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

COMPANIES COURT

IN THE MATTER OF LEHMAN BROTHERS INTERNATIONAL (EUROPE) (in administration)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

BETWEEN:

(1) ANTHONY VICTOR LOMAS **Applicants**

(2) STEVEN ANTHONY PEARSON

(3) RUSSELL DOWNS

(4) JULIAN GUY PARR

(in their capacity as administrators of the above-named company)

- and -

BARCLAYS CAPITAL INC. **First Respondent**

-and-

WENTWORTH SONS SUB-DEBT S.A.R.L **Second Respondent**

POSITION PAPER OF WENTWORTH SONS SUB-DEBT S.A.R.L.

Introduction

1. This is the Position Paper of the Second Respondent ("Wentworth"). It sets out Wentworth's position on the non-stayed issues[1], including in response to the key points made in the Position Paper of the Joint Administrators ("JA PP"). The detailed arguments in support of Wentworth's position will be set out in its skeleton argument.

2. This position paper deals with the issues in the following way:

   2.1. Client Money Entitlement (Issues 4 and 5) – where, in summary, Wentworth's position is that Barclays does not have a Parallel Unsecured Claim.

   2.2. Reduction of any Parallel Unsecured Claim by Client Money Entitlement (Issues 6 to 8) – where, in summary, Wentworth's position is that if Barclays does have a Parallel Unsecured Claim, it would be reduced by the amount of its Client Money Entitlement. This cannot be circumvented by Barclays purporting to waive its Client Money Entitlement.

   2.3. Set-Off (Issues 3 and 9) – where, in summary, Wentworth's position is that any sums owing by LBI to LBIE must be set off against any claim by Barclays.

   2.4. Effect of the LBI Payment (Issues 10-14, 17-19) – where, in summary, Wentworth's position is that any Parallel Unsecured Claim of Barclays falls to be reduced by the amount of the LBI Payment. Only the balance could be admitted to proof and statutory interest would be payable only on the balance.

3. Defined terms herein are used in accordance with the Application.

[1] Issues 1, 2, 7(5) and 7A were stayed by order of Hildyard J dated 29 November 2016.

Client Money Entitlement – No Parallel Unsecured Claim (Issues 4 and 5)

ISSUE 4

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

ISSUE 5

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

4. In respect of ETD Trades where Barclays had a Client Money Entitlement, it is Wentworth's position that Barclays does not also have a Parallel Unsecured Claim. Barclays has a beneficial interest in the Client Money Trust equal to its Client Money Entitlement and an unsecured claim for any shortfall if and to the extent that its Client Money Entitlement is dissipated.

5. The essential premise of the CASS 7 regime is that the client owns the Client Money which is the subject of the Client Money Trust.

6. That is the effect of the MiFID regime, which is a creature of EU law and refers expressly to protection of a client's ownership interest, as distinct from a situation where "*full ownership … is transferred*".[2]

7. It is this premise which distinguishes a MiFID investment firm from a credit institution. The latter can take deposits, that is to say, a full ownership interest in the money or securities deposited by its clients with the right to use them on its own account (leaving

[2] See e.g. Preamble to MiFID paras 26 and 27, MiFID Art 4(1)(a). CASS 7 is a product of the MiFID regime and must be construed so far as possible to give effect to that regime: see, for example, *Lehman v CRC* [2010] EWCA Civ 917, [59] (per Arden LJ) and [2012] UKSC 6, at [131] (per Lord Dyson).

clients with only a contractual claim) and is as a result subject to a much more extensive regulatory regime.[3]

8. The client is not a creditor in respect of the Client Money Trust – an ownership interest is not the same as a debt. In this regard:

   8.1. One cannot beneficially own property and, at the same time, be a creditor for the value of it. That is conceptually incoherent, and would be apt to permit double recovery.

   8.2. The beneficiary of a trust is not a creditor of his trustee – instead he holds a beneficial interest in the trust property on the terms of the trust.

   8.3. The investment firm qua CASS 7 statutory trustee owes fiduciary obligations to clients in its handling of client money.[4] Such obligations are simply inconsistent with a creditor/debtor relationship premised on the debtor borrowing so as personally to benefit from the borrowed funds.

   8.4. In this respect, as to JAs PP/[16], while it is true as per CASS 7.9.7R a client's Client Money Entitlement is calculated by reference to its "*client equity balance*" as defined, and that is calculated by reference to the contractual rights of the client, the Administrators misunderstand the relevance of the point. The fact that a client's contractual rights may to some extent define or delimit its Client Money Entitlement does not lead to the conclusion that they subsist beneath it so as to give rise to a separate claim in debt.

9. It is entirely unnecessary to recognise two parallel relationships (i.e. a beneficial interest in the Client Money Trust equal to the Client Money Entitlement of a client

[3] The distinction drawn by MiFID Article 13(8).

[4] CASS 7.7.1G; and 7.2.15R and 7.5.1G, etc.

and, at the same time, a Parallel Unsecured Claim equivalent to the value of the ETD Trades). More fundamentally, to do so leads to incoherence:

9.1. The statutory trust is created at the point at which the firm receives the client money and applies to all identifiable client money.[5] Thus there is no point at which the client loses an ownership interest.

9.2. A client is fully and properly protected by the Client Money Trust and by the unsecured "Shortfall" claim which arises if and to the extent its Client Money Entitlement is dissipated[6] - Shortfall Unsecured Claim. There is no need for the law to create or recognise a Parallel Unsecured Claim.

9.3. The superfluous nature of the supposed Parallel Unsecured Claim is demonstrated by JA PP/[126] describing it as "*a secondary claim for the residue of its underlying contractual entitlement*". A Shortfall Unsecured Claim is sufficient to fill any relevant gap and thereby protect the interests of the client.

9.4. It is likewise incorrect to conceptualise the process of a Primary Pooling Event as terminating or expropriating the client's contractual rights, as JAs' PP/[35] would have it.[7] Its right is always as owner, not as creditor.

9.5. The recognition of two parallel relationships would lead to fundamental difficulties and potential inconsistencies with timing and nature of valuation, of a kind explored in the *MF Global Shortfall Judgment* at [58]-[60].[8] Once it is realised that the assumption which the Judge was asked to make in that case (that Parallel Unsecured Claims exist) is unsound, those difficulties go away.

---

[5] *Lehman v CRC* [2012] UKSC 6, at [47], [62] and [144].

[6] See *MF Global Shortfall Judgment*, at [36] and JA PP/[36].

