conversion claims as non-provable debts is, as explained in paragraph 169 of my judgment, a remission to the contractual rights of the creditor. The creditor has not been paid its full contractual entitlement, the contract provides ex hypothesi for the payment of interest on its entire debt. It has not received its entire debt. It is therefore entitled as a matter of contract in my judgment to interest on that part of the debt which has not been paid as a result of currency conversion losses. Accordingly, I consider that the declaration should be in the form proposed by the Joint Administrators and supported by the Senior Creditor Group and by York*" (transcript, pages 18-19).

30. It follows from the Judge's reasoning that Wentworth is wrong to say that the interest runs from the date of the payment of the final dividend in respect of the proved debt. On the issue as to the commencement date for non-provable interest on non-provable claims, the Administrators submit that the Judge was right for the reasons that he gave.

(e) Declaration (viii) of the IIA Order

31. The SCG (and York) appeal against the Judge's declaration at paragraph (viii) of the IIA Order. By paragraph (viii) of the IIA Order the Judge declared that:

> "*Where Statutory Interest is payable at a 'rate applicable to the debt apart from the administration' and such rate is a compounding rate, accrued Statutory Interest does not continue to compound following the payment in full of the principal amount through dividends.*"

32. The SCG (and York) appeal against this on (*inter alia*) the grounds that: (a) it is fundamental to the nature of compound interest that interest accrues on the entirety of the amount owed from time to time and that interest, once accrued, it treated as part of the interest-bearing principal; (b) the word "*rate*" in Rule 2.88(9) extends to all aspects of the methodology for calculating interest including compounding; and (c) the language of Rule 2.88(7) does not require the interpretation that the Judge imposed upon it.

33. Wentworth opposes the appeal against paragraph (viii) of the IIA Order, contending that the Judge was correct to reach the conclusion he did for the reasons he gave (see paragraph [266] of the *Waterfall Part IIA* judgment), in particular given that the interpretation of Rule 2.88(7) contended for by the SCG conflicts with the requirement in Rule 2.88(7) that Statutory Interest be paid for the periods the proved debt is "*outstanding*".

34. The Administrators take a neutral position on this issue.

(f) Declaration (x) of the IIA Order

35. The SCG (and York) appeal against the Judge's declaration at paragraph (x) of the IIA Order. By paragraph (x) of the IIA Order the Judge declared that:

> "*The words 'the rate applicable to the debt apart from the administration' in Rule 2.88(9) of the Rules include a foreign judgment rate of interest applicable to a foreign judgment obtained prior to the Date of Administration but do not include:*
> *a. a foreign judgment rate of interest applicable to a foreign judgment obtained after the Date of Administration; or*
> *b. a foreign judgment rate of interest which would have become applicable to the debt if the creditor had obtained a foreign judgment (when it did not in fact do so).*"

36. The SCG (and York) appeal against this on (*inter alia*) the grounds that: (a) whenever a creditor obtains a foreign judgment and a right to interest payable at the foreign judgment rate, that rate becomes "*the rate applicable to the debt apart from the administration*" (being the counter-factual situation that rule 2.88(9) requires to be identified) and Rule 2.88(9) captures such a rate; alternatively (b) if the rate applicable to the debt apart from the administration is to be determined by reference to the existing rights of the creditor as at the commencement of the administration, it is sufficient if such a right is a contingent right in the sense described in *Re Nortel GmbH* [2014] AC 209.

37. Wentworth opposes the appeal against paragraph (x) of the IIA Order, contending that the Judge was right to reach the conclusion he did for the reasons he did (see paragraphs [179] to [181] of the *Waterfall Part IIA* judgment); and that the SCG's alternative contention, that a rate of interest under a foreign judgment was a contingent right as at the date of the commencement of the administration, should be rejected on the basis that it confuses (a) the identification of the rate applicable to the debt and (b) the identification of the proved debt itself.

