IN THE COURT OF APPEAL **A2/2015/3762**

ON APPEAL FROM

No 7942 of 2008

THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

COMPANIES COURT

Before: Mr Justice David Richards

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

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

(1)WENTWORTH SONS SUB-DEBT S.A.R.L.

Appellant

- and -

(1) ANTONY VICTOR LOMAS

(2) STEVEN ANTHONY PEARSON

(3) PAUL DAVID COPLEY

(4) RUSSELL DOWNS

(5) JULIAN GUY PARR

(as the joint administrators of Lehman Brothers International (Europe))

(6) BURLINGTON LOAN MANAGEMENT LIMITED

(7) CVI GVF (LUX) MASTER S.A.R.L.

(8) HUTCHINSON INVESTORS, LLC

Respondents

SENIOR CREDITOR GROUP'S SKELETON ARGUMENT IN RESPONSE TO WENTWORTH'S PART B APPEAL

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A. INTRODUCTION

1. This Skeleton Argument is filed on behalf of the 6th to 8th Respondents (the "Senior Creditor Group") in response to the appeal by Wentworth against two of the declarations granted by David Richards J reflecting the conclusions that he reached in his judgment in *Waterfall IIB* [2015] EWHC 2270 (Ch) (the "Judgment").

2. This appeal concerns the effect of certain standard form post-administration contracts that creditors of LBIE were required to enter into to have their claims admitted to proof. Those documents are known as Claims Determination Deeds ("CDDs").

3. At first instance David Richards J held, amongst other things that:

   (1) None of the CDDs entered into between LBIE and its creditors had, as a matter of construction, the effect of releasing creditors' rights, in the event of a surplus, to payment of the full amount of any foreign currency entitlement (Declaration (i)).

   (2) If, contrary to this, any CDD did have such an effect, the Administrators would be directed by the Court, under the principle in *ex parte James* (1874) LR 9 Ch App 60 and under Schedule 1, paragraph 74 to the Insolvency Act 1986 (the "1986 Act") not to enforce such releases (Declaration (iv)).

4. Wentworth seeks to appeal those declarations insofar as they relate to CDDs in which the Agreed Claim Amount is expressed in sterling. The Senior Creditor Group seeks to uphold them for the reasons that the Judge gave and for the further reasons set out in its Respondents' Notice.

B. BACKGROUND

5. The Administrators' actions and the CDDs need to be construed in the light of the legal and factual background. The relevant facts are summarised in the Judgment. They are also set out in two Statements of Agreed Facts in relation to Issue 36 and Issue 36A.

(1) Statutory regime for distributions

6. The powers and duties of the Administrators are set out in the 1986 Act. Following amendments made by the Enterprise Act 2002, Schedule B1, paragraph 65 of the 1986 Act

permits the administrator of a company to make a distribution to unsecured creditors with the permission of the court in accordance with the Insolvency Rules 1986 (the "Rules").

7. On 2 December 2009, on the application of the Administrators, Mr Justice Briggs made an order giving the Administrators permission under Schedule B1, paragraph 65 to make a distribution to LBIE's unsecured creditors (the "Order") (Judgment [39]). The Order also gave the Administrators liberty to issue a notice pursuant to Rule 2.95(1) which informed creditors that the Administrators intended to make a distribution. The effect of the Order and Notice was to bring into effect Chapter 10 of the Rules, comprising Rules 2.68 to 2.105. That chapter, which deals with distributions to creditors, contains the rules for proving a debt and quantifying claims, in similar terms to the rules governing such matters in a winding up.

8. Rule 2.88 contains provisions dealing with claims for interest. That rule, which was considered by David Richards J in the *Waterfall I Part A* judgment [2015] EWHC 2269, entitles creditors, in the event of a surplus, to Statutory Interest on their claims in respect of the period since the date that the company went into administration, in priority to the surplus being used for any other purpose.

9. Rule 2.86, deals with debts in a foreign currency. It provides that, for the purposes of proving a debt incurred or payable in a currency other than sterling, the amount of the debt shall be converted into sterling at the official exchange rate prevailing on the date when the company entered administration. The effect of Rule 2.86 in relation to debts in a foreign currency was confirmed in the *Waterfall I* proceedings, by David Richards J at [2014] EWHC 704 at [88]-[111] and by the Court of Appeal at [2015] EWCA Civ 485, see especially per Briggs LJ at [136]-[166] and per Moore-Bick LJ at [247]-[260]. In short:

    (1) For the purposes of proof, Rule 2.86 requires the mandatory conversion of claims in a foreign currency into sterling at the official exchange rate prevailing at the date when the company went into administration.

    (2) In the event that a creditor with a claim denominated in a foreign currency receives, by way of dividend, less than the full amount that he is owed, as a result of his claim having been converted into sterling by reference to the exchange rate as at the date of administration for the purposes of proof, the effect of the statutory scheme is that he has a non-provable claim for the balance which is payable, in the event of a surplus, in priority to any distributions to shareholders. This is often referred to as a

"currency conversion claim", although in fact it simply represents the unpaid balance of the underlying claim which has not been discharged by the payment of sterling dividends.

(3) Moore-Bick LJ at [252] stated that "*the justice of the case*" lies in allowing "*a foreign currency creditor to recover the true value of his debt* …" and Briggs LJ commented at [154] that the contrary conclusion "*would merely cause a wholly unnecessary injustice, unsupported by the need to fulfil any policy requirement*".

10. The Administrators are under a duty to distribute LBIE's assets in accordance with the statutory scheme and amongst those entitled to them; see e.g. *Austin Securities v Northgate & English Stores Ltd* [1969] 1 WLR 529. Furthermore, in determining whether to accept or reject proofs of debt, administrators, like liquidators, act in a quasi-judicial capacity according to standards no less than the standards of a court or judge; see e.g. *Menastar Finance Limited* [2003] BCC 404 at [44] and *Tanning Research Laboratories Inc v O'Brien* (1989-1990) 169 CLR 332 (HCA) per Brennan J and Dawson J at 338-341. In short, when adjudicating on a proof of debt, their duty is to determine the appropriate amount of a creditor's claim, not to act in an adversarial way to minimise claims.

11. The ordinary process of proof and adjudication of claims and the making of any distribution in accordance with the Rules does not affect creditors' rights, under the statutory scheme, to payment of Statutory Interest or the unpaid balance of any foreign currency claims in the event of a surplus.

