

Friday, 15 November 2019

(10.30 am)

MR JUSTICE SMITH: Mr Phillips.

MR PHILLIPS: Yes, my Lord. I call Judge Gropper. Who is helpfully in the witness box.

JUDGE ALLAN GROPPER (sworn)

Examination-in-chief by MR PHILLIPS

MR PHILLIPS: Judge Gropper, I anticipate that you will need bundle D1 and 2, but for present purposes could you take up bundle E1, please. And if you could turn to tab 1, please. And do you see that expert opinion of Allan Gropper as to matters of New York law?

A. Yes, sir.

Q. Yes. And in fact on page 33 this is an unsigned version in my copy. Is yours signed?

A. My copy is signed.

Q. Excellent. Is that your signature?

A. That is.

Q. Excellent. And could you just go forward to tab 4, which is the joint report of experts and if you could go to page 13, do you see that it is signed, it is signed by you and Judge Smith. Is that your signature?

A. Yes, it is.

Q. And do the opinions contained in those two reports represent the opinions, your opinions in relation to the

1 matters that you have been asked about?

2 A. Yes, they do.

3 MR PHILLIPS: If you wouldn't mind waiting there I am sure
4 my learned friend has some questions for you.

5 Cross-examination by MS TOLANEY

6 MS TOLANEY: Good morning, Judge Gropper.

7 A. Good morning.

8 Q. Please could you turn to page 22 of your report; that's
9 at bundle D1, tab 1. And this is section 6 of your
10 report. Do you have that?

11 A. I do.

12 Q. In this section you give your view on how the principles
13 of New York law you have identified should be applied in
14 the context of this case.

15 A. Well, I -- I tried to state how I thought they would be
16 applied by a judge in New York.

17 Q. Right.

18 A. I can't say how they should be applied in this case,
19 that is the province of the judge in this case.

20 Q. Indeed it is. Now shall we just have a look then at
21 some of the opinions that you express in this
22 paragraph 42. If you look at the penultimate sentence,
23 you give your view as to what the words "unknown" and
24 "unforeseen" mean.

25 A. I do, in the context of New York law.

1 Q. Right. So you state in terms that "unknown" and
2 "unforeseen" do not provide for the release of claims
3 that a party might acquire, do you see that?

4 A. Yes.

5 Q. And then if you go back to paragraph 31 you assert there
6 at the end of that paragraph:

7 "DB asserts correctly that the release covers
8 unknown, unforeseen and unforeseeable but these are not
9 the same as after-acquired claims."

10 Do you see that?

11 A. Yes. In New York law under a document --

12 Q. We will come on to that. At the moment, Judge Gropper,
13 these read like your assertions but we will come on to
14 it if you say they are not and it is just New York law.

15 If you look at paragraph 44 now, please. If you
16 look at the first two sentences, you say DB relies
17 particularly on the clause that you cite and you assert:

18 "It may have been in existence but it was not the
19 property of LBHI and the conclusion does not follow that
20 it was included in a release by a party who did not own
21 it and could not and did not release it at the time."

22 And you then go on to say what a New York court
23 would consider it was reasonable to do.

24 Now, in these passages of your report, I think it is
25 fair to say that you are saying why Deutsche Bank's

- 1 interpretation of the contract is not right, is that
2 fair?
- 3 A. I think I am -- what I intended to say is that I did not
4 think a New York court would consider it reasonable to
5 conclude that an after-acquired claim is the same as
6 a let us say an unmatured or an unforeseen claim.
- 7 Q. Right. Could you now just look at appendix A of your
8 report, which is at the back, it is not paginated, but
9 it is the memorandum setting out your instructions from
10 Weil Gortshal.
- 11 A. Yes.
- 12 Q. And over the page you will see from the beginning
13 paragraphs 12 and 13. Do you have those?
- 14 A. Yes, I do.
- 15 Q. And 13 asks you to look at two very specific questions,
16 does it not?
- 17 A. It does.
- 18 Q. So it doesn't actually ask you to give your view as to
19 what a New York court would think of Deutsche Bank's
20 arguments, does it? What is asked here very
21 specifically are what are the rules of contractual
22 interpretation and is extrinsic evidence admissible,
23 correct?
- 24 A. That is correct.
- 25 Q. And paragraph 14 and 15 set out as a matter of English

1 law what the relevant duties of an expert are, you see
2 that --

3 A. Yes.

4 Q. -- there? Have you looked at CPR 35?

5 A. Yes.

6 Q. And do you confirm in paragraph 62 of your report that
7 you are aware of the requirements of part 35?

8 A. Yes.

9 Q. And do you recall what paragraph 2.2 of the practice
10 direction part 35 says?

11 A. I -- I cannot tell you that sitting here.

12 Q. Could I pass it up to you?

13 A. Certainly.

14 MS TOLANEY: And for your Lordship it is at page 1169 of
15 Volume I of the White Book.

16 A. Thank you.

17 Q. Do you have that, Judge Gropper?

18 A. I do.

19 Q. So it is paragraph 2.2 that I am looking at and that
20 says that experts should assist the court by providing
21 objective unbiased opinions on matters within their
22 expertise and should not assume the role of an advocate;
23 do you see that?

24 A. I see that.

25 Q. Now, in drafting your report, do you think you have been

1 careful not to assume the role of an advocate?

2 A. I have. I -- I certainly did not intend to assume the
3 role of an advocate and that was not my goal.

4 Q. So do you think it is fair to say that you have carried
5 out a balanced exercise looking at both parties'
6 strengths and weaknesses of the argument, insofar as
7 you've assessed their arguments, which you appear to
8 have done?

9 A. Absolutely.

10 Q. Right, so let's look then at paragraph 52, please, of
11 your report on page 28. It starts in fact on page 27.
12 So in this paragraph you refer to the fact that
13 a New York court would consider whether there is any
14 basis for the conclusion that the commercial purpose of
15 the Settlement Agreement would have been fostered by the
16 inclusion in the release of future acquired claims, and
17 then you set out a principle of law, do you see that?

18 A. I do.

19 Q. Then in paragraph 53, in the second sentence, you
20 assert:

21 "Nor was there any commercial reason for the parties
22 to deal with the claims that LBHI might acquire in the
23 future."

24 Now, Judge Gropper, you were not asked to give
25 evidence as an expert on the Lehman Group's commercial

- 1 purposes, were you?
- 2 A. That is correct.
- 3 Q. And you were not involved in negotiating or drafting the
- 4 Settlement Agreement, were you?
- 5 A. I was not.
- 6 Q. So it is not clear on what basis you are giving the
- 7 court your opinion that there was no commercial purpose?
- 8 A. I have read the plan of reorganisation and as
- 9 a bankruptcy judge and former bankruptcy lawyer I am
- 10 familiar with the efforts to formulate a plan and what
- 11 goes into those efforts and I think I am able to give
- 12 the court assistance with regard to these matters of
- 13 New York law. The directions --
- 14 Q. But the commercial -- sorry, I will let you finish.
- 15 A. To finish, the directions asked me to opine not only on
- 16 matters of New York law but under the bankruptcy code,
- 17 and if I strayed beyond my charge the court certainly
- 18 can disregard my comments.
- 19 Q. Well indeed, because Judge Gropper nothing that you have
- 20 just said suggests that knowledge of bankruptcy law
- 21 would help you establish what the commercial purpose was
- 22 behind this particular agreement.
- 23 A. Well, I disagree with that.
- 24 Q. Well, are you aware that Deutsche Bank's case is that
- 25 there was a commercial purpose for the release of

1 after-acquired claims?

