

IN THE COURT OF APPEAL
ON APPEAL FROM

A2/2015/3763

No 7942 of 2008

THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

Before: Mr Justice David Richards

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

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

(1) WENTWORTH SONS SUB-DEBT S.À R.L.

Appellant

- AND -

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

(as the joint administrators of the above named company)

- (6) BURLINGTON LOAN MANAGEMENT LIMITED**
- (7) CVI GVF (LUX) MASTER S.À R.L**
- (8) HUTCHINSON INVESTORS LLC**
- (9) YORK GLOBAL FINANCE BDH, LLC**

Respondents

SKELETON ARGUMENT

ON BEHALF OF WENTWORTH, THE APPELLANT

ATTENDED
1 FEB 2018
CIVIL APPEALS OFFICE

Introduction

1. On 31 July 2015, David Richards J handed down his judgment in *Waterfall Part IIA* [2015] EWHC Ch 2269 (Ch). The *Waterfall Part IIA Judgment* considers a series of issues arising in relation to the entitlement of creditors to interest on their debts for periods of time after the commencement of the administration of Lehman Brothers International (Europe) (“LBIE”) on 15 September 2008 (“Date of Administration”). The background to the issues arising for determination is summarised in *Waterfall Part IIA Judgment*, at [1]-[15].
2. On 9 October 2015, David Richards J made nineteen Declarations which flowed from the conclusions reached in the *Waterfall Part IIA Judgment*. For the most part Wentworth’s arguments were accepted by the Judge.
3. Wentworth however appeals (with the permission of the Judge) against three of the Declarations as follows:
 - (1) Declaration (vi) which concerns the payment of interest on a non-provable claim. The Judge declared that where a creditor has a non-provable claim (including but not limited to a currency conversion claim¹) 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, 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. Wentworth contends that the Judge erred in law and that the Judge should have concluded that the creditor does not have a non-provable claim in respect of interest.
 - (2) Declaration (xiv) which concerns the date from which statutory interest is payable in respect of an admitted provable debt which was contingent as at the

¹ The Order provides that a currency conversion claim means a claim for an unpaid portion of a debt that arises if: (a) a creditor had a claim enforceable against the company denominated in a foreign currency; and (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 dividends paid to the creditor are, when converted into the foreign currency at the respective dates of payment in aggregate lower than the claim denominated in the foreign currency.

Date of Administration. The Judge declared that statutory interest is payable from the Date of Administration. Wentworth contends that the Judge erred in law and that the Judge should have concluded that statutory interest is payable from the date on which the contingency occurs.

- (3) Declaration (xvii) which concerns whether the calculation of a currency conversion claim should take into account the statutory interest paid to a creditor. The Judge declared that the statutory interest paid to a creditor should not be taken into account when calculating a currency conversion claim. Wentworth contends that the Judge erred in law and that the Judge should have concluded that the correct approach is to assess the difference between (1) the value of the creditor's original foreign currency entitlement outside of the statutory scheme for insolvency; and (2) the foreign currency equivalent of the sum of all payments received from the statutory scheme.

4. The three Declarations are addressed in turn in the following paragraphs.

Declaration (vi)

5. Declaration (vi) is in the following terms:

“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, 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.”

