Appeal Refs: 2016/4216, 2016/4217 and 2017/0043

IN THE COURT OF APPEAL

ON APPEAL FROM

THE HIGH COURT OF JUSTICE **No 7942 of 2008**

CHANCERY DIVISION

COMPANIES COURT

Before: The Honourable Mr Justice David Richards

[2016] EWHC 2131 (Ch)

Before: The Honourable Mr Justice Hildyard

[2016] EWHC 2417 (Ch)

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

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

YORK GLOBAL FINANCE BDH, LLC

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) WENTWORTH SONS SUB-DEBT S.À R.L.

Respondents

WENTWORTH'S REPLY SUBMISSIONS ON SUPPLEMENTAL ISSUES APPEALS

Supplemental Issue 1A: York's appeal from Hildyard J

1. In relation to Supplemental Issue 1A, York contends that Hildyard J was wrong to hold that the words "*the rate applicable to the debt apart from the administration*" in Rule 2.88(9) include, in the case of a provable debt that is a close-out sum under a contract, a contractual right of interest that began to accrue only after the close-out sum became due and payable due to action taken by the creditor after the Date of Administration.

2. In the alternative, in relation to Issue 4, York contends that David Richards J was wrong to hold that the same words excluded from Rule 2.88(9) a judgment rate applicable to a judgment which a creditor might in theory sue for but had not in fact obtained at the Date of Administration.

3. In short, York asserts that, as regards the application of Rule 2.88(9), there is no relevant difference between an unaccrued contractual right to interest (Supplemental Issue 1A) and a judgment rate applicable to a potential but unobtained judgment (Issue 4).

4. Wentworth supported York's position on Supplemental Issue 1A below, but advanced no oral submissions in relation to it. It does so now to the extent that York's submissions on that appeal touch on Wentworth's case on Issue 4, which is advanced in response to the SCG's and York's appeal on that issue.

5. Wentworth takes issue, in particular, with York's submissions on Supplemental Issue 1A (and Issue 4) to the extent that they conflate the requirements for a debt to be a provable debt with the requirements for a rate of interest to be one "*applicable*" to the debt proved apart from the administration. The former is not determinative of the latter and in fact points to a conclusion contrary to that for which York argues.

6. Pursuant to Rule 13.12, a debt which is not due at the date of administration, and which may or may not accrue in the future, but which is based on a pre-administration obligation, is capable of proof subject to quantification by the rules which permit the estimation of such a claim.

7. If proved, a contingent debt is entitled to be paid Statutory Interest pursuant to Rule 2.88. The words "*the rate applicable to the debt apart from the administration*" therefore naturally extend to the rate which would apply to the (contingent) debt proved, in the event that the debt should accrue due for payment[1].

8. By contrast, Rule 13.12 is irrelevant to the meaning of the phrase "*the rate applicable to the debt apart from administration*" in Rule 2.88(9): see *Waterfall IIA*, at [182] [A/1/2/44]. Hence, in relation to Issue 4, it is nonsensical for York (and the SCG) to assert a right to interest on a hypothetical judgment debt as if it were one applicable to the debt in fact proved, which debt is owed pursuant to a contract with LBIE: see *Waterfall IIA*, at [179]-[183] [A1/2/43-44].

9. For these reasons, there is a clear distinction between an unaccrued contractual right to interest and a judgment rate which would be applicable to unobtained judgment. The former, if in relation to the debt proved, is within the words "*the rate applicable to the debt apart from the administration*". The latter is not. It relates to a different, hypothetical debt which was not and cannot be proved.

10. For these reasons also, David Richard J was correct to hold (in *Waterfall IIA* at [180] [A1/2/43-44]) that a judgment subsequently obtained in respect of a contingent debt admitted to proof merely quantifies that debt by application of the well-established hindsight principle.

11. There is, therefore, no inconsistency between the judgment of Hildyard J on Supplemental Issue 1A and the judgment of David Richards J on Issue 4.

Supplemental Issue 2: York's appeal from David Richards LJ

12. York's contention that a Currency Conversion Claim may arise from the operation of insolvency set-off is founded on the flawed analysis of insolvency set-off at Section B of its appeal skeleton.