(2) Communications with creditors

12. Following the making of the Order, the Administrators informed creditors that they were taking steps to make a distribution, by way of an interim dividend, in accordance with the Rules and the Order. The Administrators' communications to creditors, which also form part of the background to construing the CDDs, emphasised, amongst other things, that claims would be proved and adjudicated in accordance with the Order in a way that they hoped would expedite the process and make it possible to declare an earlier interim dividend. The Judgment refers to such communications at [41]-[45].

13. In their third Progress Report dated 14 April 2010, the Administrators referred to the Order and to the notice under Rule 2.95 and stated that "*LBIE is now able to agree claims and make distributions to creditors in accordance with the Order granted by the High Court on 2 December*

2009". The Report emphasised that "*A claim valuation process which is fair, transparent and recognises market principles sits at the heart of the approach*", and said that a key aspect of the case was developing a process for formally admitting unsecured claims which could be implemented to "*simplify and accelerate claim admission and asset distribution*", explaining that there were likely to be major benefits to those creditors who engaged with the process early, including the ability to participate in the proposed interim dividend.

14. On 16 June 2010 the Administrators provided creditors with an update of their current proposal to comply with the Order, which by now was called the "*Consensual Approach*":

    (1) The proposal would involve the Administrators determining the claim of each financial trade creditor "*using a standard comprehensive set of processes, data sources and valuation methods, all subject to comprehensive review and universally applied to all relevant unsecured creditors*".

    (2) The approach was described as an innovative mechanism "*which will enable the claims to be determined in an expeditious manner, resulting in significant time and cost savings*" and which would mean that "*the timing at which cash distributions can be made will be accelerated materially*", compared to having to adjudicate on claims advanced by creditors potentially using different data and valuation methods on a case by case basis.

    (3) The update stated that the Administrators were confident that if this approach was implemented it would provide very considerable benefits to creditors, including "*the rapid determination of an agreed and formally admitted claim*", "*an acceleration to the timing of a cash dividend*" and "*the potential for enhanced overall realisations in the LBIE estate as resources are focussed on asset realisation*". Unsecured creditors were "*encouraged to embrace this initiative, to provide LBIE with their claims as a matter of priority and to respond to LBIE requests and enquiries*".

    (4) The Administrators stressed that they were "*committed to finding a … solution for the rapid determination of creditor claims that is fair, market acceptable and pragmatic*".

15. There was nothing in the Administrators' update or in the proposed Consensual Approach to suggest that the normal operation and effect of the Rules governing the quantification of claims, including in particular Rules 2.86 and 2.88, would be affected.

16. The Administrators' approach to complying with the Order was further explained to creditors in their fourth Progress Report dated 14 October 2010. The report was referred to in the Judgment at [74].

    (1) The Report stated that "*Under UK insolvency legislation, a creditor wishing to claim against an insolvent estate must submit a compliant [Proof of Debt]*" and that "*When a dividend is declared, only creditors who have submitted a [Proof of Debt] in accordance with UK insolvency law and have an admitted claim, will be eligible to be paid*". The Consensual Approach was "*designed to accelerate the agreement of unsecured claims with a view, ultimately, to expediting distribution payments*", reassuring creditors that the Administrators were seeking to treat creditors "*consistently, and are not simply imposing a discount or 'haircut' to their claims*".

    (2) Section 6.2 of the Report dealt at some length with foreign currency claims. It referred to the Order of Briggs J giving the Administrators permission to make a distribution and to the Notice and stated that "*The effect of this was to convert LBIE's administration into a Distributing Administration*" and that it also brought into effect Rule 2.86. It explained that "*Accordingly, applying Rule 2.86 and general principles of UK insolvency law all unsecured creditor claims … are to be converted into sterling as at 15 September 2008 for the purposes of having a proven claim against LBIE*" (see the Judgment at [72]-[75] which comments on this aspect of the Report and sets out the relevant passage at greater length). As the Judge said at [75] "*This important section makes clear that the conversion of foreign currency claims is to be carried out in accordance with the statutory regime contained in rule 2.86*". The statutory regime in Rule 2.86 converts all foreign currency claims into sterling by reference to the exchange rate at the date of administration solely "*for the purpose of proving a debt*". As the Judge and the Court of Appeal in *Waterfall I* confirmed, it does not operate to extinguish a creditor's right to payment of the balance of such a claim in the event of a surplus.

    (3) The Report encouraged creditors to submit Proofs of Debt as soon as possible, explaining that "*Alternatively, creditors can elect to have their claims reviewed in detail, albeit this will take significant time to conclude and, in exceptional cases, may require court adjudication*" and this would be "… *likely to take many years to conclude*".

17. The fourth Progress Report contains no suggestion that the Administrators' decision to adopt the Consensual Approach with the aim of accelerating the agreement of claims and the making of a distribution would or could result in creditors giving up rights to payment of Statutory Interest or the balance of any foreign currency claim in the event of a surplus.

To the contrary, it expressly indicated that Rule 2.86 would operate in accordance with its terms.

18. The Administrators subsequently provided creditors with a number of further Progress Reports which reinforced the messages provided in their earlier reports. Their fifth Progress Report dated 14 April 2011 recorded that they had started to issue claims determinations using the Consensual Approach, emphasising, amongst other things, that in order to be eligible for a determination creditors needed to have submitted a Proof of Debt that was compliant with UK insolvency legislation and that any offer was non-negotiable, although creditors were free to accept or reject it, but that any creditor who chose not to accept the offer would have their claims reviewed in detail on a bilateral basis at a later date (Judgment [76]).

(3) The proof of debt process and the Claims Portal

19. The Administrators developed an online process for proof of claims, which was referred to as the "Claims Portal". Their fourth Progress Report stated that by 14 October 2010 this had been launched "*to facilitate the submission of Proof of Debt forms by unsecured creditors*" and creditors were encouraged to submit their claims through the Claims Portal.

20. When construing the various CDDs, it is also important to understand the way in which creditors proved their claims through the Claims Portal and the Administrators determined and agreed those claims, before the result of that determination was formalised in a CDD.

21. The basic process, which was referred to in the Judgment at [150] and [169], was the same for all unsecured claims, regardless of which type of CDD the creditor was subsequently asked to enter into. In short:

    (1) Creditors were required to submit proofs of debt, "*complying with the Insolvency Act and Rules*", in what the creditor considered to be its currency of underlying entitlement on the Claims Portal.