6. It is convenient first to consider currency conversion claims and then to consider other non-provable claims.

- (1) *currency conversion claims*

7. The context within which this issue arises is as follows:

- (1) The Judge held in the *Waterfall Part I Judgment* [2015] Ch 1, as affirmed by the Court of Appeal [2015] 3 WLR 1205 (Moore-Bick and Briggs LJJ with Lewison LJ dissenting), that a creditor who had a contractual entitlement to be paid in a foreign currency is entitled to claim, against a surplus arising after payment in full of all proved debts and statutory interest under Rule 2.88(7), any shortfall between (1) its contractual entitlement to be paid in the foreign currency and (2) the foreign currency equivalent of all dividends paid, converted as at the date of each payment. This claim is referred to in the judgments as a currency conversion claim. An appeal against the existence of a currency conversion claim is currently pending before the Supreme Court.
 - (2) The Judge concluded that the statutory regime for payment of statutory interest on proved debts, which is found in Rule 2.88, constitutes a complete code for the payment of interest after the Date of Administration and that, accordingly, no creditor has any right to claim (from a surplus arising after payment of statutory interest pursuant to Rule 2.88 on proved debts) any further amount by way of interest in respect of its proved debts whether pursuant to a pre-existing contractual right to interest or otherwise: *Waterfall Part IIA Judgment*, at [164]-[167] and [228]. Wentworth contends the Judge was right so to conclude. The SCG (which comprises the Sixth to Eighth Respondents) is currently appealing that conclusion.
 - (3) The Judge also concluded, however, that a currency conversion claim was a species of non-provable claim, that Rule 2.88 applies to provable claims, not non-provable claims, that there is otherwise no provision in the legislation for payment of interest on non-provable claims, and accordingly a creditor with a pre-existing contractual right to interest is entitled to assert a claim for such contractual interest on its non-provable currency conversion claim from the Date of Administration until the currency conversion claim is paid in full: *Waterfall Part IIA Judgment*, at [168]-[169].
8. Wentworth contends that that conclusion of the Judge was wrong, in essence because the Judge failed to take into account the fact that a currency conversion claim is not a separate claim independent from the process of proof, but is merely such part of the

creditor's underlying contractual claim submitted to proof which remains unpaid (in the foreign currency) following payment in full of dividends (in sterling) in respect of that claim: see *Waterfall Part I Judgment CA*, at [100] per Lewison LJ "*There is only one contractual obligation; and the liability created by that obligation is provable in accordance with the Rules*". Thus, taking the example of a creditor with a contractual right to be paid \$100:

- (1) A creditor has a single, indivisible, claim – the right to be paid \$100.
- (2) That claim is a provable debt within Rule 13.12.
- (3) For the purposes of proof it is required (by Rule 2.86) to be converted into sterling.
- (4) Before there is any question of a currency conversion claim being paid (let alone interest on such a claim) the creditor will have received interest under Rule 2.88 on the whole of its proved debt – i.e. on the whole sum of \$100, as converted into sterling at the rate prevailing on the Date of Administration.
- (5) Rule 2.88 constitutes a complete code for the payment of post-administration interest on proved debts. As the Judge correctly held at [228]:

*“Rule 2.88 is a complete code for the payment of post-administration interest and it replaces all prior rights, including contractual rights. The only right of a creditor, **whether its original debt was in sterling or in a foreign currency**, is to receive interest in accordance with Rule 2.88(7)-(9) on its admitted debt, which is necessarily expressed in sterling, from the date of administration.”* (emphasis added)

- (6) It is inconsistent with this conclusion to find that the creditor with a foreign currency debt is entitled to rely on a pre-existing contractual right to interest on such part of that debt (expressed in the foreign currency) that is unsatisfied from payments of sterling dividends. As already noted, the creditor will have received interest under Rule 2.88 on the whole of that debt and if (as the Judge correctly held) the only right of a creditor is to receive interest in accordance with Rule 2.88(7)-(9) on its admitted debt, whether its original claim was in

sterling or a foreign currency, then it follows that it cannot subsequently claim interest pursuant to a pre-existing contractual right on any portion of its debt.

- (7) It is unprincipled that a foreign currency creditor should retain a contractual entitlement to interest sitting outside Rule 2.88 when a sterling creditor does not. Rule 2.86 does not require this conclusion which is contrary to Rule 2.88.
9. Accordingly, Declaration (vi) should be set aside insofar as it relates to currency conversion claims. The Court should find that the creditor does not have a non-provable claim in respect of interest on a currency conversion claim.
10. Alternatively, Wentworth contends that if any such claim to interest on a currency conversion claim exists, the Judge erred in law in concluding that interest ran from the Date of Administration. The Judge should have found that the interest runs from the date of the payment of the final dividend in respect of the proved debt.
11. In considering the date from which interest on a currency conversion claim runs, it is important to keep in mind the Judge's conclusion that the statutory regime for the payment of statutory interest on proved debts constitutes a complete code for the payment of interest after the Date of Administration, as noted above at paragraph 7(2).
12. Until the date of payment of the final dividend in respect of the proved claim (i.e. the foreign currency debt converted into sterling for the purposes of proof pursuant to Rule 2.86), it cannot be known whether a currency conversion claim exists at all. That is because the currency conversion claim comprises the shortfall (if any) between the underlying foreign currency entitlement and the foreign currency equivalent of the sum of all sterling dividends paid, at the time of payment. Prior to the payment of the final dividend there may be potential for a shortfall, but one can never know whether there is, in fact, a shortfall until all sterling payments have been made in respect of dividends.
13. It may well be, for example, that although the exchange rate at the time of payment of an interim dividend of 50% of the proved debt in sterling amounted to 60% of the

proved debt in its original foreign currency, and it was only later currency movements that resulted in an overall shortfall.