[7] See the majority judgments in *Lehman v CRC* [2012] UKSC 6, especially at [14], [15] and [22] – based on CASS 7.7.2R and s.139(1) FSMA 2000.

[8] *Heis v Attestor Master Fund LP* [2013] EWHC 2556 [2014] 1 WLR 1558.

9.6. The recognition of a Parallel Unsecured Claim likewise would lead to a conceptual difficulty were a client to purport to assign its Client Money Claim to another party. This would result in the ownership right and the unsecured claim being vested in two different persons, each of whom might assert their entitlement separately – the assignee asserting the Client Money Entitlement against the Client Money Pool and the assignor asserting the Parallel Unsecured Claim against the unsecured general estate.[9] That cannot be right.

9.7. The JAs attempt to deal with this very obvious difficulty in their case by suggesting that this would be precluded by the rule against double proof[10]. The difficulty with the JAs' position is that it proves too much – it demonstrates that the Client Money Entitlement and the Parallel Unsecured Claim are not distinct claims at all. The explanation that one is "based on"[11] the other (but they are somehow distinct) is unsustainable.

9.8. A similar difficulty arises where a Shortfall Unsecured Claim exists. JA PP/[36] correctly recognises that a client could not assert its Parallel Unsecured Claim and a Shortfall Unsecured Claim, because this would breach the rule against double proof. But if these are separate rights, why would that be so? The true reason why a client could not assert its Parallel Unsecured Claim and a Shortfall Unsecured Claim is that the Parallel Unsecured Claim does not exist. The client has a beneficial interest in the Client Money Trust equal to its Client Money Entitlement and a Shortfall Unsecured Claim if and to the extent that its Client Money Entitlement is dissipated.

---

[9] It is understood that the JAs have purported to allow such assignments as part of the Laurifer structure adopted in relation to client money claims. It is believed that the JAs have sought to avoid this difficulty in their Laurifer structure by providing for amounts claimed by the assignee, Laurifer, in the Client Money Pool to go back into the general estate. But there is nothing in the logic of their position which limits assignment to this type of structure. Moreover, there is no reason to believe that the Laurifer structure is legally effective. In this regard, it is understood that the Laurifer structure was designed and implemented without any consideration by the Court of the relevant legal issues.

[10] See JA PP/[42]-[43].

[11] JA PP/[43].

10. The approach of the JAs fails to address the legal consequences of a client's ownership interest in the Client Money which is the subject of the Client Money Trust. In particular, JAs PP/[16]-[17] and [24]-[27] simply proceed on the *assumption* that a client has a Parallel Unsecured Claim, which assumption the Court was invited to make in the *MF Global Shortfall Application*. They do not offer any meaningful justification for that argument (and indeed cite that *MF Global Shortfall Judgment* as authority for the very proposition which was assumed in it)[12]. Their approach begs the question.

11. JAs' PP/[35(1)] and [37] wrongly attempt to make into a virtue the very obvious legal difficulties and potential inconsistencies which would arise from two parallel claims (a beneficial interest in the Client Money Trust equal to the Client Money Entitlement of a client and, at the same time, a Parallel Unsecured Claim against the firm's general estate equivalent to the value of the ETD Trades). In particular, the supposed Parallel Unsecured Claim would arise from the very facts that give rise to the Client Money Entitlement, would track the same underlying changes in the values of the parties' rights and obligations as would the Client Money Entitlement, yet in the firm's insolvency, would fall to be vindicated against a different fund, subject to a fundamentally different valuation and enforcement regime, and in competition with the claims of a different set of claimants.

12. In the face of these stark and entirely unnecessary inconsistencies, the JAs contend that the Parallel Unsecured Claim is not redundant because (1) a client can waive its Client Money Claim and (2) there are different bases of valuation, meaning that in certain unusual circumstances a client may get more by pursuing its Parallel Unsecured Claim. But such features, were they to exist, would constitute defects, not virtues, for the following main reasons:

    12.1. There is no suggestion in the legislation that the convoluted result envisaged by the JAs was intended. To the contrary, the more natural inference is that CASS rights were intended to be a complete protective code.

[12] JAs' PP/[35(4)].

12.2. The intention of the CASS Regime to provide a high level of protection to clients is fully satisfied by the granting of a Client Money Entitlement. The statements cited do not evidence an intention to create a "pick-and-choose" system giving a client a right to arbitrage between two regimes. Protection does not entail opportunism.

12.3. The CASS Regime anticipates that there will be a swift distribution of the Client Money pool, in advance of distribution from the general estate (see *MF Global Shortfall Judgment* at [65]-[66]). Thus it would not have been anticipated that any substantial issue would arise in relation to interest.

12.4. The fact that in particular unusual circumstances, the effect of CASS as a mandatory protective regime is that a client which benefits from a full Client Money Entitlement under that regime would not benefit from statutory interest at 8%, does not militate against those conclusions.

13. Accordingly, Barclays does not have a Parallel Unsecured Claim in respect of those trades where it had a Client Money Entitlement. Barclays will only have an unsecured provable claim against the general estate if (and then only to the extent that) its Client Money Entitlement has been dissipated – in which eventuality it would have a Shortfall Unsecured Claim.

Reduction of any Parallel Unsecured Claim by Client Money Entitlement (Issues 6 to 8)

ISSUE 6

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

14. If (contrary to Wentworth's primary position) Barclays has a Parallel Unsecured Claim, that claim is to be valued taking into account the concurrent Client Money Entitlement.

15. The client's Client Money Entitlement is its primary right and the value of any actual or anticipated distribution from the Client Money Pool must be deducted from the valuation under IR 2.81 of any Parallel Unsecured Claim proved in the administration:

15.1. See the *MF Global Shortfall Judgment* at [58] and [68] to [69]. Wentworth agrees with JA PP/[44]-[48].

15.2. This must follow as a matter of logic – if, prior to insolvency, the client were to take back from the investment firm some or all of its Client Money, that would reduce its contractual claim. The same must apply after insolvency.

15.3. The client's entitlement in the Client Money Pool crystallises as a result of the Primary Pooling Event – see *Lehman Client Money*[13] at [42]. That entitlement therefore always exists to reduce an unsecured claim at the date of administration.