    (2) The Administrators then made an offer in respect of the creditor's claim, by reference to the claims contained in the proof of debt, which was also ordinarily in the currency in which the corresponding proof of debt was denominated. Where a creditor asserted a number of claims in a variety of foreign currencies, the Administrators' determination was expressed in a single currency (usually the currency of the largest claim) (Judgment [148]). Creditors were informed by the

Administrators that the amount at which the Administrators proposed to agree the claim was non-negotiable.

(3) A draft standard form CDD was typically sent by the Administrators at the same time as the LBIE determination, in which the amount of the agreed or admitted claim was left blank.

(4) If the Administrators' offer was accepted, LBIE and the creditor entered into a CDD to formalise the agreement. The draft CDD was typically updated by the Administrators and sent to the creditor by e-mail as a final version for signing with the agreed amount of the claim included. Where the creditor's underlying claim was in a foreign currency, the figure included in the CDD was either in a foreign currency or in sterling (after conversion under Rule 2.86) depending on the form of CDD used by the Administrators (as explained below).

22. In the event that a creditor was not willing to agree the Administrators' determination, its proof of debt would not be agreed and admitted for the purposes of any dividend. Instead, such creditors were informed that their claims would be determined on a bilateral basis at some potentially much later date.

(4) The development of different forms of CDDs

23. As originally announced, it was anticipated that a determination of a creditor's claim, once accepted by the creditor and inserted in the CDD executed by it, would constitute an admitted unsecured claim in the administration (Judgment [46]). However, for various reasons, the Administrators developed a variety of different forms of CDDs. The Judgment summarises the position at [46]-[56] and [136]. The three principal forms of CDD (each of which, as explained below, varied over time) are described below. When construing the effect of the CDDs it is also important to have regard to the development of the various forms and the reasons for their adoption, and to the purpose that they were intended to serve.

(5) The purpose of the CDDs

24. There are a number of important background factors and considerations relevant to the construction of all of the various types of CDDs. The Judge summarised these in his Judgment at [64]-[72]. In particular:

(1) The CDDs were not ordinary commercial bilateral agreements but were made by the Administrators for the purposes of making a distribution in accordance with the Order and in pursuance of their statutory duty to act in the interests of the creditors as a whole (Judgment [65], [68] and [184]).

(2) The principal purpose of the CDDs was as part of a process to simplify and accelerate the ascertainment of unsecured claims against LBIE and the payment of dividends in respect of them (Judgment [43]-[44] and [69]). A release or modification of the rights of creditors to Statutory Interest and a release of currency conversion claims were wholly irrelevant to these purposes (Judgment [69]).

(3) Statutory Interest and currency conversion claims are qualitatively different from other claims, as they arise exclusively out of or in relation to the claims admitted to proof. Statutory Interest is parasitic on a proved debt and currency conversion claims represent the unpaid part of the underlying claim, although they are not provable and can only be paid in the event of a surplus.

(4) There is no indication in the Progress Reports, which the Administrators produced in accordance with their duty to explain clearly to creditors the purposes and intended effects of the Consensual Approach, or in any other formal communications made to creditors generally, that the CDDs would have any effect on creditors' rights to Statutory Interest or currency conversion claims in the event of a surplus (Judgment [71]).

(5) So far as the treatment of unsecured claims was concerned, the operation of the CDDs would be subject to those provisions of the 1986 Act and the Rules which were mandatory, including the requirement under Rule 2.85 to convert claims into sterling for the purposes of proof (Judgment [72]-[73]).

25. The CDDs were used to provide the Administrators with finality to expedite and facilitate the payment of dividends on proved debts. They did this by identifying the underlying claims in respect of which creditors wanted to prove, and releasing all other claims, thereby preventing creditors from being able to challenge the determination of their provable claims in court or amend or subsequently supplement their proof of debt to introduce further claims as they would otherwise have been entitled to do under the Rules (see Rules 2.79 and 2.101) (Judgment [165]).

26. When the Consensual Approach was initiated and developed, and for a substantial period afterwards, the Administrators had not communicated any expectation that LBIE would or might be able to pay provable claims in full, let alone Statutory Interest or non-provable currency conversion claims (Judgment [71]). Many CDDs were therefore entered into at a time when the statutory regime was concerned with (and the duties and functions of the Administrators directed towards) the ascertainment, admission and payment of dividends on provable claims, and without any focus being placed on the likelihood of a surplus or on creditors' rights in the event of a surplus. As the Judge said, if it had been anticipated that there would be a surplus "*It is inconceivable that … the administrators would have sent out a circular or published details of the … CDDs which did not describe the effect of the … CDDs on such claims or that, if asked, the court would have permitted them to do so*" (Judgment [71]).

(6) Agreed Claim CDDs

27. The first type of CDD was the Agreed Claims CDD, which started to be used from 30 November 2010 onwards (Judgment [48]-[49]). They have also recently been used by the Administrators.

28. At the time Agreed Claims CDDs started to be used, it was unclear which of LBIE's creditors had client money claims, unsecured claims or both. This in turn created uncertainty over the correct value of creditors' provable claims (Judgment [46]).

29. Agreed Claims CDDs accommodate that uncertainty by implementing a two stage process for the agreement of claims and their admission to proof (Judgment [46]-48]). In particular, under Agreed Claims CDDs:

    (1) Creditors' unsecured claims are quantified and agreed in the currency of the underlying entitlement, in accordance with the Consensual Approach (Judgment [150]) (see paragraphs 19-22 above).

    (2) Those claims are recorded in the Agreed Claims CDDs as an "*Agreed Claim Amount*" in the currency of the underlying entitlement (Judgment [138]). In cases where the creditor had claims in more than one currency, the Agreed Claim Amount was usually expressed in the currency in which the largest element of the aggregate claim is denominated (Judgment [148]).

    (3) In order to accommodate the possibility that a creditor might be entitled to assert a client money claim, the Agreed Claim Amount is not immediately admitted for

dividends. Instead, it is admitted for dividends (as an "*Admitted Claim*") following conversion into Sterling pursuant to Rule 2.86 either: (a) upon determination by LBIE of the creditor's client money claims; or (b) upon the creditor electing to release or assign its client money claims (Judgment [141]).

30. In the absence of this two-stage process, the Administrators would have been unable to proceed with the claims agreement process until there was greater certainty regarding the extent of client money entitlements, which would have delayed the payment of dividends.