14. Conversely, it may be that the payment of an interim dividend of 50% of the proved debt in sterling resulted in a payment of only 30% of the proved debt in its original foreign currency, but that currency movements prior to the final dividend corrected the position.
15. In the second example, there can be no question of the creditor being entitled to interest on the shortfall between the foreign currency equivalent of the 50% dividend and 50% of its foreign currency debt (because there was in fact no currency conversion claim at all following payment of the final dividend).
16. In the first example, to allow a creditor interest on its currency conversion claim from the Date of Administration would result in that creditor being substantially over-compensated, because until the date of the final dividend it had received a sterling sum (and statutory interest on that sterling sum) which was greater, in its original currency, than the proportion of proved debts received by sterling creditors.²
17. In light of these considerations, if there is a right to interest at all on a currency conversion claim, it should run only from the date of the payment of the final dividend in respect of the proved debt.

(2) *Other non-provable claims*

18. Wentworth further contends that insofar as Declaration (vi) relates to interest on other non-provable claims, in circumstances where there is no defined or closed category of non-provable claims, the Judge erred in concluding that there would inevitably be a non-provable claim to interest in respect of all such claims.

² Given the terms of Declaration (xvii), against which Wentworth appeals for the reasons developed in the text below, which holds there is no offset between currency conversion claims and statutory interest, there is a further windfall benefit to a creditor with a currency conversion claim at the expense of others interested in the surplus.

19. No other non-provable claims were identified as existing in the case of LBIE's administration, no argument was directed at such a claim, and it was unnecessary for the declaration to extend beyond that which was in contemplation.
20. For the reasons set out above, Wentworth contends that the declaration ought not to have been made in relation to the one non-provable claim that was in contemplation – the currency conversion claim. Although Wentworth accepts that the declaration would be appropriate in relation to a non-provable claim which is wholly independent from, and does not arise out of, a provable claim, the declaration would be wrong in relation to a non-provable claim which arose out of a provable claim, for reasons similar to those advanced above in relation to the currency conversion claim. It would be a question for determination on a case by case basis whether a particular non-provable claim (not currently in contemplation) fell on one or other side of this line.
21. For these reasons, in circumstances where no other non-provable claim was identified as existing in the context of the LBIE administration, Wentworth contends that the declaration should be limited to the specific claim that was under contemplation.
22. Accordingly, Declaration (vi) should be set aside insofar as it relates to interest on other non-provable claims.

Declaration (xiv)

23. Declaration (xiv) is in the following terms:

“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.”

24. The Judge dealt with this issue, in conjunction with a parallel issue relating to interest on future debts, at [184]-[225] of the *Waterfall Part IIA Judgment*. The question in relation to contingent debts arises in the following circumstances:

- (1) The debts for which creditors are entitled to prove in an administration include contingent debts: see Rule 13.12.
- (2) 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. This is the process of proving a debt: see Rule 2.72.
- (3) The quantification of claims which do not have a certain value is governed by Rule 2.81 which enables the administrator to estimate the value of the debt for the purpose of proof. It provides as follows:

“(1) The administrator shall estimate the value of any debt which, by reason of its being subject to any contingency or for any other reason, does not bear a certain value; and he may revise any estimate previously made, if he thinks fit by reference to any change of circumstances or to information becoming available to him. He shall inform the creditor as to his estimate and any revision of it.

(2) Where the value of a debt is estimated under this Rule, the amount payable in the administration in the case of that debt is that of the estimate for the time being.”³

- (4) Rule 2.88(7) provides that statutory interest is payable on the proved debts “*in respect of the periods during which they have been outstanding since the relevant date*”. The relevant date in the present case is the Date of Administration.
- (5) It is therefore necessary to construe what is meant by the words “*periods during which they have been outstanding*” in Rule 2.88(7) in the context of a debt subject to a contingency which had not occurred as at the Date of Administration.
- (6) Wentworth and the Administrators contended that a contingent debt is not “*outstanding*” for the purpose of Rule 2.88(7) unless and until the contingency occurs.