2 A. I have read that in your skeleton argument, yes.

3 Q. Indeed, because it was in Deutsche Bank's position
4 paper; is that what you are referring to?

5 A. At the time I wrote these -- these words I had the
6 position paper very much in mind.

7 Q. Right.

8 A. And I have since then read your skeleton argument, which
9 attempts to make that argument even more strongly.

10 Q. Right. You see, in your instructions which we just
11 looked at -- I don't know if you want to turn them up
12 again so that you can see it, and it is at paragraph 13
13 of the letter from Weil Gortshal, if you have that. It
14 is at the back of your report.

15 A. Yes.

16 Q. You were asked to take account of the arguments in both
17 sides's position papers, weren't you?

18 A. Yes.

19 Q. And that is why the wording in paragraph 53 is very
20 strange because you say in line 5 of your report the
21 words "I have not been made aware of any commercial
22 reason why the Settlement Agreement would provide ..."
23 and so on. Now, nowhere do you say "I considered
24 Deutsche Bank's position", if this is what you are going
25 to do, and you understand I don't think this is within

1 your expertise, but nowhere do you reflect a balanced
2 view of what the parties' arguments are before deciding
3 which way you would go, do you?

4 A. I think my statement in paragraph 53 is balanced and is
5 fair based upon my knowledge of bankruptcy law. One of
6 the important rules of contractual interpretation that
7 both Judge Smith and I agree on is that a contract
8 should be interpreted in accordance with the commercial
9 realities and commercial purpose of the agreement. So
10 it seemed to me and it seems to me that it is fair to
11 comment on those commercial purposes and that a New York
12 court would do that in construing the contract at issue.

13 Q. But, Judge Gropper, even if it were fair, which we will
14 disagree on, you have acted as the advocate for LBHI in
15 advocating its case on every point, rather than
16 reflecting at the very least what Deutsche Bank has
17 said?

18 A. Well, I -- I certainly did not intend to be an advocate,
19 but it is very hard for me to find any support for what
20 Deutsche Bank has said. But, then again that may sound
21 like an advocate and --

22 Q. Indeed Judge Gropper.

23 A. -- I do not want to sound like an advocate. But --

24 Q. Well, Judge Gropper, just stepping back as you have made
25 that point, you must accept that there are

1 counterarguments to the positions you are advancing, not
2 least because Judge Smith, an experienced and respected
3 judge, senior judge, has taken the opposite view to you.
4 So to suggest that it is entirely clear cut and you
5 cannot see any strength in Deutsche Bank's arguments is
6 a little surprising, isn't it, Judge Gropper?

7 A. Well we were talking a moment ago about commercial
8 purpose of the agreement and I don't believe Judge Smith
9 discusses at any length or any specificity the
10 commercial purposes of the agreement.

11 Q. So it is just on commercial purpose you think that
12 Deutsche Bank doesn't have any good points?

13 A. Well, I think that the ultimate question of what the
14 words mean in the release in the Settlement Agreement is
15 up to this judge.

16 Q. Yes. Well, let's just test --

17 A. I think we agree with that.

18 Q. Let's just test it Judge Gropper. Tell me, what do you
19 think is Deutsche Bank's best point on the release case?

20 A. I think Deutsche Bank's best case is the breadth of the
21 words used, and I think you -- you have used that to the
22 greatest extent possible in your -- in your arguments.

23 Q. So let's look at paragraph 31 of your report speaking of
24 the breadth of the words. You say in this paragraph
25 that Deutsche Bank's reliance on the four cases it cites

1 can be distinguished apparently because the release is
2 not as wide as any and all claims raised on which could
3 have been raised; that is the justification for your
4 distinction here. Do you see that?

5 A. Yes, I do.

6 Q. Right. Shall we go to the Settlement Agreement please
7 in bundle E, if you could be passed that, at tab 16. We
8 are looking for page 461, please.

9 A. Yes.

10 Q. And you have the definition of "causes of action" there,
11 do you see that?

12 A. Yes, I see that.

13 Q. Right. So that's pretty wide, isn't it, and you don't
14 mention that, do you, when you suggest that the
15 distinguishing feature is the difference in the wording
16 that you posit in paragraph 31?

17 A. I do not discuss that. I don't recall that Judge Smith
18 discussed this.

19 Q. We are on your report, Judge Gropper. You have made the
20 distinction point, let's focus on your report.

21 A. Very good.

22 Q. So you don't refer to the very wide definition of causes
23 of action there?

24 A. That is correct.

25 Q. Right. And then in the same paragraph you assert that

1 unknown, unforeseen and unforeseeable claims are not the
2 same as after-acquired claims. And what you say is:

3 "Unknown, unforeseen and unforeseeable claims are
4 claims that the releasor possesses at the time the
5 release is executed but of which it is unaware."

6 Do you see that?

7 A. Yes, I do and I --

8 Q. Right. You see --

9 MR PHILLIPS: Sorry, my Lord, Judge Gropper did go on and my
10 learned friend has done this a few times, stops him
11 I don't know if he had more to say but he sounded as
12 though he did.

13 A. To answer your question: yes, I see that.

14 MS TOLANEY: Thank you.

15 Now, again, Judge Gropper, that is simply your
16 opinion because you don't here provide any authority or
17 reasoning in this paragraph for why you say that,
18 do you?

19 A. I -- I would submit that my entire opinion is my
20 opinion.

21 Q. Yes?

22 A. And this is also my opinion, yes.

23 Q. Yes. And the thing that has troubled me about this
24 paragraph is that the point you make about "claims that
25 the releasor possesses at the time the release is

1 executed but of which it is unaware", you see, that is
2 covered by the word "unknown", isn't it?

3 A. I believe it is.

4 Q. Right. So on this construction you give no meaning to
5 the words "unforeseen" and "unforeseeable", do you?

6 A. If I have omitted those words, then there should be no
7 implication though that I believe that these particular
8 claims at issue the after-acquired claims, I do not --
9 well then I am trespassing. I was going to say I don't
10 believe they fall within the scope of the words --

11 Q. But you have said that --

12 A. -- "unforeseen" or "unforeseeable".

13 MR JUSTICE SMITH: Judge Gropper, I think the point is that
14 one has these two words, "unknown" and "unforeseeable",
15 and an English lawyer when construing a series of words
16 will seek to give different meanings because a draftsman
17 will not normally presume to use two identical concepts.

18 A. Yes, sir.

19 MR JUSTICE SMITH: So if the presently existing and unknown
20 cause of action falls under the rubric "unknown", what
21 additional meaning do you attach to "unforeseeable", or
22 do you regard them simply as synonymous?

23 A. No, I think New York law has exactly the same principle
24 that I think you have just referred to, sir, which is
25 that every word of a contract should be given effect, if

1 it can. And I think both Judge Smith and I agree on
2 that in our joint report as to New York law.