31. The Judge considered the effect of Agreed Claims CDDs at [148]-[154]. He held that a creditor who enters into such a deed does not give up any currency conversion claim:

(1) A creditor with an entitlement to be paid in a foreign currency does not lose any currency conversion claim that he might otherwise have had merely by recording the foreign currency amount at which his claim had been determined and agreed as the "*Agreed Claim Amount*" in an Agreed Claims CDD. Thus, for example, a creditor with a claim in USD, who entered into an Agreed Claims CDD which expressed his agreed claim in USD, did not release his right to payment of any unpaid balance of that sum in the event of a surplus. This was accepted by Wentworth.

(2) However, Wentworth argued below that a creditor who had claims in more than one foreign currency (say, Euro, Yen and USD) and whose "*Agreed Claim Amount*" was expressed in, say, USD, as the currency of the largest entitlement, would lose any currency conversion claim that it might have had in respect of its underlying entitlement to payment in Euro and Yen, and would only retain a currency conversion claim to the extent that its underlying entitlement was in USD (Judgment [151]). The logic of its argument was that the creditor had agreed that his only claim was for the Agreed Claim Amount (i.e. which was expressed in USD) and that he had agreed to release all other claims (i.e. his claims in Euro and Yen). The Judge rejected this argument (Judgment [152]-[154]), saying that "*there is no possible commercial justification for this different treatment of creditors with claims in more than one foreign currency*" and that "*there are no clear words in the Agreed Claims CDD requiring this frankly absurd result*". As the Judge held, the Agreed Claim Amount in such a case was expressed in USD simply because "*it was intended to use one currency of account for arriving at a net position*".

(3) A creditor whose "*Agreed Claim Amount*" was recorded in a foreign currency also did not lose his entitlement to be paid in the relevant foreign currency merely because, before his claim could be admitted for dividends, it would first have to be converted into sterling pursuant to Rule 2.86 (Judgment [151]). This was also accepted by Wentworth.

32. The first and third aspects of the Judgment were therefore common ground below and Wentworth does not now seek to appeal the Judge's conclusion on the second aspect. However, Wentworth now contends on this appeal that any creditor who had claims denominated in different currencies but whose Agreed Claim Amount was expressed in sterling, because that was the currency of its largest claim, thereby lost any currency conversion claim (see Wentworth's Skeleton Argument at [52]). This is addressed further below.

(7) Admitted Claims CDDs

33. The Administrators started to introduce Admitted Claims CDDs in or around April 2011 (Judgment [50]) after the position in relation to client money claims had become slightly clearer.

34. Admitted Claims CDDs were used, rather than Agreed Claims CDDs, where the Administrators considered that there was little or no possibility of the creditor having a client money claim (Judgment [50]). In those circumstances, the two stage process of agreeing and admitting claims that was adopted in the Agreed Claims CDD was not necessary, as there was no need to address any uncertainty as to any client money claim or, as a result, the amount of the creditor's claim which could be admitted for dividends.

35. As a result, the amount of the Administrators' determination agreed by the creditor, and expressed in the Admitted Claims CDDs in sterling (the "*Agreed Claim Amount*") is also the amount admitted to proof as an "*Admitted Claim*".

36. The difference between the two types of CDD therefore was that, where the CDD used was an Agreed Claims CDD, the agreed amount of the claim was typically expressed in the currency of the underlying obligation, pending later conversion into sterling pursuant to Rule 2.86. Where, however, that was not necessary, the CDD used was an Admitted Claims CDD, in which the agreed amount of the claim was the amount of the determination following conversion into sterling pursuant to Rule 2.86.

37. The Judge considered the effect of Admitted Claims CDDs at [163]-[169]. He held that a creditor who entered into such a deed also does not give up any currency conversion claim. There are three parts to his reasoning:

(1) It was important once again to have regard to the context in which the CDDs were made (Judgment [165]). Their purpose was to accelerate the payment of dividends on proved debts, by using standardised methodologies and a speedier procedure for quantifying claims. It was also important that the Admitted Claim should not be the subject of challenge in court or subsequently supplemented by further claims which could be the subject of proof. As the Judge said, "*A release of currency conversion claims arising from the contractual claims accepted as Admitted Claims is wholly irrelevant to these considerations*" (Judgment [165]).

(2) The construction for which Wentworth contended would result in discrimination between claims "*to an extraordinary extent without any principled justification and, at least until a late stage, without any understanding or appreciation by any party, creditor or administrator, that this could be their effect*" (Judgment [166]). There is, as the Judge said, no possible reason why the Administrators should be understood to have adopted a process which, for example, required a creditor who signed an Admitted Claims CDD to give up any currency conversion claim, when a creditor who signed an Agreed Claims CDD or simply proved his claim in the ordinary way, did not. This is particularly so, given that there was a period during which both Agreed Claims CDDs and Admitted Claims CDDs were used, depending on whether it was thought that the creditor had or might have a client money claim (Judgment [167]).

(3) When construing the Admitted Claims CDDs it is important to have regard to the process by which the Agreed Claim Amount is agreed and converted into sterling (Judgment [169]). Creditors were required to submit proofs of debt in what they considered to be the currency of their underlying claims and the Administrators usually communicated their determination of their proofs in the currency of the underlying claims. The Agreed Claim Amount in the CDD which follows is the foreign currency figure converted into sterling pursuant to Rule 2.86. It cannot be converted otherwise than in accordance with Rule 2.86.

38. In these circumstances, the Judge held, "*The Admitted Claim, stated in the CDD to be admitted in an amount equal to the Agreed Claim Amount which is a sterling figure, is properly read as a reference to the creditor's agreed claim, converted into sterling under rule 2.86*" (Judgment [169]).

(8) CRA CDDs

39. In addition to Agreed Claims CDDs and Admitted Claims CDDs, there were also CRA CDDs. The CRA CDDs were CDDs which were entered into by creditors who had signed the Claims Resolution Agreement (the "CRA"). Although the construction of the CRA is no longer an issue on this appeal, the effect of the CRA CDDs is relevant.