15.4. Further or alternatively, the question can be viewed as one of marshalling. A creditor who may claim in two funds is to be treated as having recourse to the fund which is not available to other creditors (such as unsecured creditors) who may claim in only one fund.[14] Alternatively, it is to be treated as having done so.[15]

15.5. Further or alternatively, were Barclays to press a Parallel Unsecured Claim against LBIE's general estate, the estate would have an equity of exoneration by which it may require the Client Money Pool to pay Barclays first.[16] The valuation of the Parallel Unsecured Claim against LBIE's estate occurs on the basis that Barclays has already received payment from the Client Money Pool.[17]

ISSUE 7

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

---

[13] *Lehman Brothers International (Europe) Limited v CRC Credit Fund Ltd* [2012] UKSC 6.

[14] *Highbury v Zirfin* [2013] EWCA Civ 1283, at [18].

[15] See e.g. *McLean v Berry* [2016] EWHC 2650.

[16] *Duncan, Fox, & Co v North and South Wales Bank* (1860) 6 App Cas 1, at 12; *Highbury v Zirfin* [2013] EWCA Civ 1283, [2].

[17] *In re Richardson* [1911] 2 KB 705, 709-710; *Highbury v Zirfin* [2013] EWCA Civ 1283, [19]-[20].

16. If (contrary to Wentworth's primary position) Barclays has a Parallel Unsecured Claim, Barclays is not entitled to elect to pursue a Parallel Unsecured Claim in preference to and undiminished by its Client Money Entitlement.

ISSUE 7(1)

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

17. As a matter of logic Barclays would be required to disclaim, surrender or abandon its Client Money Entitlement before it could pursue any Parallel Unsecured Claim. However, Barclays is not entitled to waive its Client Money Entitlement (whether by disclaimer, surrender, abandonment or otherwise) in a way which would increase its ability to recover from the general estate. Thus:

    17.1. Either waiver is precluded altogether by the CASS regime; or

    17.2. Alternatively, waiver is permissible but actual and anticipated distributions from the Client Money Pool must still be taken into account in quantifying Barclays' claim, such that it cannot claim more from the general estate as a result of its waiver.

18. The ability to waive a Client Money Entitlement with the effect contended for by Barclays would be contrary to the purpose and effect of the statutory scheme imposed by MiFID and CASS 7. The headline points relied upon by Wentworth are set out in the following paragraphs.

19. The CASS Regime envisages a Client Money calculation and distribution which is certain, swift and essentially self-executing:

    19.1. Beneficial interests in the Client Money Pool crystallise at the time of the Primary Pooling Event.

19.2. Clients' rights are as beneficiary not creditor.[18]

19.3. No proof is required – the entitlement is automatic and the Client Money Pool administrator's duty to distribute is mandatory (see e.g. CASS 7A.2.4R).

19.4. It is anticipated that there will be a swift distribution of the Client Money pool, in advance of distribution from the general estate (see *MF Global Shortfall Judgment* at [65-66]). This requires certainty.

19.5. In turn, once that calculation has been made, it is immediately clear how much is to be deducted from each client's proof in the general estate.

20. If waiver in order to enhance a claim against the general estate were permissible, it would (i) disrupt the speed and certainty of the CASS regime contrary to the objectives of MiFID and CASS; and (ii) potentially prejudice other clients:

20.1. There would have to be a delay while it was determined who was waiving, and to what extent, and who was not.

20.2. There would then have to be one or more recalculations (depending on who waived and when).

20.3. "Game theory" problems arise – as one client's waiver may actually prejudice others (since more of the non-waiving creditors' entitlement would come from the Client Money Pool and thus (in the surplus scenario) less would attract statutory interest).

20.4. There is no rule or regime setting a deadline for such waivers – so different clients could waive successively, necessitating multiple recalculations.

20.5. This would all be done on imperfect (and potentially very limited) information. In the envisaged swift process, it is unlikely to be known whether

[18] *In re Lehmans (Scheme Judgment)* [2009] EWHC 2141 (Ch), [68] to [69]; [2009] EWCA Civ 1161, [59]-[60], [67], [75]-[76]; *MF Global Shortfall* Judgment at [22]; *Lehmans v CRC* [2012] UKSC 6, [20].

there is a surplus in the general estate. Information, and ability to move quickly, may also be different as between large institutional clients and "retail" clients.

21. Neither LBIE nor the JAs have the power to agree with Barclays that a different regime should apply:

21.1. The Client Money Trust is essential to the nature of an investment firm (as opposed to a credit institution), and compliance with the requirements is a core condition of the firm's regulatory authorisation. It has no power to contract out of the regime.[19] In this respect:

21.1.1. The client money obligations serve not merely private but also public interests. The latter include investor protection so as to bolster public confidence in the integrity of the financial system, facilitation of orderly resolution and winding up of distressed firms, and the limiting of contagion and systemic risk.[20]

21.1.2. To take full ownership of client money and leave the client merely with a contractual claim is to take deposits. Adherence to the client money obligations distinguishes a depository credit institution, which may treat client money as its own, from non-depository firms such as LBIE, which may not.[21] Depository institutions are subject to a more demanding regulatory regime than that applicable to non-depository firms.

21.1.3. LBIE was not permitted to opt for the less demanding non-depository regime while acting like a depository institution. Accordingly,

---

[19] See e.g. *Graham v Ingleby* (1848) 1 Exch. 651; (1848) 154 ER 277, 279 (Alderson, B), and *Johnston v Merton* [1980] AC 37. JA PP/56-58 purport to identify exceptions to this. These are considered at paragraph 24 below.

[20] See e.g. MiFID, Preamble, paragraphs 5, 25, and 71; MiFID-I, Preamble, paragraph 1; and *Lehman v CRC* [2012] UKSC 6, [132] to [136] (Lord Dyson); [173] and [186] (Lord Collins), etc.

[21] MiFID, Article 13(8); CASS 7.1.8R and 7.1.9G.

compliance with the client money obligations was a prerequisite to LBIE's authorisation to act as a non-depository investment firm.[22]

21.1.4. It follows that while LBIE was solvent, a client could not have waived its CME except as provided by CASS 7 itself.

21.2. These points are *a fortiori* when the investment firm enters insolvency:

21.2.1. The client money obligations placed LBIE qua statutory trustee in a position analogous to that which holds in relation to its general estate. Both the Client Money Pool and the general estate are subject to statutory trusts, and LBIE does not have the legal power to use property falling within either statutory trust other than for the relevant statutory purposes.[23]

21.2.2. The client money obligations attached from the time that money was received from the client (or else appropriated to a client's claim), and persisted until the relevant CME was discharged.[24]

21.2.3. It is important to distinguish any power Barclays might have to disclaim its CME (in the sense mentioned above) now that LBIE is in administration, from any power LBIE or its administrators possess to use client money and money in LBIE's general estate, respectively, other than under the terms of the relevant statutory trusts.