38. The Administrators take a neutral position on this issue.

(g) Declaration (xiv) of the IIA Order

39. Wentworth appeals against the Judge's declaration at paragraph (xiv) of the IIA Order. By paragraph (xiv) of the IIA Order the Judge declared that:

> "*Statutory Interest is payable in respect of an admitted provable debt which was a contingent debt as at the Date of Administration from the Date of Administration.*"

40. Wentworth appeals against this on (*inter alia*) the grounds that: (a) in the case of a contingent debt the debt admitted to proof is not "*outstanding*" for the purposes of Rule 2.88(7) unless and until the contingency occurs; and (b) in light of the processes for the estimation and valuation of contingent claims, the Judge's conclusion gives rise to perverse consequences.

41. The SCG oppose the appeal against paragraph (xiv) of the IIA Order, contending that the Judge reached the right conclusion for the reasons he gave (see in particular paragraphs [166] to [167] of the *Waterfall Part IIA* judgment), and arguing (*inter alia*) that Wentworth's position (a) results in creditors with contingent claims not being treated *pari passu* with other creditors; and (b) cuts across the principle that "members come last". The SCG also contend that there is a discrepancy between Wentworth's approach to contingent debts and future debts which shows Wentworth's position to be illogical.

42. York opposes the appeal and has advanced its own written submissions on this issue, contending (*inter alia*) that Wentworth confuses the underlying claim against the company with the debt for which the creditor is entitled to prove under the statutory scheme, and that the proved debt is a liquidated amount which is ascertained by reference to the position as at the date of the commencement of the insolvency proceedings.

43. The Administrators' position before the Judge was aligned with that adopted by Wentworth. The Administrators contended that a contingent debt is not "*outstanding*" for the purpose of Rule 2.88(7) unless and until the date when it would have fallen due

for payment – or, in the case of such a debt which apart from the administration would have borne interest at a rate greater than the Judgments Act Rate, the date on which interest would have begun to accrue on it – if the company had not entered administration. The Administrators have not, however, appealed against paragraph (xiv) of the IIA Order and take a neutral stance on Wentworth's appeal against it.

44. The Administrators nevertheless wish to point out that, before the Judge, this issue was considered together with the question whether Statutory Interest is payable in respect of an admitted provable debt which was a *future* debt as at the Date of Administration from the Date of Administration or from the date that the liability accrued due (this was dealt with by the declaration made in paragraph (xv) of the IIA Order). In summary:

44.1 Issue 7 related to the interest start date for contingent debts, whilst Issue 8 related to the interest start date for future debts. There is an obvious similarity in that, in both cases, the underlying claim is not due and payable at the commencement of the administration.

44.2 The Administrators argued before the Judge for a consistent approach to both contingent debts and future debts, submitting that interest is payable under Rule 2.88(7) on contingent debts and future debts only from the date on which the creditor has a complete cause of action to sue for the debt, i.e. on the date on which a future debt by its terms becomes payable or on the date, if ever, on which a contingent debt becomes payable. The Administrators submitted that such debts are "*outstanding*" within the meaning of Rule 2.88(7) only once they would become payable if there were no administration. Before the Judge, Wentworth agreed with the Administrators' submission as regards contingent debts, but submitted that, in the case of future debts, interest is payable under Rule 2.88(7) from the commencement of the administration. The SCG and York submitted that, in the case of both future and contingent debts, interest under the sub-rule is payable from the commencement of the administration.

44.3 The Judge held that both contingent debts and future debts are "*debts*" for the purposes of proof and distribution (see paragraph [192] of the *Waterfall Part IIA* judgment) and that Rule 2.88(7) is referring to the debts as admitted to proof,

rather than to the underlying claims giving rise to the admitted proofs (see paragraph [204] to [225] of the *Waterfall Part IIA* judgment), concluding at paragraph [225] that, in the case of both contingent debts and future debts, interest is payable under Rule 2.88(7) from the date that the company entered administration, not from the date (if any) on which any such debt fell due for payment in accordance with its terms.