40. The Judge dealt with the CRA at [20]-[38] and [77]-[136]. In short, it was developed, following the decision that the Court had no jurisdiction to sanction a proposed scheme of arrangement, to enable the Administrators to return trust assets to those counterparties entitled to them. Given, however, that LBIE held security over such assets, it was also necessary, as part of this process, to determine the net financial position between LBIE and the creditor. For this reason, the CRA also included a claims determination mechanism. Indeed, as drafted, it also made provision for the calculation and ascertainment of unsecured claims with parties who made no claims to trust assets (Judgment [36]). Claims were agreed in USD. The Judge held that a counterparty who signed the CRA did not give up any currency conversion claim that it might have, concluding that "*The terms of those provisions are well capable of being read on the basis that the conversion of the Close-Out Amounts into US dollars, in those cases where the contractual liability was not in US dollars, was intended to do no more than produce a common currency of account*" (Judgment [135]). Wentworth does not now seek to appeal the Judge's conclusion on this aspect of the effect of the CRA.

41. Subsequently the Administrators invited creditors whose claims had been determined pursuant to the CRA to enter into a CRA CDD. A number of different versions of CDDs were developed by the Administrators for CRA signatories, including an Agreed Claims CRA CDD (which expressed the Agreed Claim Amount in the original contractual currency) and an Admitted Claims CRA CDD (which expressed the Agreed Claim Amount in sterling, albeit that they also expressly stated that the sterling denominated amount was the value of the creditor's claim "*converted to pounds sterling at the 'official exchange rate' set out in Rule 2.86(2) of the Insolvency Rules*").

42. On Wentworth's case, a foreign currency creditor who entered into the CRA retained the right to be paid in the relevant foreign currency, but lost that right by subsequently entering into an Agreed Claims CRA CDD (if his Agreed Claim Amount was expressed in sterling) or an Admitted Claims CRA CDD. This is despite the fact that, as the Judge said, "*There was no necessity for such creditors to enter into CDDs, because their net claims had been determined under the CRA, but the administrators requested them to do so, because they considered CDDs to be a more*

straightforward and less time consuming way of documenting the unsecured claim than through the issue of notices required under the CRA" (Judgment [51], [167] and [170]). Nor did the Administrators suggest to creditors contemplating entering into a CRA CDD that doing so would affect the scope of the rights conferred by the CRA.

(9) CDDs with express preservation language

43. Once it was appreciated in 2013 that there might be a surplus, an issue arose as to whether the effect of the existing forms of CDDs might be to release claims to Statutory Interest. Subsequently a similar issue also arose in relation to currency conversion claims.

44. In response the Administrators amended the standard templates for the various CDDs to include language which expressly preserved first Statutory Interest (on a "for the avoidance of doubt" basis) and later currency conversion claims, reflecting the fact that it was not a necessary part of the Consensual Approach to release such rights. The Judgment deals with this at [54]-[56].

45. The Administrators were initially reluctant to include an express preservation of currency conversion claims because of a concern that it might have the effect of discriminating between different groups of creditors. However, after the issue was raised at a PTR for the *Waterfall I* application on 11 October 2013, the Administrators decided to cease signing CDDs unless there was an express preservation of currency conversion claims. Around that time Mr Copley, the Administrator who signed CDDs on behalf of LBIE, also stated to various creditors that he had not intended and did not intend to compromise currency conversion claims and was willing to give evidence to ensure that the CDDs were correctly interpreted, and stated to various creditors that, subject to obtaining legal advice, his preference was to make a publicly available statement making it clear to all creditors that "*it was the Joint Administrators' view that CDDs did not have the effect of releasing Currency Conversion Claims and that it had not been the intention of the Joint Administrators that creditors waive their right to Currency Conversion Claims*" (Copley [25]).

46. Following bilateral negotiations with certain creditors, interim language was used to preserve currency conversion claims expressly in some CDDs between the end of 2013 and early 2014. From mid-February 2014, a standard form provision to that effect was included in all CDDs. However, over 75% by number and value of all CDDs do not contain such express language. Ultimately, the Administrators also agreed to admit claims

by an acceptance letter without the need for any CDD and without the need for any releases by the creditor at all.

C. DECLARATION (i)

47. Declaration (i) provides that "*Neither the Claims Resolution Agreement (the 'CRA') entered into between LBIE and certain of its creditors nor any of the Claims Determination Deeds (the 'CDDs') entered into between LBIE and its creditors has, as a matter of construction, the effect of releasing any Currency Conversion Claims (as defined in the Application Notice)*".

(1) Wentworth's position on the appeal

48. Wentworth's position on this appeal, having abandoned various points in its Grounds of Appeal, appears to be as follows:

    (1) It now accepts that creditors who entered into the CRA have not thereby lost any underlying entitlement to be paid in a foreign currency.

    (2) It now also accepts that, with one exception, creditors who entered into Agreed Claims CDDs (or, presumably Agreed Claims CRA CDDs) have not lost any underlying entitlement to be paid in a foreign currency. This is so even where multiple claims in different foreign currencies have been recorded in a common currency of account. The one exception is if the common currency of account is sterling.

    (3) It contends that creditors who entered into Admitted Claims CDDs (or, presumably, Admitted Claims CRA CDDs) have lost any underlying entitlement to be paid in a foreign currency.

49. Wentworth spends the majority of its Skeleton Argument dealing with Admitted Claims CDDs, before adding that, in relation to any Agreed Claims CDDs "*where the Agreed Claim Amount in an Admitted Claims CDD was denominated in sterling … the arguments above apply equally to such CDDs*". The Senior Creditor Group will therefore deal with Admitted Claims CDDs first, although it is important to bear in mind that they were developed and used after Agreed Claims CDDs, and need to be construed against that background.

(2) The relevant provisions of the Admitted Claims CDDs

50. The relevant provisions of Admitted Claims CDDs are set out in the Judgment at [157]-[161]. Those provisions identify the claim which has been agreed and release all other claims:

    (1) Clause 2.1 provides that "*the Creditor shall have an Admitted Claim in an amount equal to the Agreed Claim Amount*". For these purposes, "*Admitted Claim*" is defined in Clause 1.1 as "*an unsecured claim of a creditor of the Company which qualifies for dividends from the estate of the Company available to its unsecured creditors pursuant to the Insolvency Rules and the Insolvency Act* …" and the "*Agreed Claim Amount*" is a sum of money expressed in sterling, following the conversion of the agreed foreign currency amount in accordance with Rule 2.86.

    (2) Clause 2.2 states that "*the Admitted Claim shall be fixed at the Agreed Claim Amount, and shall constitute the Creditor's entire claim against the Company*". By clause 2.3 both LBIE and the creditor are "*irrevocably and unconditionally released and forever discharged from …*" a wide definition of claims against each other "*save solely for the Admitted Claim*".