21.2.4. LBIE *itself* in administration possesses no additional or greater power to treat client money other than on CASS 7 terms than it possessed prior to the commencement of its administration.

---

[22] MiFID, Articles 7(1) and (2), 8(c) and (d), 16(1), 17, and 71(1); this is further supported by MiFID, Articles 2, 4(1)(1), 23(2), and (66).

[23] *National Westminster Bank Ltd. v Halesowen Presswork and Assemblies Ltd* [1972] AC 785; *Ayerst v C & K (Construction) Ltd* [1975] 3 WLR 167, 178-179; *British International Air Lines Ltd. v Compagnie Nationale Air France* [1975] 1 WLR 758; *Belmont v BNY* [2011] UKSC 38; *Lehman v CRC* [2012] UKSC 6, particularly [189] (Lord Collins).

[24] *Lehman v CRC* [2012] UKSC 6, [15].

21.2.5. No power supposedly allowing the Administrators to contract around this regime has been identified. Barclays would need to show a positive power in the Administrators to reach such an agreement. Further, and even if a relevant power could be identified, there would be no basis for its exercise in a case such as this.

21.2.6. Administrators owe a duty to the unsecured creditors of LBIE's general estate,[25] and would not in any event be entitled to reach an agreement with one client which would prejudice the position of the unsecured creditors (by increasing the payment from the general estate to which Barclays would then be entitled).

21.2.7. While the Court has inherent jurisdiction to give directions concerning the distribution on particular bases of the CMP, this jurisdiction does not enable the Court to vary or destroy beneficial interests in the CMP.[26]

22. Nor can Barclays get around that regime by waiver or similar:

22.1. It is not possible for a single party to waive a right which is conferred in the public interest and/or for a benefit of a class.[27]

22.2. The trust rights under the CASS Regime exist for the benefit of a class (namely the firm's clients as a whole) and are conferred in the public interest, including for the purposes identified in MiFID. They are laying down a series of rules allowing the Client Money held by the investment firm to be

[25] Insolvency Act 1896, Schedule B1, paragraphs 3(1)(b) and 3(2).

[26] *In re MF Global UK Ltd* [2013] EWHC 1655 (Ch), [26]. See also *In re Lehman Bros (No 2)* [2009] EWCA Civ 1161.

[27] *Graham v Ingleby* (1848) 1 Exch 651, (1848) 154 ER 277, 279. *National Westminster Bank Ltd. v Halesowen Presswork and Assemblies Ltd* [1972] AC 785.

administered in a proper and orderly way; this is a matter in which the commercial community generally has an interest.[28]

22.3. Any valid waiver of interests under CASS would impact not only the CASS regime *per se*, but its interaction with the underlying statutory regime for distributions in administrations, which are on any view rights conferred in the public interest.

22.4. That is reinforced by the fact that following a pooling event, there is a single trust of all client money. The Supreme Court emphasises the "*cataclysmic*" nature of this change – money which may previously have been segregated for separate clients is now part of a common pool and common regime.[29]

23. The Administrators seek to bolster their case on the ability to waive a Client Money Entitlement so as to pursue a Parallel Unsecured Claim by reference to five purported analogies: see JA PP/[50]. None of the attempted analogies is valid for the following main reasons:

23.1. Agreement to subordinate a claim (JA PP/[50(1)]): Subordination involves postponing a claim against a single fund, thereby *pro tanto* improving the position of other claimants to that fund. This throws no light on whether to permit abandonment of a claim against one fund (the Client Money Pool), which may improve the position of that fund's other claimants, in order to expand another claim against another fund (the general estate) to the detriment of all other claimants to the latter. This is a fortiori when the existence of the claim sought to be given up serves public and not merely private interests.

23.2. Voluntary surrender of security under IR 2.83(2) (JA PP/[50(2)]): The analogy between a Client Money Entitlement and security was expressly disapproved in the *MF Global Shortfall Judgment* (at [46] and [67]). Further:

23.2.1. Security is in general a purely private right.

[28] *Halesowen* at [ref], referring to the insolvency regime. The CASS regime is fundamentally similar.

[29] [2012] UKSC 6, at [142] and [144].

23.2.2. A secured creditor does not have parallel secured and unsecured claims. He has a single personal claim which is supplemented or protected by his proprietary security interest. The security itself does not constitute a free-standing claim.

23.2.3. Surrender of the proprietary security interest characteristically does not prejudice other creditors. While the erstwhile secured claim now competes in full with other unsecured claims against the general estate, the latter is swelled by the value of the collateral, to the advantage of all unsecured creditors as a group. This is acknowledged by Insolvency Rule 2.83(2) itself, which is cited by the JAs.

23.2.4. By contrast, the position of the JAs/Barclays is premised on the existence of two separate claims against two different funds, each subject to its own valuation and enforcement regimes operating in the interests of two distinct claimant classes. Disclaimer of one claim may benefit one such class but would be to the detriment of the others. Further, the attempted analogy pays no heed to the public interest underlying the Client Money regime.

23.3. Disclaimer of a testamentary gift (JA PP/[50(3)]): This involves neither separate claims against different funds nor prejudice to any other legatee. No public interest is at stake.

23.4. Disclaimer of a beneficial interest under a trust (JA PP/[50(4)]): Wentworth accepts that, just like any trust beneficiary, Barclays has the right to refuse payment from the Client Money Pool. This, however, is where the similarity ends. In particular, disclaimer of a beneficial interest under a trust does not cause prejudice to any other claimant against a different fund. Again, no public interest is at stake.

23.5. Abandonment of legal interest in personal property (JA PP/[50(5)]): The same disanalogies considered above remain relevant. By contrast, where the property to be abandoned does have public interest dimensions, such as with a

waste management licence, abandonment is prohibited, heavily regulated, and/or may only be done through explicit legal powers.[30]

24. JA/PP/55-59 also purports to identify three situations in which an investment firm and a client may contract out of the CASS 7 regime. They contend that these instances support a general liberty for parties to avoid the CASS 7 regime. But in fact, of these situations, only one represented a genuine liberty to contract out of the client *money* regime, and it has been abolished. Another applies only to financial instruments and only heightens the contrast with the treatment of client money. The third situation is fundamentally different from, and not at all a means of contracting out of, the client money regime . In this regard:

24.1. The pre-MiFID 'Professionals Opt out': Under the pre-MiFID regime, investment firms were offered a "professionals' opt-out", by which they could agree with professional and institutional market participants not to apply the CMR to money provided by such counterparties.