³ In practice, the Administrators have not admitted any contingent debts on an estimated basis and have instead waited for the relevant contingency to occur before admitting a claim.

- (7) The SCG and York contended that a contingent debt should be viewed as “*outstanding*” for the purpose of Rule 2.88(7) from the Date of Administration.
25. The Judge, in agreement with the SCG and York, concluded that statutory interest is payable on a contingent claim from the Date of Administration until payment of the final dividend in respect of that claim. His reasoning was essentially as follows:⁴
- (1) distribution in administration is made to creditors *pari passu* in discharge of their proved debts, not their underlying claims;
 - (2) creditors are compensated by the payment of statutory interest for the delay in payment of their admitted debts, not their underlying debt; and
 - (3) although in some parts of Rule 2.88 the reference to “*debt*” is to the underlying debt, that is not true of Rule 2.88(7), which provides for the payment of interest on “*those debts*”, being a reference back to “*the debts proved*”.
26. Wentworth contends that the Judge’s conclusion is wrong. In the first place, while it is true that the reference in Rule 2.88(7) to “*those debts*” is to the debts admitted to proof, in the case of a contingent debt, the debt admitted to proof is nevertheless not “*outstanding*” unless and until the contingency occurs. This is unaffected by the fact that “*the amount payable in the administration in the case of that debt*”, being the value estimated for the time being (Rule 2.81(2)), is treated as payable as at the Date of Administration.
27. The conclusion for which Wentworth contends is reinforced by the fact (as the Judge found) that once a contingency has occurred, the actual value of the debt is substituted for the estimated value, without application of any discount for the time value of money to reflect the period between the Date of Administration and the date that it fell due.

⁴ *Waterfall Part IIA Judgment*, at [207]-[208].

- (1) *A contingent debt is not “outstanding” within the meaning of Rule 2.88(7) until it falls due for payment*
28. The purpose of Rule 2.88(7) is to compensate creditors for the delay in payment of their debts caused by the insolvency: see *Waterfall Part I Judgment*, at [86] *per* David Richards J; *Waterfall Part I Judgment CA*, at [59].
29. This is reflective of the purpose of an award of interest generally, namely to provide compensation for the period during which the payee is deprived of its principal sum: see *Novoship (UK) Ltd v Mikhaylyuk* [2015] QB 499 *per* Longmore LJ at [132]-[133]; Blackstone’s Commentaries where interest is described as “*an increase by way of compensation for the use of money*”;⁵ Mann, Legal Aspects of Money which states that “*Interest has been defined as payment by time for the use of money*”.⁶
30. There is no sense in which a contingent creditor has been kept out of its money at any time prior to the occurrence of the contingency. Prior to that date it is not known whether it will ever become entitled to payment at all.
31. To use the language of Jessel MR in *Re Northern Counties of England Fire Insurance Company (Macfarlane’s claim)* (1880) 17 Ch D 337, at 340, although any “*liability*” contingent at the date of bankruptcy which “*ripens into a debt*” during the bankruptcy is provable:
- “There is no debt due at the time of adjudication. No doubt a man with whom a contract has been entered into may, in certain cases, treat a declaration of insolvency or an adjudication in bankruptcy of the other party to the contract as a refusal to perform the contract, and may, at his election, treat it as a breach of contract; but that is by election, and the claimant in this case never made any, so that there would be no debt at all according to this argument. It appears to me that that is unanswerable.”*** (emphasis added)
32. This is reinforced by the rationale for the choice of the Judgments Act Rate as the minimum rate of interest payable under Rule 2.88(7), namely that the commencement of administration or liquidation will or may prevent creditors from taking proceedings

⁵ Blackstone’s Commentaries, Book II, Ch.30, p.455.

⁶ At 3.07.

and obtaining judgment against the company: see *Waterfall Part I Judgment*, where David Richards J stated as follows at [163]:

“The justification for statutory interest, even in those cases where the debts do not already carry a right of interest, is that the creditors are prevented by the liquidation regime from obtaining judgment against the company which would then carry interest at the judgment rate.”