3 As to unforeseeable, I actually gave some thought to
4 that, having heard the colloquy yesterday and it seems
5 to me that in this context unforeseeable would be
6 a claim that came up in one of the cases that we cite or
7 one of us cites, it is in the cases where the court held
8 that a release of claims relating to the construction of
9 a building included a -- damage from a subsequent storm.
10 And it seemed to me that an unforeseeable claim could be
11 a storm that was in excess of any storm that had ever
12 taken place before. But in this context, construing the
13 release, the parties released the builder from any
14 claims that would arise from the construction which had
15 already taken place. And that was the purpose.

16 Whether the construct -- the damage was from
17 a foreseeable storm or from an unforeseeable storm, but
18 I think that throughout -- at least throughout the
19 colloquy and the testimony yesterday, the parties have
20 properly used the word "after-acquired claim" to mean
21 something different and I think it does mean something
22 different because it means a claim that was not in -- as
23 I understand it, it means a claim that was not in the
24 possession or the ownership of a party of the releasor
25 at the time the release was executed, but was

1 subsequently acquired. And that is I think unique and
2 distinguishes as a matter of New York law and
3 after-acquired claim from an unforeseeable claim.

4 MR JUSTICE SMITH: Yes, thank you. Yes, I --

5 A. But I may be trespassing now on what is your decision
6 trespassing.

7 MR JUSTICE SMITH: No, I think quite understandably you
8 moved on from the distinction between unknown and
9 unforeseeable, which was to the line that you very
10 clearly draw between after-acquired and presently
11 existing causes of action, I understand that. But
12 thank you for your evidence on the distinction between
13 unknown and unforeseeable.

14 A. Thank you, sir.

15 MS TOLANEY: I am going to press a bit more on that
16 distinction if your Lordship is happy to do so.

17 You see, "unforeseen" and "unforeseeable" are words
18 that look to the future, aren't they?

19 A. They do.

20 Q. And what they mean is that even if something in the
21 future, a future claim arises, it will be released?

22 A. No, I don't think that. I think they are -- both words
23 are used in tandem, "matured", "unmatured";
24 "foreseeable", "unforeseeable".

25 Q. Yes?

1 A. And I think that the word "unforeseeable" takes into
2 account the storm that no-one foresaw but that could
3 take place.

4 Q. But it is something that happens in the future because
5 it has not been foreseen?

6 A. It is something that happens in the future, yes.

7 Q. Right. And the words "unforeseen" and "unforeseeable"
8 are used in the context of claims between two sets of,
9 let's put it that way, Lehman Group companies in this
10 agreement; the debtors and UK affiliates?

11 A. I am sorry?

12 Q. The words in the release clause --

13 A. Yes.

14 Q. -- are used in a Settlement Agreement --

15 A. Yes.

16 Q. -- that takes place between on the one hand the debtors
17 on the other hand the UK affiliates; put it that way.

18 A. That's correct.

19 Q. The two sets of companies.

20 A. As I understand it, yes.

21 Q. Right. And new claims between those companies couldn't
22 arise in the future given that they were all being
23 wound up and weren't going to have any future dealings?

24 A. I -- I don't think that is exactly correct, in that
25 a claim could have been discovered that existed at the

1 time but that the parties had, either through negligence
2 or simply through the passage of control from the
3 managers to the administrators, the claim was
4 overlooked.

5 Q. Yes, and that is covered by unknown, isn't it?

6 A. Yes. I think that is -- that is that is true, yes.

7 Q. You see, the only way future claims could arise is if
8 a party acquired an existing claim from someone else and
9 in that context these words must mean the transmission
10 of the claim?

11 A. But the release agreement doesn't cover blanket future
12 claims. There is no language in the release that says
13 future claims are covered, there is no language in the
14 release that says after-acquired claims are covered by
15 the release.

16 Q. Right, but you accept if there had been that language
17 then they would have been covered?

18 A. If the words "after-acquired" had been included, I would
19 think let me -- can I give you an answer that is in my
20 report? I think that -- first I think the parties would
21 have made specific reference to after-acquired claims,
22 because it would be extraordinary to include them in
23 a release. But certainly possible.

24 Q. Right.

25 A. I think the way they would have handled after-acquired

1 claims is that the debtors would have given a covenant
2 that if they acquired a claim in the future, they would
3 release that claim, or I think perhaps the claim would
4 be deemed to have been released by this agreement.

5 Q. So just --

6 A. Because I don't think that they would have simply relied
7 on what is something of a metaphysical concept here,
8 I think, which is that once the claim is acquired
9 somehow ex post facto -- it is not ex post facto but
10 somehow by some kind of magic the claim was released
11 years before in this particular release, I think that
12 would be highly unusual. And if the parties intended
13 that, I think they would have specified it. But
14 maybe -- I may be trespassing again.

15 Q. Well I think what was interesting, Judge Gropper, is you
16 expressed the view that it would be extraordinary for
17 anybody every to include after-acquired claims.

18 A. I think it would be unusual.

19 Q. That is your view, isn't it, that is not a point of
20 New York law?

21 A. Well, I am saying that only as a New York lawyer.

22 Q. Do you accept Judge Smith is a New York lawyer?

23 A. I certainly do.

24 Q. Right.

25 In paragraph 40 of your report you say that New York

1 law would take cognisance of the fact that Deutsche Bank
2 is arguing that an approximately \$2 billion claim
3 against PLC was forfeited merely because it was assigned
4 to another party. Do you see that?

5 A. I do.

6 Q. You say you were here yesterday during the testimony of
7 Mr Geraghty, so you are aware, are you, that both at the
8 settlement date and at the date of the assignment the
9 administrators of PLC estimated that it wouldn't have
10 sufficient assets to pay a single penny on the claim;
11 you heard that yesterday?

12 A. I cannot disagree with your characterisation of the
13 testimony.

14 Q. Right. And do you want to look at the document I showed
15 Mr Geraghty? It is bundle F9 and it is at page 5245.2.

16 A. And the page is 5245?

17 Q. Point 2. And you can see what the document is on the
18 prior page.

19 A. Yes.

20 Q. The last paragraph on the right-hand column of that page
21 is what I showed Mr Geraghty yesterday, which makes the
22 point I have just told you, Judge Gropper. So does that
23 cause you to reconsider what you say in paragraph 40 of
24 your report?

25 A. It does not.

1 Q. Even though it has been demonstrated to you that the
2 value of 2 billion is not correct, or certainly wasn't
3 considered to be correct at that time?

4 A. Well, I speak only of a \$2 billion claim, not what it
5 was worth.

6 Q. Well, where have you got the figure of \$2 billion from,
7 Judge Gropper? The administrators don't have it.

8 A. I do not remember.

9 Q. No. But let's say hypothetically it wasn't a \$2 billion
10 claim but a claim valued at zero. Would you still take
11 this position in paragraph 40?

12 A. I would.

13 Q. But I thought the point that you make in paragraph 40
14 was that the law abhors a forfeiture, but if the claim
15 is valued at zero, what is the forfeiture?

16 A. Well, I -- I have to assume that if this lawsuit is --
17 is a serious project, and I think judging by the time
18 and effort put into the case, that it is serious, it
19 must have some value and therefore is a matter of -- of
20 substance and importance between the parties. Is that
21 an incorrect assumption?

22 Q. Well, I can tell you what is the case is that you have
23 seen the Settlement Agreement, haven't you?

24 A. I have.

25 Q. I don't know if you have that still at tab 16 of

1 bundle E.