This opt-out was inconsistent with MiFID,[31] and was withdrawn as of 1 November 2007.[32] That is to say, investment firms could no longer agree with a client simply to disapply the CMR. This in itself demonstrates that the JAs' argument, which asserts precisely the opposite, is untenable.

24.2. Financial Instruments: JA/PP makes the point that it is possible to opt out of the CASS 7 regime in relation to financial instruments. That is true, but the differential treatment of instruments and money in the MiFID/CASS framework serves to refute rather than support the proposition that the obligations can be contracted out of in relation to client money. The provisions under which LBIE's obligation to safeguard clients' ownership of financial

[30] See e.g. *Re Celtic Extraction Ltd* [2001] Ch 475.

[31] European Commission, '*Your questions on financial legislation*', ID 185, Internal reference 28.2, "Client funds and client property rules – application to professional clients'. Available at URL: http://ec.europa.eu/finance/koel/index.cfm?fuseaction=question.show&questionId=185.

[32] See e.g. Financial Services Authority, *MiFID Permissions and Notifications Guide* (May 2007), pp. 26-27.

instruments could have been contracted out of, are in clear distinction from those dealing with client money.[33]

24.3. Title transfer financial collateral arrangements ('TTFCAs'): MiFID co-exists with the Financial Collateral Arrangements Directive,[34] which provides special treatment for TTFCAs. The JAs mischaracterise TTFCAs as a way of "contracting out of" the client money regime. In fact, the TTFCA serves a fundamentally different commercial purpose to the Client Money Entitlement, operates differently, and has different consequences:

24.3.1. The Client Money Entitlement exists in the client's interests and to protect the client's rights. By contrast TTFCA protects the firm by securing or otherwise covering the client's obligations to it.[35] This is confirmed by CASS 7.2.3R, which is cited by the JAs.

24.3.2. In order for the firm's position to be protected through a TTFCA, the TTFCA must be evidenced in writing.[36] This requirement was complied with by *Global Trader*, as confirmed by the very passage from Sir Andrew Park's judgment cited by the JAs.[37] No such precondition exists in order for the CMR to protect the client.

24.3.3. A TTFCA takes effect according to its terms notwithstanding commencement of insolvency proceedings concerning the collateral taker.[38] That is to say, it is not affected by the CASS 7 treatment of a primary pooling event.

---

[33] Compare MiFID, Article 13(7) and MiFID-I, Article 19 (financial instruments), with MiFID, Article 13(8) and MiFID-I, Article 18 (client money). Similarly, compare CASS 6.2.1 and 6.4.1R (financial instruments) with CASS 7.4.1R and 7.4.11R (client money).

[34] MiFID, Recital 27.

[35] The Financial Collateral Arrangements (No. 2) Regulations 2003 ('**FCAR**'), r. 3.

[36] FCAR, r. 3.

[37] *Re Global Trader Ltd* [2009] 2 BCLC 18, [41].

[38] Art 4(5) of the FCAD; FCAR, r. 8.

24.3.4. Taken together, these considerations demonstrate the untenability of the JAs' invocation of the TTFCA. For clients intending to provide title transfer security to an investment firm to cover their obligations, the TTFCA is part of a distinct regime with distinctive rules of operation and distinctive consequences upon the firm's insolvency. This can throw no light on the position of clients intending, not to provide security to the firm, but instead to accept a lower level of protection for themselves than envisaged under the CMR.

25. Finally, any perceived "prejudice" by being unable to claim statutory interest by pursuing solely the alleged Parallel Unsecured Claim to the exclusion of the Client Money Entitlement is not something in respect of which clients have a legitimate expectation:

25.1. In an insolvency situation, the precise calculation of distributions, timing, interest etc, is all a function of the particular regime into which a claimant falls. It always involves some degree of arbitrariness.

25.2. Statutory interest substitutes for contractually agreed interest rates (or for no interest at all) when insolvency proceedings supervene. It exemplifies the rough-and-ready/one-size-fits-all nature of insolvency regimes.

25.3. The CASS regime has other such quirks – for example the potential discrepancy between contractual entitlement and Client Money Entitlement. In the *MF Global Shortfall Judgment* at [56] and [57], David Richards J rightly gave such complaints short shrift.

26. Further or alternatively, if the Court finds that Barclays is entitled to disclaim, surrender or abandon its Client Money Claim, then Wentworth agrees with the JAs that any prior or anticipated distributions from the Client Money Pool must be taken into account when valuing the Parallel Unsecured Claim. Wentworth's position is that Barclays could not, by waiver, avoid such reductions.

27. It should be noted that it is Wentworth's position that an assignment of the Client Money Entitlement would be inadequate in any event as the effect of any valid assignment (were this conceptually possible) would be to maintain the Client Money Entitlement, but in the hands of a third party. It could not be right that Barclays could prove in respect of the Parallel Unsecured Claim in circumstances where its assignee would continue to be entitled to recover in respect of the Client Money Entitlement.

ISSUE 7(2)

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

ISSUE 7(3)

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

ISSUE 7(4)

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

28. This is an essentially procedural matter. Wentworth does not disagree with the position taken in JA PP/[66]-[70], viz that if a Parallel Unsecured Claim exists (i) the valuation of the Parallel Unsecured Claim would require the deduction of any actual or anticipated distributions from the Client Money Pool; and (ii) in theory an administrator could admit it to proof and/or pay dividends prior to distribution of the Client Money Pool. However, that would be the exception rather than the rule, as the CASS regime envisages swift distribution of the Client Money Pool.

ISSUE 8

If Barclays is not entitled to elect to pursue the Parallel Unsecured Claim to the exclusion of the Client Money Entitlement:

(1) Are the Administrators entitled and/or obliged to admit any Unsecured Claim prior to the Client Money Pool being distributed? If so, to what extent should the Client Money Entitlement be taken into account when admitting the Unsecured Claim?

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

29. This is also essentially procedural:

29.1. A circumstance in which a client has as a matter of principle a Parallel Unsecured Claim, but is not entitled to pursue it to the exclusion of its Client Money Entitlement, is functionally equivalent to a situation where a client has no Parallel Unsecured Claim but has a Shortfall Unsecured Claim.

29.2. In either case, paragraph 28 above is repeated.

Set-Off (Issues 3 and 9)

ISSUE 9

If Barclays has an Unsecured Claim (whether a Parallel Unsecured Claim, a Shortfall Unsecured Claim or any other Unsecured Claim):

(1) Is such Unsecured Claim subject to a mandatory set-off under Rule 2.85 against any sums owing by LBI to LBIE?