33. There is no sense in which a creditor whose debt is contingent has been prevented by the administration or liquidation from obtaining judgment against the company at any time prior to the occurrence of the contingency.
34. This conclusion is unaffected by the fact that (1) for the purposes of proof an estimated value is placed upon a contingent debt, and (2) such amount is treated for the purpose of a *pari passu* distribution as payable as at the Date of Administration (as the Judge stated at [201] to [203] of the *Waterfall Part IIA Judgment*). Importantly, what is payable from the Date of Administration is not the debt itself (neither the ‘underlying debt’ nor the ‘proved debt’ – the distinction drawn by the Judge, at [206]-[207] of the *Waterfall Part IIA Judgment* between the underlying debt and the proved debt is thus irrelevant). Instead, what is payable as at the Date of Administration is the “*amount provable in the administration in the case of that debt*”, being the estimated value of the debt, pursuant to Rule 2.81(2).
35. In other words, the fact that an amount is provable, and thus treated as payable as at the Date of Administration, in respect of the proved debt does not mean that the proved debt itself is treated as being outstanding as from the Date of Administration.

(2) *The estimation and valuation of contingent debts*

36. The conclusion for which Wentworth contends is reinforced by the manner in which contingent claims are estimated and valued for the purposes of being admitted to proof.
37. As to this, the Judge reached the following key conclusions:

- (1) in estimating the value of a contingent debt, at any time *before* the contingency occurs, at least in some cases the estimation of liability must include an element of discounting: *Waterfall Part IIA Judgment*, at [198];
 - (2) once the contingency occurs, however, so that an ascertained claim becomes payable by the company, the hindsight principle is applied so that the amount of the ascertained claim is substituted for a previous estimate of the contingent debt made by an administrator pursuant to Rule 2.81: *Waterfall Part IIA Judgment*, at [200]; and
 - (3) the value of a matured contingent debt is not discounted back to the commencement of the insolvency process: *Waterfall Part IIA Judgment*, at [216]-[224].
38. In fact discounting will be impossible in relation to some contingent debts: for instance, in cases in which the period for which a debt is to be discounted to a present value is not known.
39. In the case of the LBIE administration, any claim that was contingent as at the Date of Administration has either matured, or has been proved not to exist. Accordingly, the amount payable in respect of every claim, contingent as at the Date of Administration, upon which statutory interest is now payable, has been arrived at without discounting back in respect of the period between the Date of Administration and the date the debt became due. This is important because to allow statutory interest from the Date of Administration would, in all cases, result in significant double-counting: the creditor's debt is not reduced by a discount to reflect the time value of money for the period after the Date of Administration, yet it would receive interest as compensation on the assumption that it had suffered such a reduction.
40. The same point arises in every administration:
 - (1) Wherever statutory interest is payable on a contingent debt where the contingency has occurred, the debt is paid without discount for time value of

money, so there would always be double counting if statutory interest were payable from the Date of Administration.

- (2) Wherever, on the other hand, a contingent debt remains contingent at the time Statutory Interest comes to be paid, to pay interest on such debt would necessarily involve doing so before it was known whether the creditor would ever in fact be entitled to payment.
41. The perverse consequences to which this gives rise (and which would be avoided in the event that statutory interest was payable in respect of contingent debts from the date on which the contingency occurred) are illustrated by the following example:
- (1) A creditor, X, claims under an agreement with LBIE pursuant to which LBIE was obliged to pay X £100 if the FTSE was below 7000 on 1 March 2014 and X was obliged to pay LBIE £100 if the FTSE was above 7000 on 1 March 2014.
 - (2) When LBIE entered into administration on 15 September 2008 there was no way of knowing whether X would, in fact, be the payor or the payee under the terms of the agreement.
 - (3) X would however constitute a contingent creditor under Rule 13.12 and, as such, be entitled to prove in the administration. The quantification of X's claim would be governed by Rule 2.81.
 - (4) The contingency occurred on 1 March 2014 – when the FTSE was below 7000 – shortly before the payment of the final dividend by the Administrators on 23 April 2014.
42. The effect of the Judge's ruling is as follows:
- (1) X's claim is admitted to proof for its full amount of £100 as:

- (a) the hindsight principle leads to the estimate of the contingent debt for the purposes of proof being revised to take into account the occurrence of the contingency: *Waterfall Part IIA Judgment*, at [200]; and
 - (b) the value of a matured contingent debt is not discounted back to the commencement of the insolvency process: *Waterfall Part IIA Judgment*, at [216]-[224].
 - (2) X is entitled to statutory interest at 8% per annum on the claim of £100 for the period from 15 September 2008 to 23 April 2014.
 - (3) Accordingly, X will receive a payment of statutory interest which amounts to more than 60% of its proved debt in circumstances where X has only been deprived of its money for less than two months.
43. It is respectfully suggested that such a perverse result is directly contrary to the purpose of Rule 2.88(7) which is to compensate creditors for the delay in payment of their debts caused by the insolvency.
44. Accordingly, a debt should not be considered “*outstanding*” for the purpose of Rule 2.88(7) – a rule designed to compensate creditors for delay in payment of their debts – until such time as it comes into being as an actual debt, i.e. until the occurrence of the contingency upon which its existence depends.
45. The Judge placed at least some reliance on the fact that the wording of the bankruptcy legislation prior to 1986 was said more clearly to point towards interest on contingent debts being payable “*from the date of the receiving order*”: see *Waterfall Part IIA Judgment*, at [211]. First, the fact that wording of the 1986 Rules is, markedly different is good reason (as the Judge noted) to be cautious about relying on the former wording. Second, the parties were unable to identify any reported case where the question of the date from which interest ran in respect of debts which were contingent at the date of the receiving order was considered by the Court.

Declaration (xvii)

46. Declaration (xvii) is in the following terms:

“Declaration (xvii): 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) should not take into account (nor, therefore, be reduced by) the Statutory Interest paid to a relevant creditor.”

47. The Judge dealt with this issue at [226]-[231] of the *Waterfall Part IIA Judgment*. The Judge concluded (at [228]) that since Rule 2.88 is a complete code for the payment of post-administration interest and replaces all prior rights, including contractual rights, to interest, there is no comparison to be made between the foreign currency equivalent of the statutory interest and the foreign currency interest to which it was entitled under its contract.
48. Further, the Judge concluded (at [229]-[230]) that (1) the creditor has two separate claims – a claim for the debt proved (including accrued interest at the Date of the Administration) and a claim for interest, (2) that a currency conversion claim is a claim for payment of the unpaid portion of the debt proved, and (3) that a subsequent payment of interest in sterling did not discharge the debt proved.
49. Further, and consistent with the Judge’s conclusion that Rule 2.88 constituted a complete code, Declaration (xviii) is to the effect that a creditor with a contractual right to interest has no non-provable claim to the shortfall, if any, between the amount of interest in the foreign currency that it would have been contractually entitled to receive and the foreign currency equivalent of the interest paid on its proved debt pursuant to Rule 2.88.
50. Wentworth contends that both the Judge’s conclusion that Rule 2.88 is a complete code and the conclusion in Declaration (xviii) are correct.
51. Nevertheless, Wentworth contends that the Judge was wrong to conclude that statutory interest is not to be taken into account in calculating a currency conversion claim. In essence, Wentworth’s contention is that a currency conversion claim is

calculated by reference to the shortfall if any between (1) the creditor's contractual right to payment of principal and (2) the foreign currency equivalent of all payments received from the statutory scheme referable to the proved debt.

52. In the *Waterfall Part I Judgment CA*, Briggs LJ (at [137]) described a currency conversion claim as “*the balance of the creditor's original contractual claim which has not been discharged by the process of early conversion, proof and dividend under the relevant part of the insolvency scheme*”. Briggs LJ was not there concerned with, and therefore did not address, the question as to precisely which payments arising from early conversion, proof and dividend will have discharged the original contractual claim. In particular, the Court of Appeal was not concerned with the question whether payments by way of interest under Rule 2.88 will have discharged the underlying contractual claim.
53. Wentworth contends that payments by way of interest under Rule 2.88 will indeed have discharged the underlying contractual claim, and thus must be taken into account when calculating the amount of a currency conversion claim.
54. The insolvency scheme for distribution to creditors, whether in a liquidation or a distributing administration, is part of the collective process of enforcement in respect of all the company's indebtedness. If a creditor participates in that scheme, by submitting a proof of debt, then it obtains a package of both benefits and burdens. That package of benefits and burdens includes, in the case of a creditor whose debt is denominated in a foreign currency, the following:
- (1) The creditor submits to the conversion of its claim into sterling at the rate prevailing on the Date of Administration.
 - (2) The creditor obtains the right to be paid dividends from the assets available for distribution to all creditors, in sterling.
 - (3) A creditor who had no contractual right to interest obtains a statutory right to interest on its sterling denominated proof of debt, at a rate which is fixed by reference to the fact that the debt is payable in sterling.