2 A. Yes.

3 Q. And you have seen that clause 8 gives mutual releases,
4 does it not?

5 A. Yes.

6 Q. So both parties took the risk and received the benefit
7 of mutual releases in the terms they did?

8 A. That is correct.

9 Q. So why do you suggest that one might have got an
10 advantage over the other?

11 A. I am not aware of claims running from the parent to the
12 subsidiary of this nature. But then again I have no
13 direct knowledge.

14 Q. No.

15 A. I have no direct knowledge.

16 Q. So if the claim isn't worth 2 billion and given that you
17 have no knowledge of any claims running the other way,
18 you cannot really say who's got the advantage over the
19 other, can you?

20 A. That is correct.

21 MR JUSTICE SMITH: Ms Tolaney, I take the second point, the
22 fact that the release operates both ways and that
23 obviously must factor into the question of
24 commerciality. I don't think I understand the point you
25 are making about the value of the claim, because the

1 fact is the release doesn't make any kind of distinction
2 between value of the claim and what the value of this
3 particular claim actually is neither here nor there.
4 What the judge could equally well say is that assuming
5 an after-acquired claim there was worth 100 million, it
6 would be released and that, subject to the mutuality
7 point, he would suggest is uncommercial. We don't
8 really need to go to the question of whether the claim
9 is worth 2 billion or zero, the fact is --

10 MS TOLANEY: It is simply, my Lord, because Judge Gropper
11 has tied his paragraph 40 into the value of that claim.

12 MR JUSTICE SMITH: Well, yes he has, but the fact is that is
13 after the event --

14 MS TOLANEY: Indeed.

15 MR JUSTICE SMITH: -- and what we are talking about and
16 I think the substance of the point that is being made
17 here is that there is the potential for the release of
18 something that is, but for the release, a very valuable
19 claim, simply by virtue of the fact that it moved from X
20 who is not subject to the release to Y who is and
21 suddenly you move from 100 million to zero. And that
22 I think is the substance of the point that is being made
23 here. It may very well be that the claim here is not
24 worth 2 billion or anything, but that really is a matter
25 for me.

1 MS TOLANEY: I think the follow-up point that I was going to
2 may though to Judge Gropper is having accepted that
3 there were mutual releases, and putting aside questions
4 of value or not of the claim, a mutual release of claims
5 cannot be a forfeiture, otherwise the release of every
6 claim would be abhorred by New York law.

7 A. Is that a question?

8 Q. It is.

9 A. All right. No, I do not agree with that proposition,
10 because although there may be a mutual release here, and
11 again I don't want to trespass, I don't think
12 after-acquired claims were included on either side. But
13 if they were, why wouldn't a party simply not acquire
14 the claim and there would then be no argument as to
15 a release?

16 That -- certainly the acquisition of the claim, if
17 the parties had intended the claim, the after-acquired
18 claim to be included in the release, was a very
19 uncommercial act and I think Judge Smith and I have
20 agreed in our joint report that under New York law
21 parties are presumed to act reasonably in regard to
22 their contract and it seems to me that accepting the
23 assignment or liquidating a subsidiary and taking the
24 property of that subsidiary as part of a general effort
25 to close out companies, liquidate claims and pay

1 creditors, to do that and to forfeit a claim worth \$2,
2 it seems to me would be not acting reasonably if the
3 parties had, in fact, intended the release to cover
4 after-acquired claims.

5 Q. Even if they are mutual releases?

6 A. Even if they are mutual; on either side.

7 Q. And that is going back to your view that nobody should
8 include after-acquired claims?

9 A. No, I think if parties wish to include after-acquired
10 claims, they could do one of two things. They could
11 make it clear in the release that after-acquired claims
12 were included and that they would then act accordingly
13 in connection with their contract. They would they
14 would act reasonably toward their contract in the
15 future.

16 Q. So to test this, if there was a claim that wasn't an
17 after-acquired claim.

18 A. Yes.

19 Q. And it was a unknown claim.

20 A. Yes.

21 Q. That had arisen with the same parties, but it was worth
22 2 billion, you would think that was absolutely fine,
23 then?

24 A. I would think that the parties would have had the
25 ability at the time to identify that \$2 billion claim

1 and it was their responsibility to do so. The context
2 here is the Lehman -- the -- the US debtors's plan of
3 reorganisation and the debtors had every reason to
4 identify and either admit or object to, or in other
5 words to liquidate, all claims against them because they
6 would then participate in the plan and get
7 a distribution accordingly.

8 The English rule is a little different, there is no
9 bar date in terms of filing a proof of claim. But the
10 English debtors got a mutual release as you have said
11 and a reciprocal agreement from the debtors.

12 So, yes, you have an obligation, particularly in the
13 context of a bankruptcy, to identify all claims and to
14 liquidate them, put them in your proof of claim, get
15 a distribution accordingly. And Lehman had every reason
16 to want to liquidate the very large proof of claim that
17 the English administrators had filed. But those -- if
18 they made a mistake and they simply omitted to include
19 a claim, they could not later say that claim should be
20 excluded.

21 Q. Can we just stick very closely to the questions
22 following that speech --

23 A. I am sorry.

24 Q. -- because it is very unclear to me from what you just
25 said, you just said that the reason it wouldn't be

1 unfair is because the parties would have had the ability
2 to identify that claim.

3 A. That is correct.

4 Q. So how is that claim unforeseeable then?

5 A. I don't think the claim is unforeseeable.

6 Q. Right. So you think which category does it fall into
7 then of the words?

8 A. Unknown.

9 Q. But it is --

10 A. Known or unknown.

11 Q. Right. So we still have not given any meaning to the
12 word "unforeseeable"?

13 A. In this context, I -- I see it in terms of our
14 construction contract. In these contexts, I am not
15 sure, although because the possibility that a claim
16 would be omitted is foreseeable.

17 Q. Indeed.

18 A. That possibility is definitely ...

19 Q. Quite.

20 A. Is definitely there.

21 MR JUSTICE SMITH: Judge Gropper, can we try to define our
22 terms a little more clearly. We have been speaking
23 a lot about "after-acquired claims" and because it is
24 the facts of this case the after-acquired claim we are
25 thinking of is one that is acquired through a voluntary

1 transaction, that is to say free choice was involved --

2 A. Yes, sir.

3 MR JUSTICE SMITH: -- whereby a right is assigned. But
4 presumably an after-acquired claim -- I would like your
5 view on this -- can extend to the acquisition of claims
6 that are acquired by operation of law and I don't want
7 to speculate how that might occur in an insolvency
8 situation like this, but obviously one can acquire, as
9 an entity, rights which you acquire involuntarily and
10 not by choice. Does that involuntary acquisition of
11 right, acquisition by operation of law, fall within your
12 definition of after-acquired rights and does it make
13 a difference to your view assuming that there is
14 a material risk of acquiring such rights by operation of
15 law, does it affect your view as to the commerciality of
16 the release contended for by Ms Tolaney?

17 A. I don't think it would make a difference in terms of my
18 view.

19 MR JUSTICE SMITH: First of all -- pause there -- do you
20 accept that after-acquired rights goes beyond the
21 acquired through a voluntary assignment?

22 A. Yes.

23 MR JUSTICE SMITH: But it doesn't make a difference to your
24 view as to commerciality?

25 A. Well, as to commerciality, obviously the parties are not

1 taking a voluntary act, but releases, as case after case
2 that we both have cited say, and as I discuss a little
3 bit in my Glazier Group decision, releases speak as of
4 the date of execution of the release and I believe this
5 release did also because a party can release those
6 claims, the claims that it owns. And in this case, both
7 parties released claims that they owned. I don't
8 believe they released claims that they might acquire in
9 the future, either voluntarily or by operation of law.