(2) Is such Unsecured Claim subject to a mandatory set-off under Rule 2.85 against any sums owing by Barclays to LBIE?

(3) Does LBIE have an equitable right to set off such Unsecured Claim against any sums owing by Barclays and/or LBI to LBIE?

(4) Does LBIE have a common law right to set off such Unsecured Claim against any sums owning by Barclays and/or LBI to LBIE?

30. LBIE has a right to set off against any Unsecured Claim of Barclays sums owing by LBI to LBIE.

31. Any Unsecured Claim of Barclays is therefore subject to (and extinguished by) set-off against the sum owed by LBI to LBIE. In summary::

32. As assignee under the APA, Barclays takes subject to rights of set-off which could be asserted against the assignor (LBI):

    32.1. An assignor cannot place an assignee in a better position than himself.[39]

    32.2. The assignee takes subject to defences, including statutory or equitable set-off, which could be raised against the assignor.[40]

    32.3. That is unaffected by insolvency.[41]

33. As a matter of equitable set-off, LBIE's claims against LBI were sufficiently closely connected that it would have been manifestly unjust to allow one to enforce payment against the other, without taking account of the cross-claim.[42]

34. As a matter of insolvency set-off:

    34.1. The discharge or satisfaction of a claim by way of set-off operates retroactively, taking effect from the date of administration (see *LBIE v Burlington* at [42] to [47]).[43] Only the balance is a provable debt.[44]

---

[39] *Wilson v Gabriel* (1863) 122 ER 450, 452.

[40] *Glencore Grain Ltd v Agros Trading Co* [1999] 2 Lloyds Rep 410.

[41] *Mulkerrins v PWC* [2003] UKHL 41 at [15], per Lord Millett.

[42] *Geldof Metalconstructie NV v Simon Carves Ltd* [2010] EWCA Civ 667, at [43] per Rix LJ.

34.2. The assignment under the APA post-dates the administration of LBIE. Accordingly, as at the date of administration, LBI's claim (later assigned to Barclays under the APA) is extinguished.

34.3. The suggestion at JA PP/[88], that if insolvency set-off operates as described by David Richards J, this would not lead to the extinction of the claim, is incomprehensible. If the claim would be extinguished in the hands of LBI, with effect to prior to the assignment, how or why would the assignment resurrect it?

34.4. The effect of Barclays' contrary position, and that set out at JA PP/[76]-[79] and [82]-[83] would be that LBI could, after the commencement of insolvency proceedings, by assignment improve the recovery in respect of its claim at the expense of other creditors. That is contrary to public policy and is an invitation to the trafficking of claims.

35. The JA PP/[100]-[103] attempt to argue that LBIE's cross-claims against LBI were settled and compromised in their entirety pursuant to the LBI/LBIE Settlement, and so cannot be the subject matter of a set-off against Barclays. While the construction and intended effect of the Settlement is a matter of New York law, the JAs' argument cites no particular provision of the Settlement and is implausible in its generality:

35.1. The Settlement provides different treatment for different categories of claim, such as the several sub-categories of 'Omnibus' and 'House' claims as well as the different types of 'Duplicative Claims'. The extent to which the Settlement extinguishes potential LBIE cross-claims against LBI (and thus against Barclays) falling in any of these sub-categories requires a systematic analysis of the Settlement; and

---

[43] *Administrators of LBIE v Burlington Loan Management* [2016] EWHC (Ch) 2131. See also Totty, Moss & Segal on Insolvency (November 2016 update), Volume 2, H6-04, paragraph 4.2.

[44] *Gye v McIntyre* (1991) 171 CLR 609, 622 (HCA).

35.2. The Settlement assumes the continued existence of, expressly preserves, or requires the JAs on behalf of LBIE to assert set-off rights.[45] This refutes the JAs' position that the Settlement has extinguished all potential cross-claims that LBIE may assert against LBI, and thus against Barclays.

35.3. In any event, the LBI/LBIE Settlement cannot override the mandatory administration set-off. The JAs' reliance on it at JA PP/[91]-[93] is therefore unfounded. Further and in any case, while temporarily suspending (not extinguishing) LBIE's set-off rights against LBI and the LBI Trustee, Article 10.06(d) explicitly did not affect LBIE's set-off rights against Barclays.

36. Wentworth is currently unaware of whether other sums are owed by Barclays to LBIE. If there are, then they are capable of being the subject matter of a set-off.[46]

ISSUE 3

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

37. This Issue assumes, contrary to Wentworth's primary position, that a Parallel Unsecured Claim exists alongside a Client Money Entitlement.

38. Wentworth's position is that where an investment firm has a cross-claim against a client, the client's aggregate recovery pursuant to its Client Money Entitlement, considered together with its supposed Parallel Unsecured Claim, must be reduced to take account of the firm's cross-claim. Not to make such a reduction would be unjustly to enrich the client at the expense of the group of claimants against either or both of the Client Money Pool and the firm's general estate.

---

[45] See e.g. Settlement, Section 10.09(a), and also Sections 2.03(c), 10.06(b) and (d), and 10.08(a).

[46] In an analogous context, see *Bovis International Construction Inc v The Circe Partnership* (1995) 49 Construction LR 12, 22.

39. Suppose the Parallel Unsecured Claim and the firm's cross-claim are each worth £100m. When set-off operates, the firm's general estate loses its £100m claim against the client in return for the discharge of the client's £100m claim against it. When the client subsequently obtains (say) £100m pursuant to its Client Money Entitlement, the client is enriched, in that he has received both his £100m and the discharge of his liability to the firm. This enrichment is at the expense of the claimants to the firm's general estate in that:

    39.1. all the other Client Money Entitlement holders as a group recover less from the Client Money Pool and therefore press greater Shortfall Unsecured Claims against the general estate, thus pro tanto diluting all claims; and

    39.2. the general estate itself is the residual claimant to the Client Money Pool,[47] and receives up to £100m less in this capacity despite having effectively given 100 pence on the pound to the client by way of set-off.

40. The general estate therefore has a restitutionary claim against the client. Formally, the firm's insolvency office-holders could, *qua* administrators of the Client Money Pool, permit the client to raise its Client Money Entitlement, while setting up a cross-claim against it *qua* administrators of the firm's general estate. The firm's restitutionary claim against the client for repayment of the £100m Parallel Unsecured Claim would then be subject to a legal set-off against the client's £100m Client Money Entitlement claim.