- (4) A creditor who had a contractual right to interest loses that right, save to the extent that its right to statutory interest on its sterling denominated proof of debt may be measured by reference to a higher pre-existing contractual rate, notwithstanding the fact that such higher rate was referable to the particular foreign currency in which its debt was originally denominated.
55. The fact that the rate at which statutory interest is paid is linked to the currency in which the proved debts are paid is important:
- (1) The justification for statutory interest is that creditors are prevented from obtaining a judgment against the company by reason of the insolvency: see *Waterfall Part I Judgment*, at [163].
- (2) The justification for applying the Judgments Act rate to interest on proved debts is thus because it is the rate that would have applied to a judgment had the creditor obtained one.
- (3) The Judgments Act rate, however, is a rate that is specifically linked to a sterling judgment: see, for example, *Standard Chartered v Ceylon Petroleum* [2011] EWHC 2094, at [15] *per* Hamblen J; and *Novoship (UK) Ltd v Mikhaylyuk* [2015] QB 499, 538-39 at [128]-[131] *per* Longmore LJ.
- (4) The Judgments Act rate would therefore have applied only if the creditor had obtained a judgment in sterling: the rate applicable to a non-sterling judgment is in the discretion of the court and would be reflective of the currency in which the judgment was obtained: see s.44A of the Administration of Justice Act 1970 and *Standard Chartered v Ceylon Petroleum* [2011] EWHC 2094, at [16]-[19]. Moreover, it would be set at a rate to give effect to the compensatory principle of an award of interest.
- (5) Accordingly, the right to obtain interest at the Judgments Act rate (currently 8%) is dependent on, and flows from, the conversion of the creditor's claim into sterling.

56. A currency conversion claim is one which arises, if at all, only after all creditors have received all that is due to them from the estate, by way of both principal and interest. That is because until that point in time to allow a payment of a currency conversion claim would be contrary to the *pari passu* principle which lies at the heart of distribution from an insolvency estate: see *In re Lines Bros Ltd* [1983] Ch 1, per Brightman LJ at 16.
57. Thus, the currency conversion claim can only arise once all creditors have received their full entitlement from the package of benefits and burdens constituted by the insolvency scheme for distribution. If, after that, the foreign currency creditor entitled to a debt of \$100 has in fact received out of the insolvency estate payments (whether by way of dividend or statutory interest) which amount, when converted into dollars at the date of each payment, to \$100 or more, then there ought to be no surviving currency conversion claim.
58. The SCG's objection to this conclusion (accepted by the Judge) was that this would result in foreign currency creditors receiving less by way of statutory interest than an equivalent sterling creditor. That objection is, however, misplaced. It is no part of Wentworth's case that the amount of statutory interest should be reduced for any creditor. Wentworth is concerned only with the extent to which a foreign currency creditor (with, for example a debt of \$100) can be heard to say, after receipt of principal and statutory interest *in full*, that it has still not received \$100. In that regard, its contention is merely that when it comes to calculating the extent to which a creditor has suffered a shortfall by reason of the conversion of its claim into sterling for the purposes of proof, full account must be taken of all payments from the insolvency estate consequent upon that proof.
59. The conclusion for which Wentworth contends avoids the potential for unfairness in any case where currency movements change direction between payment of the final dividend and payment of statutory interest. It is important to recall that a currency conversion claim only operates one way: in the example referred to above, if the currency movement results in the creditor receiving *more* than \$100 from the payment of dividends, then there is no obligation on the creditor to repay that excess to the company. It may be, however, that as a result of currency movements changing