10 Perhaps my point with regard to parties acting
11 reasonably under their contract would not apply where
12 the claim is acquired by operation of law. But
13 I believe that the parties would not, without very
14 strong language in the contract, agree to release
15 after-acquired claims that they did not own at the time
16 the release was executed.

17 They could. There is no question they could do
18 that. But I do not believe -- and again maybe I am
19 trespassing -- I do not believe that under New York law
20 the parties did that in this contract and there are
21 a number of reasons that I have tried to give as to why
22 I believe that.

23 But again I don't want to trespass on your
24 prerogatives.

25 MR JUSTICE SMITH: Judge Gropper, if you are trespassing it

1 is at my invitation, so no issue there. But just one
2 further follow-up. You clearly see this line between
3 presently existing and after-acquired claims as a very
4 clear one. But what about a case that would be fuzzier,
5 let's say. Suppose one has an assignment of a future
6 receivable. Under English law, such an assignment can
7 take effect in equity but actually the way it works is
8 that the assignment really only creates a claim when the
9 future receivable is received by the party who is
10 assigning. Now, would you say that that was a case of
11 a present claim, or an after-acquired claim?

12 A. I think it might well be a present claim. It sounds to
13 me very much like the contention that has been made that
14 subrogation claims were after-acquired claims. And I do
15 not believe that under this agreement that subrogation
16 claims are similar to after-acquired claims. I can
17 explain why, but I don't want to trespass unless counsel
18 or your Honour, your Lordship wishes me to -- to
19 explain.

20 MR JUSTICE SMITH: I think I understand what you are saying.

21 I shall leave Ms Tolaney to explore that point further
22 if she wishes to, but thank you very much.

23 MS TOLANEY: Judge Gropper, you mentioned the Glazier case,
24 did you not, just now?

25 A. I did.

1 Q. And that is the T-Bone case, isn't it?

2 A. Yes, the T-Bone restaurant.

3 Q. And in that judgment you wrote:

4 "Subsequent claims will not be barred unless they
5 are specifically embraced within the release or fall
6 within the fair import of its terms."

7 A. I think I was quoting another New York case, but yes,
8 I did.

9 MS TOLANEY: For his Lordship's note that is D2 tab 79.

10 So you would accept then that the question for this
11 court is whether the relevant release encompassed the
12 PLC sub-debt when it was acquired by LBHI?

13 A. Certainly the parties could have agreed to include in
14 their contract after-acquired claims in their
15 contract -- in the release I should say.

16 Q. And that is a matter for construction of the release?

17 A. Yes, it is.

18 Q. Could you look at paragraph 43 of your report, please.

19 Because here you suggest that a New York court would be
20 particularly influenced by the fact that Deutsche Bank's
21 interpretation conflicts with several provisions of the
22 Settlement Agreement, you say.

23 A. Yes.

24 Q. And you give two examples. You quote section 4.04(b) as
25 one of those examples, do you see that?

1 A. Yes.

2 Q. Could we look at that, that is at E/16, page 493.

3 A. E/16, page 498 yes.

4 Q. 493.

5 A. 493.

6 Q. You say in your report at paragraph 43, that

7 section 4.04(b) contains a representation as to the

8 title of claims held by the UK affiliates, do you see

9 that in your report?

10 A. Yes, I do.

11 Q. That is not in fact correct, on the document. I think

12 you mean section 4.04(a). Because you appear to be

13 quoting what is in (a), which you say each -- you are

14 talking about the transfer.

15 A. I am sorry, give me just one more moment.

16 Q. Sorry, you want more time.

17 The point you seem to be making is about the

18 title --

19 A. Yes.

20 Q. -- of claims --

21 A. That is correct.

22 Q. -- which appears to be in 4.04(a), just trying to

23 establish which section you were actually focused on.

24 MR PHILLIPS: I am sorry, there is a quote from the clause

25 in Judge Gropper's paragraph 43 and it is in (b). The

1 words "claims or receivables for the release hereunder".

2 MS TOLANEY: That is a separate point. If Mr Phillips could

3 allow me to just establish --

4 MR PHILLIPS: I think in fairness to the witness you ought

5 to point out he has quote the --

6 MS TOLANEY: His point seems to be that it would have title.

7 And I am not sure whether you are relying on (a) for

8 that point or (b)?

9 MR JUSTICE SMITH: Why don't you read paragraph 43 of your

10 report, Judge Gropper, and section 4.04 and see whether

11 you want to make any correction to paragraph 43, if any,

12 and then we will proceed in the light of what you say.

13 A. I think (b) -- (b) is correct in terms of the quote.

14 Q. Yes?

15 A. But (a) does refer to title.

16 Q. So (a) makes the point I think that you are relying on

17 that what would be false would a representation as to

18 title?

19 A. I think -- I think I am alighting both (a) and (b).

20 Q. Right.

21 A. And my report perhaps should have referred to both.

22 (a)~refers to title, (b) refers to a covenant or

23 representation not to transfer.

24 Q. And those --

25 A. Which is under -- I think is an obvious representation

- 1 to be made in an agreement like this.
- 2 Q. Yes. But you see the point is that you are making that
3 the representation, if it was just (b), would be not to
4 transfer, that a UK affiliate could not transfer
5 a claim?
- 6 A. Any claims that are released hereunder yes.
- 7 Q. So why would that representation be false on
8 Deutsche Bank's case?
- 9 A. Because ultimately the claim that it is argued was
10 released hereunder by virtue of this agreement itself
11 was transferred, directly or indirectly, by a UK
12 affiliate, was it not?
- 13 Q. And when you say you rely on (a), that relates only to
14 house proof claims, does it not?
- 15 A. Yes.
- 16 Q. So that doesn't have any relevance?
- 17 A. I think the reference in my paragraph 43 to 4.04(b) is
18 correct, but that it does not refer to title, but that
19 it would not thereafter transfer any of the claims or
20 receivables that are released hereunder, that is
21 correct.
- 22 Q. And then similarly you refer to 5.04(a)?
- 23 A. 5.04(a).
- 24 Q. That is at page 495.
- 25 A. Yes.

- 1 Q. That is a representation by the debtors of title to the
2 claims that may be released.
- 3 A. Yes.
- 4 Q. And it says that each debtor owns all claims it may have
5 against a UK affiliate.
- 6 A. Yes.
- 7 Q. Now, the purpose of this clause is to ensure, isn't it,
8 that releases granted under this Settlement Agreement
9 are effective because it offers protection against
10 somebody coming along and saying they own the claim that
11 was released?
- 12 A. Essentially yes, I agree.
- 13 Q. It is not right to say, is it, that this representation
14 would be false on Deutsche Bank's case, because at the
15 point of the release of any after-acquired claim, that
16 claim will by definition have been acquired by a debtor
17 and the debtor will have title to it?
- 18 A. But as I understand your position, it is this agreement
19 ipso facto that released the claim. It is an
20 after-acquired claim but this agreement released it. It
21 wasn't any subsequent agreement or subsequent act other
22 than the acquisition of the claim by LBHI and I think if
23 that was how this agreement was intended to operate,
24 that this representation would have been false.
- 25 Q. But why would it have been false, do you want to explain

1 that to his Lordship?