41. The outcome is materially identical to the situation in which the set-off against the Parallel Unsecured Claim pro tanto discharges the Client Money Entitlement.

Effect of the LBI Payment (Issues 10-14 and 17-19)

ISSUE 10

In what manner, and from what date, does the LBI Payment fall to be applied towards the discharge or reduction of:

[47] CASS 7.7.2(5)R.

(1) Barclays' Client Money Entitlement (if any);

(2) Barclays' Unsecured Claim(s) in respect of the ETD Trades (if any); and/or

(3) Barclays' other claims (if any)?

42. Wentworth's position is that the LBI Payment is to be treated as a payment of Barclays' Client Money Entitlement from the date of receipt of that payment.

43. As to any Parallel Unsecured Claim (on the assumption that such a claim exists), Wentworth's primary position is that it would be reduced in any event by the amount of any actual or anticipated distribution in respect of Barclays' concurrent Client Money Entitlement. This would include the amount of the LBI Payment.

44. Failing that, if the LBI Payment were to be treated as a direct payment in respect of the Parallel Unsecured Claim, this would self-evidently reduce the Parallel Unsecured Claim by the sum of USD 777m.

45. In these respects, Wentworth agrees with the position set out in JA PP/[110]-[133].

ISSUE 11

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

46. The amount of the LBI Payment should be deducted from the amount of any Parallel Unsecured Claim to be admitted to proof for the reasons given in relation to Issue 10, above.

47. Further or in the alternative, because the hindsight principle applies in valuing the debt as proved (see *Re Lehman (No 5)* at [200][48] and IR 2.72(3)(b)(ii) (payments from third

[48] *In re Lehman (No 5)* [2015] EWHC 2269.

parties), IR 2.81(1) (power to make and revise estimates), IR 2.94 (realisations from security)). This extends to any valid discharge of the debt (*Wight v Eckhardt Marine GmbH*).[49] Account must therefore be taken of the LBI Payment.

48. In these respects, Wentworth agrees with the position set out in JA PP/[134]-[152].

49. As to the guarantee cases relied on by Barclays in support of its argument that it is entitled to prove without making any deduction in respect of the LBI Payment, Wentworth agrees with the conclusion in JA PP/[153] that these cases have no application to the present context. The LBI Payment is neither analogous nor relevantly similar to payments received by a lender with the benefit of a third-party guarantee. Wentworth adopts the JAs' arguments in support of this proposition in JA PP/[163].

50. In the alternative, if the LBI Payment is to be characterised as analogous or otherwise relevantly similar to payments received by a lender with the benefit of a third-party guarantee, then the principles underlying the guarantee cases show that the Barclays Proof must be reduced to account for it:

    50.1. <u>The extent of the guarantee need not coincide with the quantum of the guarantor's obligations</u>:[50] The terms of the guarantee may distinguish between the extent of the principal debtor's obligation guaranteed and the maximum quantum of the guarantor's liability. For example, the guarantee might cover the entire £1,000 of the principal debtor's obligation, while limiting the guarantor's payment liability to £777.

    50.2. <u>The lender is entitled to the full benefit of its bargain</u>:[51] While any part of the guaranteed debt remains unpaid, it is the lender rather than the guarantor who has the right to prove in the principal debtor's insolvency. In the example

[49] [2004] 1 AC 147.

[50] See e.g. *Re Sass* [1896] QBD 12, at 12-13 and 15; *Re Houlder* [1929] 1 Ch 205 (case concerning guarantor's bankruptcy) 212.

[51] *Re Rees* (1881) 17 Ch 98; *Re Sass* [1896] QBD 12, at 15; *In re Blakely* (1892) 9 Morr 173 (case concerning insolvent debtor and insolvent guarantor), 174-5.

above, even after payment of £777, the guarantor has no right to prove in the debtor's insolvency. Correspondingly, the lender is entitled to maintain its proof for the full £1,000. The rationale is to accord the lender the full benefit of its security by enabling it to receive dividends on its undiminished proof. This holds until the lender has received its £1,000 in full.

50.3. The bargain between lender and guarantor cannot prejudice the insolvent debtor's other creditors:[52] The primary application of this principle is the rule against double proofs, which precludes more than one proof in relation to any given part of the debtor's liability. To permit otherwise would be to prejudice the debtor's other creditors. Accordingly:

50.3.1. In the example above, where the guarantee covers the debtor's £1,000 liability to the lender but the guarantor's payment obligation is limited to £777, the guarantor may not prove in the debtor's estate even after paying the lender £777. Since the lender has the right to maintain its proof in full, the rule against double proofs excludes the guarantor, thus protecting other creditors. Suppose now that the lender receives its remaining £233 from the bankruptcy estate. The lender may no longer maintain a proof, and the guarantor may now prove for its £777 instead. At no time do the other creditors have to compete against one or more proofs which together exceed the full £1,000 worth of the relevant liability.

50.3.2. By contrast, if the extent of the guarantee – and not merely the guarantor's payment obligation – is limited to £777, and the guarantor pays this to the lender in full, then it is the guarantor and no longer the lender who holds the right to prove for the £777 in the debtor's insolvency. Again, other creditors never compete against one or more proofs exceeding the debtor's actual £1,000 liability.

50.4. The rule against double proofs:

[52] *Re Sass* [1896] QBD 12, at 15.

50.4.1. applies to liabilities that are essentially the same;[53]

50.4.2. excludes one or more of the proofs if they together exceed what might be claimed against the debtor if solvent;[54] and,

50.4.3. is applied by looking at the likely position as at the date at which dividends would be determined.[55]

51. For the same reason that two proofs would not be admitted that together exceed the debtor's actual liability, so too one proof would not be admitted that exceeds that liability:

51.1. What matters in determining whether other creditors are prejudiced is the quantum proved for, not the number of proofs admitted.

51.2. This general principle protecting other creditors is endemic, and, for example, underlies the rule that a lender holding proprietary security over the debtor's assets may only prove for the unsecured part of its liability, or else surrender its security before proving for the full amount.[56] No proof may be submitted or maintained in relation to any part of the debt actually, or expected to be, discharged through appropriation of the proceeds of the sale of the collateral. To permit otherwise would be to prejudice other creditors, whose proofs would compete for dividends against that of the secured creditor. This remains true even if the latter would not receive more than 100 pence on the pound.

52. Applying these principles to the LBI Payment:

---

[53] Ibid, p. 636E-F.

[54] Ibid, pp. 636H, 637B, and 638A.

[55] Ibid, pp. 636B-D and 637H to 638A-B.

[56] See e.g. Insolvency Rule 4.88.