[1] As found by David Richards LJ in relation to Supplemental Issue 1(C), in a case where contractual interest first starts to run on a provable debt at some point after the Date of Administration, the "*rate applicable*" for the period from the Date of Administration to the date when contractual interest first starts to run is a zero rate: *Supplemental Issues Judgment*, at [26]-[35] [A2/1/7-10]. There is no appeal against this finding.

13. In paragraphs 19 to 22 of its submissions, York asserts that the Court of Appeal in *In re Kaupthing Singer & Friedlander Ltd* [2011] BCC 555 "*put into context*" the decision of the House of Lords in *Stein v Blake* [1996] AC 243. The Court of Appeal is said by York to have held that, contrary to the terms of Lord Hoffmann's speech and the facts of that case, insolvency set-off did not extinguish the claim and cross claim and create a new balance that was provable; rather, insolvency set-off left intact whichever was the greater claim save to the extent of its *pro tanto* discharge by the set off of the smaller claim.

14. There is however no support in the judgment of the Court of Appeal in *Kaupthing* for York's interpretation of that decision or of *Stein v Blake*. *Kaupthing* concerned the quantum of the claim by the company against the creditor arising as a result of insolvency set-off, specifically, whether the claim by the company to loans repayable in the future was to be discounted according to Rule 2.105.

15. Etherton LJ, who delivered the judgment of the Court of Appeal, explained, at [34] and [36]:

> "*Contrary to the approach of the judge and the submissions of Mr Fisher, I consider that it is perfectly possible to interpret IR r.2.85(7) and (8), without straining their language, so as to produce a sensible meaning, in accordance with a sound policy objective and general principles of insolvency administration. IR r.2.105(2) provides for the discount of a future debt to current value, by application of the statutory formula, "for the purpose of dividend (and no other purpose)". That is consistent with the purpose of IR r.2.85, which, as appears from the express provisions of IR r.2.85(1) , is triggered by, and is for the purpose of, making of a distribution. I see no difficulty in the circumstances in reading the words "for the purposes of this Rule" in IR r.2.85 as confining the effect of the incorporation of IR r.2.105 to what is necessary to calculate what should be paid by way of dividend to the creditor, and, for that purpose, the making of the insolvency set-off, and as not touching at all upon what remains due to the company after the insolvency set-off has taken place.*
>
> …
>
> *I do not accept that the principle in Stein v Blake, that on the taking of the account for the purpose of insolvency set-off the original causes of action are extinguished, has any relevance to the present issue. That case concerned the question whether, where A and B have mutual claims against each other and A becomes bankrupt, A's claim against B continues to exist so that A can assign it to a third party or whether the effect of the set-off is to extinguish the claims of A and B and to substitute a claim for*

the net balance owing after setting off one against the other. It was held that the original causes of action were extinguished. That has nothing to do with, and cannot assist in resolving, the question whether, as a matter of the proper interpretation of IR r.2.85(7) and (8), the discounting mechanism in IR r.2.105 applies further than is necessary for the purpose of establishing the amount of a distribution to be made to the creditor."

16. The Court of Appeal thereby affirmed the ratio of *Stein v Blake* that insolvency set-off extinguished the original cause of action and distinguished that decision from the question in *Kaupthing*. *Kaupthing* therefore provides no support for York's submissions on Supplemental Issue 2 and in fact highlights the flaw in its submissions, specifically that insolvency set-off extinguishes the original cause of action. That effect is fatal to a Currency Conversion Claim, which claim is premised upon a remission to unproved, undischarged rights which are again enforceable upon the emergence of a surplus after the payment of the final dividend.

17. Moreover, the fact that the conversion to sterling for the purpose of insolvency set-off gave rise to "*a substantive and permanent alteration of the creditor's contractual rights*" was confirmed by Briggs LJ in the *Waterfall I* appeal: [2016] Ch 50, at [152].

18. Accordingly, Wentworth respectfully requests that York's appeal on Supplemental Issue 2 is dismissed.

19. In addition to the above, which it is submitted is sufficient to dismiss York's appeal on Supplemental Issue 2, the Court can place reliance upon the Judge's reasoning as to the time at which insolvency set-off takes effect. York's principal objection to the Judge's construction of Rules 2.85 and 2.95, in which insolvency set-off has effect as at the date of administration, is that any retrospective effect would cut-across contractual set-offs effected prior to the issue of a notice of intent to distribute: see paragraph 45 of York's submissions.