2 A. Yes, because it says there each debtor, and they are the
3 releasers here, that includes LBHI as I understand it,
4 owns all of the claims it may have against any UK
5 affiliate. And then including all claims released
6 hereunder.

7 Q. Yes?

8 A. Free and clear of any and all liens. To me this is
9 a representation that what I am releasing I am legally
10 capable of releasing, right, that is pretty standard.

11 Q. Yes?

12 A. And all of the claims that are being released hereunder
13 I own, period, as of the date of this agreement which is
14 2011.

15 Q. Well but if -- bear with me -- if a claim subsequently
16 false within the scope of this clause, once it false
17 within the scope of the release clause there is no
18 falsity to this representation, is there, because it has
19 been released hereunder? The representation is only
20 made when it is released hereunder?

21 A. I think this representation is made as of the date of
22 the agreement and to say that, well, this representation
23 somehow is made many years in the future is a -- I think
24 I called it metaphysical. It is a metaphysical concept
25 that is frankly beyond me as a lawyer.

- 1 Q. But how is it untrue as at the date of the agreement
2 when there has been no after-acquired claim?
- 3 A. Because the parties did not intend to release
4 after-acquired claims.
- 5 Q. Right, so it just comes back to that same point you say
6 they didn't intend to release after-acquired claims?
- 7 A. I think that there is no disagreement between
8 Judge Smith and me on the point that each clause in
9 a contract should be given effect. The contract should
10 be read as a whole and read together and I think this
11 clause is evidence that the parties intended to release
12 claims that they owned at the time and that they didn't
13 make specific provision for after-acquired claims.
- 14 Q. But?
- 15 A. But, again, I don't mean to trespass.
- 16 Q. You go further than that Judge Gropper, don't you,
17 because you actually say if DB's interpretation of the
18 agreement were correct, this representation was false
19 and I am just trying to understand why you say it was
20 false?
- 21 A. Because the representation at the time is that we own
22 all the claims that are released hereunder.
- 23 Q. But that is true?
- 24 A. No, it's not true, because I believe your point and
25 correct me if I am wrong is that this agreement

1 pro tanto -- I may have my Latin wrong, but this
2 agreement in and of itself released the claim and it
3 released the claim as of a future act, yes, a future act
4 was required. LBHI had to acquire the claim, but there
5 was no subsequent release, subsequent act. The release
6 was under this document itself.

7 Q. So just take his Lordship's point that you have claims
8 that are released as a matter of operation of law in the
9 future. Would that also mean this representation was
10 false?

11 A. I believe in terms of after-acquired claims that if the
12 claim was acquired by operation of law that the point
13 that parties are deemed to act reasonably in connection
14 with their contract would not apply with the same
15 form -- with the same force. But I would say -- again
16 from the perspective of New York law -- that it would
17 not be reasonable for the parties in a release like
18 this, in a Settlement Agreement like this to release
19 after-acquired claims.

20 Q. Well, let's just ask the question again.

21 A. All right.

22 Q. If on his Lordship's hypothesis there were claims that
23 were released in the future as a matter of operation of
24 law, on your evidence that would render this
25 representation false?

- 1 A. I think that is correct.
- 2 Q. Can we just look at please the joint report
3 paragraph 13, please. And that is at tab 4 of the D1
4 bundle where your report is as well.
- 5 A. Right, yes.
- 6 Q. We can see that you have agreed with Judge Smith that
7 New York law distinguishes between a specific release
8 and a general release and a specific release is one that
9 releases only identified claims, whereas a general
10 release is one that releases all claims subject to
11 express qualifications and exceptions, do you agree?
- 12 A. Yes.
- 13 Q. And whether a release is specific or general is a matter
14 of contractual interpretation, looking first at the
15 language of the contract?
- 16 A. That is correct.
- 17 Q. Now, at paragraph 27 of your report, if you just go back
18 to that, please.
- 19 A. Of my report?
- 20 Q. Of your report, which is in the first tab.
- 21 A. All right, okay. You say in paragraph 27 that even the
22 broadest general release will be limited to claims that
23 are shown to have been within the contemplation of the
24 parties at the time the release was executed.
- 25 Does your Lordship have that? It is paragraph 27 of

1 Judge Gropper's report --

2 MR JUSTICE SMITH: Yes.

3 MS TOLANEY: -- about three lines in.

4 So can I just test that with you, Judge Gropper.
5 Assume a release clause said A hereby releases all
6 claims against B, including, for the avoidance of doubt,
7 any claims that are not within A's contemplation as at
8 the date of this release. New York law would give
9 effect to those clear terms, would it not?

10 A. I believe they would give effect to those terms and that
11 New York would give effect to those terms by looking at
12 the purpose of the release and what was within the
13 contemplation of the parties.

14 Q. But on the hypothesis I have just given you, I said that
15 the clause said specifically that for the avoidance of
16 doubt it included any claims that are not within A's
17 contemplation at the date of this release?

18 A. I think the court would have to construe what the
19 parties meant by "within the contemplation of the
20 parties". I don't think that necessarily takes in
21 after-acquired claims, for example as a matter of
22 New York law. It is an unusual formulation, different
23 from the one in the Settlement Agreement but I do think
24 the court would have to construe that and looking at the
25 principles of New York law with regard to the

1 interpretation of releases, the court would try to
2 determine what was within the contemplation of the
3 parties in terms of the scope of the release.

4 Q. But you accept, don't you, that a release is a contract
5 to which general principles of interpretation apply?

6 A. Yes, but as you see both Judge Smith and I agree, that
7 there are special rules applied to the construction of
8 a release under New York law.

9 Q. But I thought we agreed that you would look at the
10 language of the contract --

11 A. Absolutely.

12 Q. -- for a release?

13 A. Absolutely.

14 Q. And looking at the language of the hypothetical clause
15 I have just given you, it seems pretty clear on the
16 language that that would include all claims, including
17 those not within the contemplation at the date of the
18 release. So on what basis would you exclude claims?

19 A. Well, first, after-acquired claims are a different
20 species of claim. A release speaks of the date of its
21 execution and after-acquired claims are something very
22 different and unusual in my opinion and certainly not
23 within the scope of most releases and I think there are
24 several the cases that we have both cited say that,
25 including my T-Bone case.

- 1 Q. Give me an example, specifically, of where you say,
2 notwithstanding this sort of wide language of the
3 hypothetical, after-acquired claims are excluded,
4 specifically after-acquired claims?
- 5 A. Because a release ordinarily includes all claims that
6 the parties are capable of releasing at the time,
7 meaning claims that they own as of the date of the
8 release. The standard form of general release in
9 New York before we had computers was on a form that you
10 would buy from a legal stationer, and it was called
11 a Blumberg form because that was the name of the
12 stationary company. It was a long page and it says
13 release known and unknown, all of that language was in
14 there, plus from the beginning of the world to the date
15 of these present -- I state that in my report.
- 16 Q. You do.
- 17 A. And that is the way they were formulated, they were
18 formulated to release claims that the party releasing
19 them, the releasor had the legal capacity of releasing
20 at the time.
- 21 Q. Well give me an example, I asked you, of a case where
22 after-acquired claims were treated in that specific way
23 that you suggest they are, with a clause as wide as the
24 hypothetical clause I gave you?
- 25 A. Well, when you say treated in that way, that is not

1 included --

2 Q. Well you are suggesting --

3 A. -- in a release that is admittedly broad.

4 Well, I would cite, frankly, the case that you have
5 found, the Prosat case, as the only case that either
6 party has been able to find that includes within
7 a release an after-acquired claim. You said, well this
8 is a good statement of the law. I would suggest that
9 the opposite; that there has never been another case
10 that has held an after-acquired claim to be within the
11 scope of a release whether general or not. And I would
12 also say -- but I am now going beyond your question --
13 that the Prosat case was decided on its very specific
14 facts and on a release that was broader than the release
15 we have in our case.