44.4 The Judge's thorough analysis highlights repeatedly the obvious conceptual similarity between contingent debts and future debts, and much of the Judge's reasoning is applicable to both of these concepts. The central reasoning behind the Judge's conclusion on both contingent debts and future debts was that "[the] *distribution in the administration is being made to creditors* pari passu *in discharge of their proved debts, not their underlying claims*" (see paragraph [206] of the *Waterfall Part IIA* judgment) and that the purpose of Rule 2.88(7) is to provide compensation for the delay in the payment of the proved debts, not to provide compensation for the non-payment of the creditors' underlying claims (see paragraph [207] of the *Waterfall Part IIA* judgment).

44.5 Although Wentworth appeals against the Judge's decision in respect of contingent debts, no party is appealing against the Judge's decision in respect of future debts. However, a successful appeal by Wentworth on the contingent debt issue might, depending on the Court's reasoning, call into question the Judge's decision on the future debt issue, notwithstanding that it is not formally before the Court, and the Administrators therefore wish to ensure that the Court is alive to this possibility.

(h) Declaration (xvii) of the IIA Order

45. Wentworth appeals against the Judge's declaration at paragraph (xvii) of the IIA Order. By paragraph (xvii) of the IIA Order the Judge declared that:

> "*The calculation of a non-provable claim (excluding any non-provable claims to interest (as to which no declaration is made) but including, although not limited to, a Currency Conversion Claim* [as defined]*) should not take into account (nor, therefore, be reduced by) the Statutory Interest paid to a relevant creditor.*"

46. Wentworth appeals against this on the grounds that the correct approach is to assess the shortfall (if any) between: (a) the creditor's contractual right to payment of principal; and (b) the foreign currency equivalent of all payments received from the statutory scheme referable to the proved debt. Wentworth contends (*inter alia*) that a creditor obtains a package of benefits and burdens under the statutory insolvency scheme and that a currency conversion claim will arise only where a shortfall exists after the application of those benefits and burdens. If the benefits and burdens under the statutory scheme produce a sum in excess of the creditor's contractual entitlement, the creditor cannot be said to have suffered a shortfall. Wentworth also says that the principle of fairness requires a foreign currency *surplus* in one part of the statutory scheme to be set off against any foreign currency *shortfall* in another part of the statutory scheme.

47. The SCG oppose the appeal against paragraph (xvii) of the IIA Order, contending that the Judge reached the right conclusion, but for reasons which are different from those that the Judge himself gave (see paragraphs [226] to [231] of the *Waterfall Part IIA* judgment). In particular, the Judge rejected Wentworth's position at first instance on two alternative bases, namely: (a) Rule 2.88 contains a complete code for post-administration interest; and (b) even if that is incorrect, a creditor does not have a single composite claim comprising principal and interest. By contrast, the SCG argues that the Judge's reason (b) was correct, and only adopts the Judge's reason (a) if and to the extent that the Court of Appeal rejects the SCG's contention that Rule 2.88 does not constitute a complete code for post-administration interest. The SCG contend (*inter alia*) that there is no reason why a creditor, who is entitled under Rule 2.88(7) to compensation for any delay in the payment of his proved debt, should have to give credit for that sum when claiming any unpaid principal amount remaining due on his contractual claim. The SCG say that these rights are separate and that the creditor is accordingly entitled to both.

48. The Administrators' position in opposing this appeal is aligned with the SCG, save that the Administrators' position, consistent with the Judge's own reasoning, is as follows:

48.1 The Judge's reason (a) is correct and provides a complete answer to Wentworth's appeal;

48.2 Alternatively, if reason (a) is incorrect, then reason (b) is correct and provides a complete answer to Wentworth's appeal.

49. As to the Judge's reason (b), the Administrators agree with the SCG's submissions on this point. As to the Judge's reason (a):

49.1 The Administrators contend that the Judge was correct, for the reasons he gave at paragraphs [164] and [228] of the *Waterfall Part IIA* judgment, to hold that Rule 2.88 constitutes a complete code for the payment of post-administration interest on proved debts. In particular the Judge was correct to find at paragraph [164] that, if Rule 2.88 was only a partial measure, the effect of the legislation would be to prescribe one regime for the payment of interest as a first charge out of the surplus remaining after the payment of proved debts in full, leaving without any explicit recognition the possibility of the payment of further post-insolvency interest as a non-provable debt out of the surplus remaining after the satisfaction of creditors' rights to statutory interest. There is no sensible policy justification for such an effect.