20. York however errs in its criticism of the Judge. The requirements of Rule 2.85(3) that the "*account shall be taken as at the date of the [notice of proposed distribution]…and the sums due from one party shall be set off against the sums due from the other*" permits any contractual set-offs effected prior to the issue of a notice of intention to distribute to have and remain in effect. This because a set-off perfected prior to notice of a proposed

distribution eliminates, as regards the debts set off thereby, the account to be taken as at the date of the notice. If however the claims and cross claim exist as at that date, the account will be taken and given effect as from the date of administration.

21. Furthermore, the Judge's conclusion that insolvency set-off operates with retrospective effect is consistent with the need to achieve a *pari passu* distribution. The effect of York's contrary position would be that a creditor could, after the commencement of LBIE's administration, 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.

Supplemental Issues 4 and 5: SCG's appeal against David Richards LJ

22. The SCG appeals against the conclusion of David Richards LJ on Supplemental Issues 4 and 5 and contends as follows:

    (1) David Richards LJ was wrong to find that (i) the CRA had the effect of releasing non-provable claims to interest (including non-provable claims for interest on Currency Conversion Claims); (ii) the CDDs had the effect of releasing non-provable claims to interest;

    (2) Alternatively, the Joint Administrators should be directed not to enforce such releases.

23. It will become apparent from the analysis in the following paragraphs that the arguments developed by the SCG fail to pay any or any sufficient regard to the unambiguous wording used in the CRA and the CDDs or the relevant context in which the CRA and the CDDs were entered into.

24. Accordingly, Wentworth's position is that the Judge was correct to find that (i) the CRA and the CDDs had the effect of releasing non-provable claims to interest and that the Joint Administrators should enforce the terms of the releases: see *Waterfall IIB*, at [116], [147], [162] [B1/2/29, 37, 40] and *Waterfall Supplemental Issues*, at [58]-[61] [A2/14-15]; and (ii) the CRA had the effect of releasing non-provable claims to interest on

Currency Conversion Claims and that the Joint Administrators should enforce the terms of the releases: see *Waterfall Supplemental Issues*, at [64]-[68] [A2/1/16]. Moreover, as set out in its appeal against (part of) Supplemental Issue 5, Wentworth's position is that the Judge should have gone further and found that the CDDs had the effect of releasing non-provable claims for interest on Currency Conversion Claims and that the Joint Administrators should enforce the terms of such releases.

CRA

25. The genesis of the CRA is set out at the SAF, [29]-[48] [S/6/6-9] and *Waterfall IIB*, at [20]-[38] [B1/2/6-10].

26. Similar to the practice of providing an explanatory statement along with a scheme of arrangement, the CRA was provided to creditors along with a detailed circular (the "Circular") explaining its purpose and key terms. A copy of the Circular is at [B3/11] and a number of the key provisions are highlighted in *Waterfall IIB*, at [77]-[100] [B1/2/18-24].

27. The basic architecture of the CRA, so far as it affects creditors' unsecured claims, is that creditors waive and release all Claims (very broadly defined) against LBIE in exchange for the right to claim as new obligations of LBIE the net amount determined to be due to them under the CRA.

28. This is achieved by the following provisions:

    (1) **Clause 4.2**: each signatory agrees to "*waive and release…all Claims…in respect of any Financial Contract*" [B3/11/118].

    (2) "*Claim*" is defined very broadly as a claim in law or in equity "*of whatsoever nature*" [B3/11/238], and includes claims arising from the termination of any contractual obligation, or any failure of a person to perform any contractual obligation, or any claim for loss computed by reference to value which may have been available had an obligation been duly performed in a timely manner, or otherwise.

(3) Such released claims are defined (with other released claims) as the "Released Claims" [B3/11/118, 256].