(3) The Judge's reasoning

51. The Judge considered the effect of Admitted Claims CDDs at [163]-[169]. He held that a creditor who entered into such a deed does not give up any currency conversion claim. The three parts to his reasoning are summarised in paragraph 37 above.

52. Having referred to the various points in respect of the context and to the discrimination that would result if Wentworth's construction was correct, the Judge dealt with the effect of the provisions of the Admitted Claims CDD at [169]. He held that:

> "*In light of all the relevant contextual considerations, and in particular in the light of the mandatory application of rule 2.86, the correct approach to construction of the Admitted Claims CDDs is, as Mr Dicker submitted, to have regard to the process by which the Agreed Claim Amount is agreed and converted into sterling. Creditors were required to submit proofs of debt in the currency of their underlying claim. The Agreed Claim Amount in the CDD which follows, is the foreign currency figure converted into sterling pursuant to rule 2.86. It cannot be converted otherwise than in accordance with rule 2.86. The Admitted Claim, stated in the CDD to be admitted in an amount equal to the Agreed Claim Amount which is a sterling figure, is properly read as a reference to the creditor's agreed claim, converted into sterling under rule 2.86. This will necessarily lead to a currency conversion claim, if the sterling dividends do*

not fully discharge the underlying agreed claim, and the terms of the CDD do not necessitate the unintended and unprincipled conclusion that such currency conversion claims are lost".

(4) Why the Judge was right

53. The answer to whether a creditor who entered into an Admitted Claims CDD retained any currency conversion claim requires one to identify what is preserved by that agreement. This is because the releases operated to release LBIE from claims "*save solely for the Admitted Claim*". If an entitlement to be paid in a foreign currency is preserved by this language, the fact that the deed contained wide releases of other claims is irrelevant.

54. Having regard to the context, the Judge held that a reasonable person with all the background knowledge would understand that the reference to the sterling figure, referred to in Admitted Claims CDDs, was to be read as meaning *"£x, being the agreed amount of the creditor's entitlement to payment in the relevant foreign currency of USD as converted into sterling pursuant to Rule 2.86 for the purposes of proof*". The releases therefore do not apply to the Admitted Claim as correctly construed in this way.

55. This is correct, for the reasons given by the Judge. In particular:

(1) Claims admitted to proof in accordance with the process set out in the Rules continue to derive from, and are referable to, the creditor's underlying contractual or other entitlements, and do not result in the release of the creditor's right to payment of the full amount of his foreign currency entitlement in the event of a surplus.

(2) The purpose of the Consensual Approach was simply to expedite the making of a distribution by adopting a common approach to valuing claims. It did not require creditors to release any currency conversion claims they might otherwise have had.

(3) The Administrators, when they informed creditors of the Consensual Approach, referred to the fact that, before a dividend could be paid, the claim would need to be converted into sterling for the purposes of proof pursuant to Rule 2.86. There was no suggestion at any stage that their right to any currency conversion claim would or might be prejudiced.

(4) The determination process involved claims being submitted, adjudicated and ordinarily agreed in the currency of the underlying entitlement, before being formally recorded in a CDD.

(5) Subject only to the need to accommodate possible client money claims, Agreed Claim CDDs and Admitted Claims CDDs, and the CRA CDDs, were each intended to have exactly the same effect. The parties cannot sensibly be taken to have intended that they would "*result in discrimination between the claims of creditors to an extraordinary extent without any principled justification and, at least until a late stage, without any understanding or appreciation by any party, creditor or administrator that this could be their effect*" (Judgment [166]).

(6) Nor can the parties have sensibly intended that whether a creditor released any currency conversion claim would depend, for example, on whether: (a) despite having had his claim determined under the CRA, he agreed to enter into a CRA CDD because the Administrators considered this easier; or (b) he signed a CDD, which at the time was the only mechanism made available by the Administrators for claims to be admitted for early distribution, rather than requiring his claim to be adjudicated on a bilateral basis at some later date.

(7) The "*Agreed Claim Amount*" was expressed in an Admitted Claims CDD having been converted into sterling in accordance with Rule 2.86, because the Rules required such a conversion before any claim could be admitted for dividends. There was no other possible reason why such claims would have been converted using an exchange rate as at the date when LBIE went into administration.

(8) It would have been a breach of the Administrators' duties to creditors to have unnecessarily and unjustifiably procured the release of currency conversion claims, thereby, in the event of a surplus, giving rise to a windfall to shareholders.

56. Wentworth accepts that, where the Admitted Claim is recorded as a foreign denominated Agreed Claim Amount, pending conversion into sterling under Rule 2.86, the releases do not destroy any underlying entitlement to be paid in a foreign currency. The logic of Wentworth's position is therefore that, if an Admitted Claims CDD had recorded the Agreed Claim Amount in a foreign currency, and contained a further provision which immediately converted that sum into sterling pursuant to Rule 2.86, creditors would retain their entitlement to be paid in a foreign currency. But this, in substance, is what it does.

57. The Judge also referred, by analogy, to the effect of an Admitted Claims CDD on a claim to Statutory Interest (Judgment [164]). Wentworth accepted below that Clause 2 of the Admitted Claims CDD could not be read entirely literally, and that the mere fact that the

amount of the Admitted Claim constitutes the creditor's "*entire claim*" and that the releases extend to all Claims "*including all Claims for interest*", does not extend to a release of a creditor's claim to Statutory Interest.

(5) Agreed Claims CDDs

58. As explained above, Wentworth accepts on this appeal that, with one exception, an Agreed Claims CDD does not result in a creditor being deprived of any currency conversion claim that it might otherwise have had. In particular:

    (1) It accepts that this remains the position even where a creditor with a variety of claims in different foreign currencies entered into an Agreed Claims CDD which recorded his "*Agreed Claim Amount*" in one currency and was expressed to release all other claims he might have.

    (2) It also accepts that the fact that an Agreed Claims CDD provides for the "*Agreed Claim Amount*" to become an "*Admitted Claim*" in certain circumstances and to be converted into sterling pursuant to Rule 2.86, does not alter the position.