49.2 Further, the Administrators contend that the Judge was correct to find that, if (as the Judge accepted) the Administrators and Wentworth are correct that Rule 2.88 constitutes a complete code for the payment of post-administration interest on proved debts (see paragraphs 20 to 23 above), then Wentworth's submissions on the issue giving rise to paragraph (xvii) of the IIA Order must be rejected.

B. The Wentworth IIB Appeal

(a) Declaration (i) of the IIB Order

50. Wentworth appeals against the Judge's declaration at paragraph (i) of the Order made by the Judge on 9 October 2015 giving effect to his decision in the *Waterfall Part IIB* judgment (the "**IIB Order**"). By paragraph (i) of the IIB Order the Judge declared that:

> "*Neither the Claims Resolution Agreement (the "**CRA**") entered into between LBIE and certain of its creditors nor any of the Claims Determination Deeds (the "**CDDs**") entered into between LBIE and its creditors has, as a matter of construction, the effect of releasing any Currency Conversion Claims (as defined in the Part A Order).*"

51. Wentworth appeals against paragraph (i) of the IIB Order on the grounds that: (a) the Judge failed to give proper effect to the plain and unambiguous effect of the wording of the CDDs; and (b) the Judge adopted too restrictive an approach to the analysis of the purpose and context of the CDDs in a number of respects.

52. The SCG opposes the appeal against paragraph (i) of the IIB Order, contending that the Judge reached the correct conclusions for the reasons he gave (see paragraphs [117] to [135] and [148] to [170] of the *Waterfall Part IIB* judgment). The SCG also argue that (a) Wentworth's position in relation to Agreed Claim CDDs is illogical and contrary to commercial common sense; and (b) Wentworth's contention that a CDD is conceptually no different from an ordinary bilateral contract is wrong, given the purpose of the Administrators in entering into the CDDs.

53. The Administrators take a neutral position on this appeal but intend to be represented at the hearing of the appeal to assist the Court, if called upon to do so, in circumstances in which they devised the CRA and the CDDs and caused LBIE to enter into them.

(b) Declaration (iv) of the IIB Order

54. Wentworth appeals against the Judge's declaration at paragraph (iv) of the IIB Order. By paragraph (iv) of the IIB Order the Judge declared that:

"*If (contrary to declaration (i) above) the CRA or any of the CDDs had, as a matter of construction, the effect of releasing any Currency Conversion Claims, the Administrators would be directed by the Court, under the principle in ex parte James (1874) LR 9 Ch App 609 and under paragraph 74 of schedule B1 to the Insolvency Act 1986, not to enforce such releases.*"

55. Wentworth appeals against this, in particular on the grounds that: (a) the Judge applied the jurisdiction under *ex parte James* too broadly by using "*unfairness*" as a sufficient ground; and (b) the Judge erred in applying the principle to the enforcement of the releases of Currency Conversion Claims, in particular in circumstances where there is no suggestion of misrepresentation, fraud, mistake or duress and given that the achievement of certainty and finality falls within the scope of the proper functions of an administrator.

56. The SCG opposes the appeal against paragraph (iv) of the IIB Order, contending that the Judge reached the right conclusion for the reasons he gave (see paragraphs [171] to [189] of the *Waterfall Part IIB* judgment), and contending (*inter alia*) that: (a) the Court of Appeal should only interfere with the conclusion of the Judge below if clearly satisfied that his view was wrong; and (b) the Judge, who has substantial experience in insolvency matters, was correct and justified for various reasons in concluding that it would be grossly unfair for releases to be enforced.

57. The Administrators take a neutral position on this issue (as they did before the Judge) but again intend to be represented at the hearing of the appeal to assist the Court, if called upon to do so, in circumstances in which it is their possible conduct (in enforcing the terms of the CRA and CDDs) which is in issue.

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