16 Q. We will come on to the Prosat case but I think the
17 answer to my question is you can't give me an example of
18 a case that supports your position, but you have cited
19 the Prosat case as being the only one that you would say
20 supports my position, is that right?

21 A. That appears to be the only one that either party has
22 been able to find.

23 Q. Shall we have a look at the Prosat case?

24 A. Very well.

25 Q. You deal with this case at paragraph 55 of your report,

1 don't you?

2 A. I do.

3 Q. What you say is that the case was obviously decided only
4 on its own special facts, even assuming that California
5 law would be the same as New York's on this point.

6 Can we just deal with the latter point. You are not
7 suggesting that Californian law is not the same for this
8 purpose, are you?

9 A. For this purpose no, I am not.

10 Q. So that caveat is not relevant.

11 So we are down to your point of obviously on its own
12 special facts.

13 A. I don't -- did I use the word "obvious"?

14 Q. You did. Do you want to have a look at your report?

15 A. All right.

16 Q. You said it in the penultimate line of paragraph 55.

17 A. I did, you are correct.

18 Q. "The case, which incidentally has never been cited or
19 relied upon by any other court, was obviously decided on
20 its own special facts."

21 A. You are correct.

22 Q. And you have obviously anticipated the question I was
23 going to ask you, because nothing in the report suggests
24 that it was obviously decided on its own special facts,
25 does it?

1 A. Well, certainly the facts are set out at length and the
2 facts were quite different from the facts that
3 I understand are present here.

4 Q. Well, let's have a look at the decision at tab 90 of
5 bundle D2.

6 A. Very good, are we in the District Court decision on
7 appeal, or in the bankruptcy court?

8 Q. We are on the appeal.

9 MR JUSTICE SMITH: Tab 90 is the appeal.

10 MS TOLANEY: Tab 90 is the appeal.

11 A. Yes.

12 Q. And if you could look at page 5, in the right-hand
13 column the first complete paragraph, which starts with:

14 "The question is whether the release in the
15 Settlement Agreement asserted by the Shiff estate is
16 unenforceable."

17 Can you see that?

18 A. I do.

19 Q. What you see in this paragraph is the reasoning that the
20 release is broad?

21 A. I do.

22 Q. And that appears to be the essence of the reasoning of
23 the appellate court, because as you see in the
24 paragraphs that follow there is an analysis of the
25 language that is used and its breadth and in particular

1 and the words "all claims", "all and any claims without
2 limitation including unknown future claims of any
3 character, nature and kind" and you also see the words
4 "released, forever discharged" and "unknown, suspected",
5 "unsuspected, et cetera".

6 A. Yes, but the "et cetera" contains I think a critical
7 clause that the court cited which is that the release
8 covered all claims or possible claims --

9 Q. Indeed.

10 A. -- and the court relied on that language, which goes far
11 beyond, I think, goes -- strike that. It goes beyond or
12 is different from the language in the Settlement
13 Agreement.

14 Q. Well, two follow-up questions to that, Judge Gropper.
15 First, I gave you a hypothetical clause that was very
16 wide and you said that you didn't think after-acquired
17 claims would fall into that clause even though it is
18 incredibly wide and yet here we have an example where
19 you are justifying the court's decision based upon very
20 similar language to the one that I gave you.

21 A. I don't necessarily agree that it is very similar
22 language. But the context of this case is that it was
23 agreed that if the releasor paid a third party,
24 Imagitas, for its position, its claim, that it would
25 have a claim and only in that event and in this case the

1 releasor Shiff obtained the claim for no consideration
2 at all and the bankruptcy court found that this was in
3 violation of the intent of the agreement.

4 The facts were very specific with regard to the
5 acquisition of the Imagitas claim and there certainly
6 was reason to assume that in this case the parties
7 wanted to be done with each other.

8 Q. Well, Judge Gropper, first of all, we were focusing on
9 the language and you just shifted your answer to the
10 commercial purpose.

11 A. Well --

12 Q. But, secondly -- here is my question -- if you look at
13 the paragraph below the one I asked you to read, it says
14 in terms that:

15 "Extrinsic evidence might establish that a release
16 refers only to all claims of a particular type, but
17 there is no evidence that was the parties' intent at the
18 time they negotiated the release. Absent such evidence
19 the law imputes to a person an intention corresponding
20 to the reasonable meaning of his words and acts and in
21 this case the reasonable and plain meaning of the
22 release is given effect."

23 So there is no evidence that the Court of Appeal
24 looked at the commercial purpose rather than the words
25 of the clause?

- 1 A. You always start with the words of the contract.
- 2 Q. Right.
- 3 A. No question. And if the words of the contract are clear
4 then you stop. But in New York, as to releases, a court
5 is enjoined to go further and to determine what was
6 within the contemplation of the parties at the time.
7 And some of the rules with regard to introduction of
8 evidence and the like are elusive in order to deal
9 fairly with releases. I do not know the full extent of
10 California law on that particular point and if
11 California law has developed as far as New York law has
12 on that point.
- 13 Q. But I thought you just said there was no material
14 difference between California and New York law?
- 15 A. I agree. For purposes of this inquiry I will accept
16 that there is no material difference.
- 17 Q. But you would agree then, it sounds like,
18 hypothetically, that if you had a clause of this type of
19 width and you had a commercial purpose of the nature you
20 have just described, then after-acquired claims could be
21 released?
- 22 A. They could be released, certainly.
- 23 Q. And I think you tried to suggest that this clause was
24 wider than the clause in the Settlement Agreement which
25 was a distinguishing feature?

- 1 A. I think the term "possible claims" is wider. It is
2 a sloppy term if I may use that --
- 3 Q. Right.
- 4 A. -- word. I think the parties who drafted the Settlement
5 Agreement were far more sophisticated and they certainly
6 didn't use the term "possible claims".
- 7 Q. Well, that is one of the reasons I asked you why you
8 hadn't cited the definition of causes of action in your
9 report, because the width of the term as defined in the
10 Settlement Agreement "causes of action", coupled with
11 the language of clause 8.02, I would suggest to you is
12 every bit as wide?
- 13 A. I -- I do not agree with that. As I think is obvious
14 from my testimony and my report.
- 15 Q. And so you would put the difference you say on the
16 inclusion of the words in the Prosat cases "possible
17 claims"; that is the difference?
- 18 A. I think -- well, that is one factor that I think the
19 appellate court took into account, in addition to the
20 specific facts where the acquisition of the claim by the
21 releasor for no consideration was in direct
22 contravention of the purpose, the bankruptcy judge said
23 the spirit of the agreement which is a fairly vague
24 term, but I think that clearly it was in contravention
25 of the purpose and intent of this specific agreement.