59. Wentworth contends that the one exception is that an Agreed Claims CDD will result in the creditor losing any currency conversion claim it would otherwise have, where the "*Agreed Claim Amount*" was expressed as a sterling sum; see Wentworth's Skeleton Argument at [52]. As explained above, this could occur where a creditor had a claim in different currencies (say, Euro, Yen, USD and sterling) and where his Agreed Claim Amount was expressed in sterling because this was the largest claim.

60. Wentworth's appeal in relation to Agreed Claims CDDs further illustrates the illogicality of its position:

    (1) It accepts that, if a creditor had claims in say Euro, Yen and USD, and the Agreed Claim Amount was expressed in USD as that was the largest claim, it would *not* have lost its entitlement, in the event of a surplus, to payment of the full amount of his Euro, Yen and USD claims.

    (2) However, it contends that if, in contrast, the creditor has claims in say, Euro, Yen and sterling, and the Admitted Claim Amount is expressed in sterling because this is the largest claim, the creditor *will* have lost his entitlement to payment of the full amount of his Euro and Yen claims.

61. This does not make sense, either as a matter of logic or commercially. The precise nature of the illogicality is however important:

(1) Both situations involve a creditor agreeing that a specific sum, defined as his "*Agreed Claim Amount*", is his "*entire claim*", and that he is releasing all other claims that he might have. The only difference is that in the first situation the claim is expressed in, say, USD, whilst in the second it is expressed in sterling.

(2) On Wentworth's case however, the effect of that agreement in the two situations is different. In the first case, the creditor is still entitled to be paid the full amount of his Euro and Yen claims in the event of a surplus, despite having agreed that a specific USD sum was his "*entire claim*" and that he released all other claims. In the second case, in contrast, the creditor has lost his right to payment of his Euro and Yen claims in full, because he has agreed that a specific sterling sum was his "*entire claim*".

(3) Wentworth's position thus involves accepting, at the same time, both that the effect of agreeing an Agreed Claim Amount does not extinguish any entitlement to payment in any other currency and also that it does.

62. Nor, for two reasons, can the fact that the Agreed Claim Amount is expressed in sterling, rather than, say, USD, be the reason for the difference. First, the scope of the releases is the same irrespective of the currency in which the Agreed Claim Amount is expressed. Secondly, the distinction makes no commercial sense, particularly in circumstances where the decision to express the Agreed Claim Amount in USD or sterling depends solely on the denomination of the largest element of the creditor's aggregate claim.

(9) Response to Wentworth's specific submissions

63. Wentworth's argument on construction boils down to the assertion in its Skeleton Argument at [19] that:

> "*The plain and unambiguous effect of the words in Clause 2 of the Admitted Claims CDD is to preclude the creditor (among other things) from ever asserting against* LBIE *any part of its original contractual claim save only for a claim to a specified sum denominated in sterling. Accordingly, and in particular, it is precluded from ever asserting a right to be paid any part of its original contractual claim in any foreign currency*".

64. The Senior Creditor Group agrees that the principles of contractual construction are as set out in the various decisions of the Supreme Court, including *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 at [21] and *Arnold v Britton* [2015] 2 WLR 2593 at [17]-[18]. It is also necessary to bear in mind, when dealing with releases, that "*The generality of the wording has no greater reach than [the] context indicates*"; *Bank of Credit and Commerce International v Ali* [2001] UKHL 8 per Lord Nicholls at [29] (Judgment [60]-[63]).

65. In this respect:

(1) It is perfectly possible to read the expression of the Agreed Claim Amount in sterling in an Admitted Claims CDD as meaning *"£x, being the agreed amount of the creditor's entitlement to payment in the relevant foreign currency of USD as converted into sterling pursuant to Rule 2.86 for the purposes of proof*". That is, in substance, exactly what it is.

(2) This is the only construction that makes legal and commercial sense, in the light of the background, including the Administrators' duties, their communications with creditors, the process of determining claims and the purpose of the CDDs. In contrast, Wentworth's case ascribes to the parties an intention to create discrimination between the creditors to an extraordinary extent without any principled justification.

(3) Wentworth itself accepts that the mere fact that pursuant to a CDD a creditor has agreed that its entire claim is a specified sum expressed in a particular currency, does not necessarily mean that it has released any right that it would otherwise have had to payment in a foreign currency (see paragraphs 58-62 above).

66. At paragraphs [23]-[47] of its Skeleton Argument, Wentworth takes issue with a number of the contextual considerations relied on by the Judge. There is nothing in any these points. In particular:

(1) Wentworth contends that the Judge was wrong to conclude that the CDDs are in a different position from an ordinary bilateral contract between parties with competing interests as "*the absence of a profit motive on the part of the administrator does not lessen the adversarial nature of the negotiations between the administrator for the general estate, on the one hand, and the creditor in question, on the other hand*". This is wrong. The CDDs formed part of the Administrators' process for determining claims in accordance with mandatory provisions of the statutory scheme and in respect of which they were

acting in a quasi-judicial capacity. The CDDs were also standard form contracts which were presented to creditors as non-negotiable and as an integral and necessary component of the Consensual Approach for expediting the admission of claims to proof to enable earlier distributions to be made.

(2) Wentworth accepts that the Judge was right to conclude that it was not necessary to release entitlements to be paid in a foreign currency to achieve the purpose for which the CDDs were developed. But it contends that "*the fact that it was not inherently necessary to do so does not mean that, properly construed, such a release did not form part of the bargain reached with the creditor*". However, the CDDs are more naturally construed, given the context, in a way which preserves currency conversion claims, and the contrary construction makes no legal or commercial sense.

(3) Wentworth contends that the Judge was wrong to have regard to the fact that no indication was given by the Administrators that the CDDs would have the effect of releasing currency conversion claims. It says that this is inadmissible as a matter of construction, as it assumes that the Administrators and all of the parties were aware of currency conversion claims when they entered into the CDDs. This is incorrect. The fact that the Administrators were focussed on achieving an earlier distribution in respect of what was anticipated at that stage to be an insolvent estate, and not on the position in the event of a surplus, forms part of the relevant background.

D. DECLARATION (iv)

67. Declaration (iv) provides that:

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

68. The Judge dealt with this aspect in his Judgment at [171]-[189]:

(1) He reviewed the relevant authorities and concluded that, under *ex parte James* "*unfairness is a sufficient ground for the application of the principle … if the court thinks that, in all the circumstances, it is right to apply the principle*" (Judgment [174]-[183]). He reached the same conclusion in relation to Schedule B1, paragraph 74 (Judgment [188]).