(4) **Clause 4.4.2:** "*All Signatories shall have their Released Claims exchanged for the following as appropriate…*" [B3/11/119]:

(a) "*the right to have their Net Contractual Position, Allocations, Distributions and Appropriations determined on the basis set out in this Agreement*" ("Net Contractual Position" means the Close-out Amount, i.e. the amount payable on termination of a Financial Contract: clause 24.2);

(b) "*the right to claim as a new obligation of the Company their Net Financial Claim (if any)*" ("Net Financial Claim" means a "*Net Contractual Position in respect of a Signatory expressed as a positive number will represent an amount due and owing by the Company to that Signatory, which shall constitute an ascertained unsecured claim of that Signatory in the winding up of the Company or any distribution of the Company's assets to its unsecured creditors*"; and

(c) "*an Ascertained Claim (if any) for such amount as is determined under this Agreement*" (An "Ascertained Claim" is "*an ascertained, unsecured claim in the winding up of the Company or any distribution of the Company's assets generally to its unsecured creditors.*").

(5) Such claims are defined as the "*New Claims*".

(6) **Clause 24.1**: "*All Close-out Amounts shall be denominated in US dollars*." It stipulates a spot rate for the conversion of non-US dollar amounts at close of business on the date of the Administrators' appointment.

(7) The Net Financial Claim so ascertained was to be set off against (any) Trust Assets held for the Creditor.

29. Express provision is made for interest accruing on creditors' claims as follows:

(1) **Clause 25.1** [B3/11/154]: "*For the avoidance of doubt no interest shall accrue on any Net Financial Claim, save to the extent provided in Rule 2.88 of the Insolvency Rules*".

(2) **Clause 20.4.7** [B3/11/144]: "*[I]n determining the Close-out Amount in respect of a Financial Contract, no interest shall accrue on any unpaid liability of [LBIE] from the Administration Date save to the extent that such interest would accrue under Rule 2.88 of the Insolvency Rule.*"

30. Wentworth contends that the clear and unambiguous wording of the CRA removes the right of creditors to claim interest on their claim against LBIE save to the extent that they are entitled to interest under Rule 2.88.

31. First, the nature of "*Claims*" released is clearly broad enough to include a claim for interest.

32. Second, the only claim which remains after execution of the CRA is the Net Financial Claim (described as a new obligation of LBIE in clause 4.4.2 [B3/11/119]), and clause 25.1 [B3/11/154] states expressly that no interest shall accrue on that claim save as provided under Rule 2.88.

33. Third, the effect of clause 20.4.7 [B3/11/144] is as follows:

(1) It is part of clause 20.4 which sets out the Overriding Valuation Provisions, pursuant to which the Close-out Amounts due to all creditors are to be determined;

(2) It applies to the determination of a Close-out Amount, i.e. to the calculation of the amount due upon termination of a Financial Contract. The Close-out Amount is required to be determined so far as possible in accordance with the provisions of the relevant Financial Contract (clauses 21.1 and 21.2 [B3/11/145]);

(3) The mechanism for determining a Close-out Amount under a Financial Contract will often require amounts due either way under the contract to be netted off as at the calculation date;

(4) Where Clause 20.4.7 states that in determining the Close-out Amount "*no interest shall accrue on any unpaid liability*" it can only be referring to interest which the relevant contract provides should be calculated on unpaid liabilities up to the calculation date, and thus is taken into account in the netting process to arrive at the Close-out Amount;

(5) In other words, it can only be referring to interest which the Financial Contract requires to be paid;

(6) The fact that it provides a saving for the accrual of such interest, to the extent it would accrue under Rule 2.88, confirms that such interest does not *otherwise* accrue.

34. Fourth, the consequence of the above provisions is that any contractual right to interest on the creditor's sole remaining claim against LBIE is removed, as part of the overall compromise intended to provide finality as between the creditor and LBIE. Accordingly, the essential pre-requisite for a non-provable claim to interest, namely the remission to contractual rights, is removed.

35. Fifth, to the extent that it is contended that any right to interest is not premised upon remission to a contractual right to interest, then such right is clearly released by the wide definition of Claims released, and by the bar in clause 25.1 [B3/11/154] "*for the avoidance of doubt*" of *any* interest accruing on the Net Financial Claim after the Date of Administration, save to the extent provided in Rule 2.88.

36. Accordingly, the Judge was correct to find that the CRA had released non-provable claims for interest (including non-provable claims for interest on Currency Conversion Claims).