direction after the date of payment of the final dividend, the creditor receives more (in dollars) by way of statutory interest than it would have been entitled to based on the conversion rate as at the Date of Administration. Whilst recognising that there is no free-standing right, in favour of the company, to claw back the foreign currency excess received by the foreign currency creditor, it would be unfair if the foreign currency excess received from one part of the statutory scheme was not offset against the foreign currency shortfall arising from another part of the statutory scheme, given that both parts of the statutory scheme are concerned with distributions in respect of the same creditor and the same underlying claim. This in itself provides a compelling reason to take the broader approach to the calculation of currency conversion claims for which Wentworth contends, so as to take into account the foreign currency equivalent of all benefits received from the statutory scheme by the foreign currency creditor in determining whether there is any shortfall in the foreign currency entitlement of the creditor.

60. Wentworth notes that the SCG is appealing the Judge's conclusion that the statutory regime for payment of statutory interest on proved debts, which is found in Rule 2.88, constitutes a complete code for the payment of interest after the Date of Administration and that, accordingly, no creditor has any right to claim (from a surplus arising after payment of statutory interest pursuant to Rule 2.88 on proved debts) any further amount by way of interest in respect of its proved debts whether pursuant to a pre-existing contractual right to interest or otherwise: *Waterfall Part IIA Judgment*, at [164]-[167] and [228]. Wentworth will be opposing the SCG's appeal against the Judge's conclusion.
61. Wentworth will contend that, if the SCG's appeal is to be successful, then a currency conversion claim is to be calculated as the shortfall, if any, between (1) the aggregate contractual rights of the creditor to receive principal and interest in the relevant foreign currency and (2) the foreign currency equivalent of all distributions from the insolvency estate in respect of the proved debt and statutory interest.
62. If Rule 2.88 does not represent a complete code, it follows that a creditor with a right to an interest bearing debt is entitled to be remitted to its contractual rights in respect of interest in the event of a surplus arising after payment of all statutory interest. The

basis of the currency conversion claim is the same: i.e. a reversion to contractual rights, but this time to its right to payment in the relevant foreign currency. Each is a non-provable claim arising only after payment in full of proved debts and statutory interest.

63. Importantly, the *effect* of conversion of its debt to sterling for the purposes of proof extends to its rights in respect of interest, since (1) statutory interest is itself payable in sterling (whereas its contractual entitlement is to payment of interest in the foreign currency) and (2) it is payable by reference to the proved debt which is in sterling (and not the relevant foreign currency).
64. In these circumstances, it is logical to analyse the non-provable claims in respect of both interest and currency conversion as part of a composite claim to the shortfall, if any, between the creditor's contractual rights and the payments that it receives from the statutory process of distribution from the insolvency estate. Where the creditor is entitled to be paid in a foreign currency, that claim necessarily encapsulates what has been termed the 'currency conversion claim' *and* any shortfall as against its contractual rights to interest.
65. Given the likelihood of exchange rates varying over the period during which dividends and statutory interest are paid, this approach has the distinct merit of ensuring that currency gains, on some of those payments, and currency losses, on other payments, are ironed out. It would be wholly artificial to regard a creditor as having suffered a currency loss if, at the point in time at which such claim could be asserted (i.e. after payment in full of its proved debt and statutory interest) it has received in full its contractual entitlement to be paid principal and interest in the relevant foreign currency.
66. Moreover, having regard to the rationale for allowing a currency conversion claim, such a claim in those circumstances could not be justified. That rationale is that once all debts and interest have been paid, a foreign currency creditor is no longer in competition with other creditors of the insolvent debtor, but only with the contributories. From the contributories perspective, there is no distinction between principal and interest the company is liable to pay, or between contractual interest and

statutory interest. All are “*liabilities*” of the company for which (in the case of an unlimited company) there is a liability to contribute in a liquidation: see *Waterfall Part I Judgment* at [163]-[165]. If, by the time a currency conversion claim might otherwise arise, the whole of the company’s liabilities to the creditor (for which the contributory is liable to contribute) have in fact been satisfied, then the extent to which its right to be paid *in the foreign currency* was satisfied by way of payments of dividends or interest is a matter of no relevance.

Conclusion

67. For the above reasons, the Court is respectfully invited to allow Wentworth’s appeal against Declarations (vi), (xiv) and (xvii).

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