(2) He also concluded, in the light of all of the circumstances, that "*it would be grossly unfair to the creditors who have entered into … any CDD to enforce any waiver or release of their currency conversion claims that may, on the construction of any such agreement, exist*" (Judgment [184] and [188]).

69. The Judge's conclusion on the law was correct and, so far as *ex parte James* is concerned, reflects the recent discussion of that principle by Lord Neuberger in *Re Nortel GmbH* [2013] UKSC 52 at [122].

70. In these circumstances the Court will only interfere with the conclusion of the Judge below if clearly satisfied that his view is wrong; see, for example: *Re Wigzall* [1921] 2 KB 835 per Scrutton LJ at 861.

71. The Judge, who has enormous experience in relation to insolvency matters, was correct and fully justified in concluding that it would be grossly unfair to creditors who have entered into CDDs to enforce any waiver or releases of their currency conversion claims. In addition to the reasons specifically referred to by the Judge at [184] and [188], the Senior Creditor Group also rely on the following:

(1) The Administrators are bound to act for the purposes of the Administration and under a duty to distribute LBIE's asserts in accordance with the scheme, and to adjudicate proofs of debt in quasi-judicial manner. It would have been contrary to their duties for them to have procured the release of currency conversion claims as part of the Consensual Approach.

(2) The CDDs were presented to creditors as non-negotiable. Creditors were also told that they needed to enter a CDD to be entitled to participate in an early distribution, and that no alternative process was then available to enable their claims to be admitted for proof for the purposes of any early distributions. They were entitled to assume that the Administrators would be acting consistently with their duties and in the best interests of creditors.

(3) The Administrators also told creditors that, if they insisted on having their claims adjudicated on a bilateral basis, this would take some considerable time. In any event, it was not suggested that in such circumstances they would not still be required to sign a CDD. In circumstances where the Administrators' indications were that LBIE was insolvent and there was thus no expectation of any surplus to

pay Statutory Interest, any creditor who did not accept the Consensual Approach would not be compensated for the consequential delay in receiving a dividend.

(4) It was never the Administrators' intention that creditors would release such rights. Mr Copley did not intend to compromise currency conversion claims and told creditors this. Indeed, he ceased signing CDDs which did not contain express language preserving such claims once it became clear that it was being suggested that the effect of such documents might be to release them. Had he known about the existence of currency conversion claims at the time that the CDDs were developed, he would have sought to have carved them out if it was necessary to do so in order to preserve such claims; Copley [28].

(5) The loss and harm caused by the release of currency conversion claims would have been inadvertent and based on a misapprehension of the law, either as to the existence of currency conversion claims or the effect of the CDDs. Had the true position been known, such claims would have been expressly preserved (as, in the case of the CDDs, they subsequently were).

(6) If the releases in respect of currency conversion claims are enforced the consequence will be that the estate does not have to pay claims that, but for the releases, would have had to have been paid before any surplus could be returned to shareholders. That would, to adopt Briggs LJ's comment in *Waterfall I*, be a "*wholly unnecessary injustice*". The unfair harm suffered by certain creditors would therefore translate directly into an unjustified windfall to subordinated creditors and shareholders. That windfall may amount to up to £2 billion, solely and entirely unnecessarily as a result of a process adopted by the Administrators to expedite the payment of distributions.

72. It is noteworthy that the Administrators have never sought to contend that it would be appropriate for them, as officers of the Court, to enforce any release of currency conversion claims. Instead it is Wentworth, whose interests are aligned with those of the subordinated creditors and shareholders, which advances various arguments as to why it would be appropriate to enforce the releases. The majority of the points it makes are variations on two themes:

(1) The first theme is that the CDDs are enforceable according to law and equity and there is "*no question of there being any vitiating factor such as misrepresentations, mistake, fraud or duress*" (Wentworth's Skeleton [70]-[71], [75], [77]). This is a bad point. The rule

in *ex parte James* inevitably applies to produce a different result than would arise as a matter of law or equity, and it is no answer to say that its application would involve a departure from the parties' strict legal rights. That is precisely the situation in which it operates[1]. Nor does it prevent the operation of Schedule 1, paragraph 74.

(2) The second theme is that the terms of the CDDs were "*freely agreed*" (Wentworth's Skeleton [72]-[73], [76]-[78]). While arguments of this sort might have some relevance in the context of a dispute between two arm's length commercial parties seeking to advance their own commercial interests, they ignore the effect of the statutory regime and duties of the Administrators, the nature of their relationship with creditors and the way in which the Consensual Approach and the CDDs was developed and presented by the Administrators acting in their quasi-judicial role.

73. Wentworth's position can be tested by asking what would have happened had the Administrators sought directions from the Court before embarking on the Consensual Approach. In those circumstances, it is inconceivable that they would have considered it appropriate to seek to include terms compromising valuable rights in the event of a surplus as part of a process which did not require such outcome or that, if they did, the Court would have concluded that it was appropriate for them to do so. The Administrators could not properly have set out to achieve that result and are in no different position merely because it may have been inadvertent.

ROBIN DICKER Q.C.
RICHARD FISHER
HENRY PHILLIPS

20 May 2016

South Square, Gray's Inn

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[1] The Senior Creditor Group does not, in any event, accept that the cause of the situation cannot be described as having arisen as a result of a mistake; see *Pitt v Holt* [2013] UKSC 26 Lord Walker at [104]-[108]. However, this is not an issue that was to be decided at the hearing below. Thus Issue 36B expressly leaves over for determination any issue other than one of general application, including claims for rectification, estoppel and or relief from the consequences of a common or unilateral mistake.

A2/2015/3762

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT
CHANCERY DIVISION
DAVID RICHARDS J
[2015] EWHC 2270 (Ch)

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

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

WATERFALL II DIRECTIONS APPLICATION

SENIOR CREDITOR GROUP'S SKELETON ARGUMENT FOR APPEAL

Freshfields Bruckhaus Deringer LLP
65 Fleet Street, London, EC4Y 1HS
Tel: 0207 9364000
Solicitors for CVI GVF (Lux) Master S.a r.l.

Ropes & Gray International LLP
60 Ludgate Hill, London, EC4M 7AW
Tel: 0203 2011500
Solicitors for Hutchinson Investors, LLC

Morrison Foerster
City Point, One Ropemaker Street London, EC2Y 9AW
Tel: 0207 79204000
Solicitors for Burlington Loan Management Limited