<u>CDDs</u>

37. Wentworth's case in relation to the purpose of the CDDs is contained at paragraph 6 of its appeal skeleton against the declarations in *Waterfall IIB* [B1/8/3-5].

38. The key release provision in the CDDs (insofar as interest is concerned) is as follows[2]:

> "*[LBIE] and the Creditor irrevocably and unconditionally agree that notwithstanding the terms of any contract to which the Creditor and [LBIE] are party (including the Creditor Agreement):*
>
> *2.1 the Creditor shall have an Admitted Claim in an amount equal to the Agreed Claim Amount;*
>
> *2.2 the Admitted Claim, shall be fixed at the Agreed Claim Amount, and shall constitute the Creditor's entire claim against [LBIE];*
>
> *2.3 save solely for the Admitted Claim, the Creditor and [LBIE] and the Administrators, are hereby each irrevocably and unconditionally released and forever discharged from any and all losses, costs, charges, expenses, Claims (including all Claims for interest, costs and orders for costs), demands, actions, causes of action, liabilities, rights and obligations (including those which arise hereafter upon a change in the relevant law) to or against each other and howsoever arising, whether known or unknown, whether arising in equity or under common law or statute or by reason of breach of contract or in respect of any tortious or negligent act or omission (whether or not loss or damage caused thereby has yet been suffered) or otherwise, whether arising under the Creditor Agreement or not, whether in existence now or coming into existence at some time in the future, and whether or not in the contemplation of the Creditor and/or [LBIE] and/or the Administrators on the date hereof; and*
>
> *2.4 the Creditor will not take any steps to prove for, or to Claim for, any debt in the Administration (or other insolvency process) of [LBIE], or otherwise bring any Claim, action, demand or issue (or continue) any Proceedings against [LBIE] and/or the Administrators (or any of them) in any jurisdiction in respect of any and all Claims and matters as are referred to in Clause [??] above.*"

39. It can be seen that Clause 2.3 clearly and unambiguously releases any right which the creditor may have had to a non-provable claim for interest. The release clause expressly includes "*all claims for interest*" among those released.

40. In light of the very broad words of release summarised above, the essential foundation of a non-provable claim to interest, namely the survival of (and remission to) the creditor's original contractual or other pre-commencement right to be paid interest, is destroyed.

[2] Later versions of the CDDs included an express carve-out of the right to Statutory Interest. Such a carve-out simply makes express what is already implicit in the release provision and, if anything, strengthens the conclusion that any other claims for interest must have been intended to be within the clear words of the release provision.

41. Accordingly, the Judge was correct to find that the CDDs had released non-provable claims for interest.

Release of interest claims in the U.S. bankruptcy

42. The approach which is contended for by the SCG in relation to non-provable claims for interest can be contrasted with the holding of the U.S. Bankruptcy Court (Chapman J) in response to a claim for post-petition interest against Lehman Brothers Commercial Corporation ("LBCC") made by creditors (whose claims were acquired by assignment from Lehman Re). The claim in question was submitted under the terms of a plan pursuant to Chapter 11 of the U.S. Bankruptcy Code (the "Plan") which had been confirmed in relation to the joint estate of Lehman Brothers Holdings International ("LBHI") and LBCC. The claim was rejected by Chapman J insofar as it asserted contractual claims to interest in excess of the federal statutory rate. Such claims were contrary to the terms of a settlement agreement made between Lehman Re and LBCC and others prior to the plan becoming effective and prior to the assignment by Lehman Re of its claims. In summary:

(1) The creditors asserted a right to post-petition interest at an alleged contractual rate (under the agreement referred to as the "GCCM") of GBP LIBOR as at 3 October 2008 (5.4%).

(2) The claim was asserted pursuant to the settlement agreement which had provided for the admission of a proof of debt as an allowable claim under the Plan. The U.S. Court was therefore construing a document equivalent in its function to a CDD. Further, it did so in circumstances in which admitted claims had been paid in full.