52.1. If LBI's position is analogous to that of a guarantor, then the full extent of the "guarantee" appears to be USD777m.[57] Therefore, if LBI were a guarantor of USD777m of LBIE's liability to Barclays on otherwise identical terms, the LBI Payment (in the full amount) would cause a *pro tanto* transfer of Barclays' right of proof against LBIE to LBI.[58]

52.2. There is no doubt that the LBI Payment related to, and discharged, the very liability that founds the Barclays Proof.

52.3. Assessed independently of administration proceedings, the LBI Payment has undoubtedly reduced LBIE's liabilities by UDS777m, with a corresponding release of its claim by Barclays. To require LBIE's other unsecured creditors to compete with any greater claim would be wrongly to dilute their position, which exceeds anything bargained for by LBI (or Barclays) and which is prohibited by the rule against double proofs.

52.4. The relevant date at which to ascertain the permissible quantum of the Barclays Proof is that at which dividends would be determined. This will post-date the LBI Payment, which must therefore be accounted for in the Proof upon its admission.

53. This analysis is consistent with David Richards J's judgment in the *MF Global Shortfall Judgment)*:[59]

53.1. Whether a client who has received a Client Money Entitlement payment should be required to account for that in its Parallel Unsecured Claim proof is to be tested by assuming that the debtor firm is solvent and asking whether the proofs submitted in its administration exceed its liabilities, were it solvent;

---

[57] This is a question of the proper construction of the LBI/LBIE/Barclays settlement, which is governed by New York law.

[58] See *Re Sass* [1896] QBD 12, 15.

[59] [2013] EWHC 2556 (Ch), [61] to [69].

53.2. Payment in relation to Parallel Unsecured Claims and Client Money Entitlements are in substance payments in relation to the same liability; and,

53.3. Were the firm solvent, discharge of Client Money Entitlement liabilities would pro tanto discharge liabilities in relation to which Parallel Unsecured Claims may be brought.

54. In the alternative, Wentworth concurs in the analysis at JA PP/[153]-[167].

ISSUE 12

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

55. The LBI Payment must be taken into account in valuing and admitting the Barclays Proof. This is for the reasons outlined in relation to Issues 10 and 11 above.

ISSUE 14

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

56. Barclays appears to concede that if (contrary to Wentworth's position on Issues 10-12) the Barclays Proof were admitted without any deduction in respect of the LBI Payment, it would be obliged to give credit in respect of the LBI Payment when receiving payment of dividends on the Barclays Proof.

57. That would be the correct result. However, the lack of any principled basis for this concession demonstrates that Barclays' approach in relation to Issues 10-12 is misconceived.

58. In this respect Wentworth agrees with the position set out at JA PP/[181]-[190], especially at [187]-[189].

Statutory interest (Issues 17 to 19)

ISSUE 17

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

ISSUE 18

If the Administrators admit the Barclays Proof for a reduced amount by deducting an amount in respect of the LBI Payment (or any part thereof):

(1) Should the Administrators be directed under the rule in* Re Condon; ex p James *(1873-74) LR 9 Ch App 609; and/or

(2) Should the Administrators be directed under paragraph 74 of Schedule B1; and/or

(3) Are the Administrators estopped from refusing

to pay Statutory Interest on some amount other than the sum admitted to proof? If so, how should such amount be calculated, and from what date should Statutory Interest be paid thereof?

ISSUE 19

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

59. Statutory Interest is payable to Barclays only on any distribution in respect of the unsecured claim admitted to proof and not on the amount by which any unsecured claim has been reduced as a result of its Client Money Entitlement or the LBI Payment.

60. As set out in relation to Issue 10 above, a Parallel Unsecured Claim is reduced in any event by the amount of any actual or anticipated distribution of Barclays' concurrent

Client Money Entitlement. To this extent it is not a "debt proved" within the meaning of IR 2.88(7).

61. In any event, "debts proved" in IR 2.88(7) refers to debts admitted to proof and paid by a distribution in the administration, not debts in respect of which a proof has been filed – see *Lehman Waterfall IIA* at [204]-[208]:[60]

    61.1. Barclays' construction is inconsistent with the words "*surplus remaining after payments of debts proved*".

    61.2. The purpose of the rule is to compensate for delay in payment by reason of the time taken to manage the administration. The same policy does not apply to delayed payments from other sources.[61] Statutory interest is not compensation for the general non- or late- payment of the underlying debt.[62]

62. There is no basis for Barclays' assertion that the terms of the LBI/Barclays Settlement entitle Barclays to receive statutory interest otherwise than on the admitted amount of the Barclays Proof in accordance with IR 2.88(7).

63. There is no basis on which fairness or other discretionary criteria (whether by way of *Ex parte James*, para 74 of Sch B1 to IA 1986, estoppel or otherwise) would justify requiring the Administrators to pay (at the expense of unsecured creditors) statutory interest on Barclays' claims in circumstances where none is due.

64. Wentworth concurs with the position as set out in JA PP/[207]-[238].

Subsidiary Issues relating to the LBI Payment (Issues 13 and 15 to 16)

ISSUE 13

---

[60] *Lehman Waterfall IIA* [2015] EWHC 2269.

[61] See e.g. in *re Lehman (No 5)* at [26].

[62] *Lehman Waterfall IIA* at [207].

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

65. The creation of the Dedicated Reserve and the LBI Payment (or the ancillary actions related thereto) do not constitute an admission to proof or payment of a dividend in respect of the Barclays Proof.

66. Wentworth concurs with the position set out in JA PP/[169]-[180].

ISSUE 15

In relation to Issues 10 to 14 and Issue 19, how is the amount in respect of the LBI Payment to be calculated? In particular, if it is the Sterling Equivalent that is to be taken into account, should the Sterling Equivalent of the LBI Payment be calculated based on the exchange rate prevailing at:

(1) The Time of Administration;

(2) The time when Barclays received the LBI Payment; or

(3) Some other time?

ISSUE 16

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

67. Wentworth so far has insufficient information to take a position on these issues. In particular, the information relating to the denomination of Barclay's various claims is insufficient. For example:

67.1. It is apparent from Downs WS/Annexes 1 and 2 that there were various accounts in various currencies. However, the individual currency balances are not stated.

67.2. Very little information is given as to the way in which trading worked or was accounted for – in particular, whether US dollars were the substantive "money of account" as the Administrators contend, or whether US dollar balances were simply recorded for administrative convenience.

DAVID ALLISON QC
ALEX BARDEN
RIZ MOKAL