(3) The Judge rejected the claim for contractual interest, at paragraph 13 to 17, on the basis that the settlement agreement had released the underlying contractual right to interest:

> "*13. [E]ven assuming arguendo that the GCCM constituted a contract reflecting a rate of interest, the Court finds that, as a matter of law, the Settlement Agreement rejects, terminates, releases, and supersedes the GCCM.*

14. The Settlement Agreement unambiguously reflects that, pursuant to its terms, Lehman Re relinquished any and all rights it may have had against LBCC based on any contract other than the Settlement Agreement.

…

16. While the Holders do not allege that the Settlement Agreement is invalid, they nonetheless assert that the foregoing provisions in the Settlement Agreement are merely "boilerplate" and do not serve to "retroactively nullify provisions in prepetition agreements concerning the accrual of interest." See Response at ¶¶ 36-38. The Court disagrees.

17…The Court finds that, even if a prior contract between Lehman Re and LBCC had existed, the operative language in the Settlement Agreement wholly eliminates the Holders' entitlement to make a demand for postpetition interest based on a rate in such contract. Thus, the Settlement Agreement is the only contract relevant for purposes of calculating postpetition interest due and owing on the Allowed Claim."

(4) As a result, the Judge awarded post-petition interest at the federal statutory rate, which she held to be the federal judgment rate in effect on the day that LBCC commenced its Chapter 11 case (1.59%).

43. It can be seen that the U.S. Bankruptcy Court thereby gave effect to the clear wording of the Settlement Agreement in the way that Wentworth submits that this Court should give effect to the clear wording of the CDDs and the CRA.

Ex parte James / Para 74 Sch B1 Insolvency Act 1986

44. The SCG's essential argument that any release of rights to non-provable interest should be restrained is that the Administrators owed a duty to act for the purposes of the administration, specifically to distribute in accordance with the statutory scheme and to act in a quasi-judicial capacity. This, it is said, distinguishes the CDDs and the CRA from other commercial contracts, which agreements, being the product of free and fair negotiations, can be enforced in accordance with their terms.

45. Wentworth does not repeat its response to the above argument which is set out in full in its appeal against the declarations in *Waterfall IIB*, at [54]-[81] [B1/8/18-25]. Its case, in summary, is that the SCG is mistaken in its characterisation of the CDDs and the CRA. Each represents a free and fair agreement made, on the one hand, by the creditor in

question, and on the other hand, by the Administrators acting for the general estate, i.e. for all other creditors. The Administrators had a proper motive to enter into the CDDs and the CRA, namely to achieve a quicker and cheaper distribution of the estate and a certain resolution of *that* creditor's claims against the estate – both known and unknown, and based on whatever legal theory. There is no suggestion of any breach of duty on the part of the Administrators at the time the agreements were made and, just as the meaning of those agreements cannot change upon the emergence of a surplus, neither can the propriety of entering into those agreements.

46. In seeking to characterise the matter otherwise, the SCG derives no assistance from the quasi-judicial capacity in which an office-holder is to act in adjudicating upon a proof of debt. First, the entry into a compromise is not an adjudication. Secondly, a judge does not negotiate or compromise with litigants. The quasi-judicial role of an officeholder is irrelevant to the question of whether releases properly applicable by their terms are enforceable.

47. None of the few reported cases in which the rule in *Ex parte James* has been considered (let alone applied) concerned a free and fair agreement made by an officeholder. That is, an agreement made without the presence of any vitiating factor or which is rendered unenforceable by the operation of a statutory overlay (such as the Unfair Contract Terms Act 1977). To hold such an agreement to be unfair in a sense that would attract the rule in *Ex parte James* is to fail to recognise the fairness of upholding a bargain that has been freely made. It represents both a substantial extension of the rule in *Ex parte James* and the disregard of the morality of a promise. Where an agreement is free and fair, it is just to hold the parties to its objective meaning.

48. This is especially so in the context of mutual releases. The non-enforcement of a release of claims to non-provable interest on proved debt is a one-way non-enforcement. The release however means that LBIE cannot now assert any claims against the creditor that it may have overlooked, whether because of an error of fact or a mistake of law. Such matters would ordinarily provide a basis for adjusting a proof and claiming for restitution. In the context of a surplus, any such claim could properly be liquidated by a set off or withholding against a claim to that surplus. The mutual release however denies that

possibility to LBIE. Notwithstanding that, the Judge was prepared to order the non-enforcement of releases of which LBIE had the benefit.

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