1 The only case that I think either party has found on
2 the -- for the proposition that an after-acquired claim
3 should be included within a release and a case that was
4 decided after the release in the Settlement Agreement
5 was agreed to. So I am assuming at that time there
6 simply was not authority for the proposition that an
7 after-acquired claim would be included within a release.

8 Q. But there is now, Judge Gropper. So let me just focus
9 on this case.

10 A. There is there is the Prosat case.

11 Q. So the words you were trying to draw -- I am just going
12 on your evidence and exploring your evidence. You were
13 trying to suggest that the reason this case could be
14 distinguished was for two reasons. One because you say
15 that inclusion of the words "all possible claims" makes
16 a material difference to the width of the Settlement
17 Agreement, correct?

18 A. I think it made a difference to the appellate court yes.

19 Q. Right. And the second is you say that it is the purpose
20 factually of acquiring after-acquired claims in the
21 context of the particular facts of this case?

22 A. Essentially, yes.

23 Q. And what specifically in the particular facts do you
24 rely on?

25 A. The fact that the agreement dealt with the

1 after-acquired claim itself provided that if
2 consideration was paid for by the releasor for that
3 claim, the claim could be admitted and the obvious
4 implication was that if no consideration was paid that
5 there would be no claim for -- in respect of the
6 Imagitas claim.

7 MS TOLANEY: My Lord, is that a good moment to break?

8 MR JUSTICE SMITH: Yes, thank you.

9 Just one question. Are you going to be taking the
10 judge to the point about evidence going to the
11 contemplation of the parties at the time the release was
12 agreed, because I understand there is a difference
13 between --

14 MS TOLANEY: Yes, I am.

15 MR JUSTICE SMITH: You are.

16 Five minutes. Thank you very much.

17 (11.54 am)

18 (A short break)

19 (12.00 pm)

20 MS TOLANEY: Judge Gropper can we go back to paragraph 27 of
21 your report, now, please. And that is in bundle D1.
22 And this is your proposition that the broadest general
23 release will be limited to what is shown to be within
24 the parties' contemplation. And you have a quote from
25 the Mangini decision.

1 A. Yes.

2 Q. So could we just look at the Mangini decision, please;
3 that is in bundle D1, the same bundle, at tab 18. And
4 if you turn to the headnote first, just for his
5 Lordship's benefit we see that this is a personal injury
6 case. If you then go on to page 4 of the document, and
7 read the second paragraph in the left-hand column, which
8 makes the point half way through that:

9 "The Manginis alleged that the releases were entered
10 into under a mutual mistake of fact as to the extent of
11 the daughter's injuries and the parties had not intended
12 to discharge liability for such unknown injuries."

13 And then if you go next to the final complete
14 paragraph in the right-hand column you see there the
15 terms of the release are set out. Do you have that?
16 This is on page 4 of the report.

17 A. Page 4, I am not --

18 Q. The page numbers are really faint -- it is rather
19 irritating, they are very faint on the right-hand corner
20 at the bottom.

21 A. I see. Yes, thank you, I see it.

22 Q. They are not very visible I am afraid.

23 A. Okay.

24 Q. I have just referred you to the second complete
25 paragraph on the left-hand side describing the mistake

1 allegation and then the paragraph I have referred you to
2 is on the bottom of the right-hand column where the
3 terms of the release are set out.

4 A. Yes.

5 Q. And you will see that there is no express release of
6 unknown claims, is there?

7 A. Not in this language, no.

8 Q. No. Then over the next page, page 5, if you go to the
9 second paragraph in the left column, you can see in the
10 paragraph that starts "Dr Gazeley" that the point is
11 made there that the injuries now discovered could not
12 have been discovered at the time of the settlement.
13 Then two paragraphs down, we have the passage you have
14 quoted in your report at paragraph 27 which includes
15 a sentence "Thus while it has been held that an
16 unreformed general release will be given its full
17 literal effect" and so on, that is the passage you
18 quote.

19 A. Yes.

20 MR JUSTICE SMITH: Ms Tolaney, where exactly is that?

21 MS TOLANEY: That is the paragraph which starts "It is
22 true", two paragraphs down from the Dr Gazeley
23 paragraph --

24 MR JUSTICE SMITH: Yes.

25 MS TOLANEY: -- and I think the passage that is quoted by

1 Judge Gropper starts "Thus while it has been held ..."

2 The point I was going to put to Judge Gropper is
3 that when you read the whole of the paragraph and the
4 one that follows, it is apparent that what the court is
5 saying is that in some cases a release will be given
6 general effect and in others, and examples of the others
7 are cited, the release is held not to extend to
8 uncontemplated claims?

9 A. That is correct.

10 Q. And we then go on and see that there is a discussion in
11 this case in the next column of mutual mistake and the
12 fact that special principles have been developed in
13 relation to personal injury claims and you see that
14 right in the bottom paragraph on the right-hand column.

15 A. Yes, but I don't believe -- all of this certainly was
16 a personal injury case. I do not believe that these
17 principles are restricted to personal injury cases.

18 Q. No, I think you and Judge Smith disagree on the merits
19 of that, but the point that I am making is that the
20 court records that the principle has spilled over into
21 personal injury --

22 A. Yes.

23 Q. -- and that nevertheless the courts have applied special
24 rules by way of analogy to unknown injuries, treating
25 them as matters not in contemplation at the time of the

1 settlement, have you got that?

2 A. Yes, I do.

3 Q. That is what I was referring to.

4 You then have the next paragraph over the page which
5 is not quoted in your report which says:

6 "But if from the language of the release or from the
7 circumstances of the negotiated settlement there was
8 a conscious and deliberate intention to discharge
9 liability from all consequences of an accident, the
10 release will be sustained and bar any future claims of
11 previous known injuries."

12 A. Yes.

13 Q. So it is possible on the basis of particular language or
14 from the circumstances of the settlement for the court
15 to conclude the parties intended to release all
16 consequences of the accident even unknown claims even in
17 the personal injury field?

18 A. That is correct -- I believe that to be correct, yes.

19 Q. So you accept therefore that it is possible and indeed
20 there are cases in which the court has given effect to
21 a release of unknown claims that were not in the
22 contemplation of the parties at the time of the
23 settlement?

24 A. Well, I -- I perhaps would amend that to say that where
25 the court has concluded that unknown claims were within

1 the contemplation of the parties, at the time of the
2 settlement, and therefore were included within the
3 release. I get to the same place you get.

4 Q. It was possible for those to be released.

5 A. I believe that to be the case.

6 Q. Right. So could we then look next at paragraph 37 of
7 your report and you refer there to the WorldCom
8 decision.

9 A. I do.

10 Q. And you say that the court recognised that broad
11 releases may be avoided with respect to uncontemplated
12 transactions and you cite the Mangini case we have just
13 looked at.

14 A. Yes.

15 Q. So could we look at the WorldCom decision which is in
16 the same bundle D1 at tab 53.

17 A. Yes.

18 Q. And you can see from the headnote that the issue was
19 whether Bracknell's proof of claim in the WorldCom
20 bankruptcy should be rejected on the basis that it had
21 been released by a Settlement Agreement governed by
22 New York law and that is from the very first page of the
23 report you can pick that up. Do you see that?

24 A. Yes.

25 Q. Then page 6, again I am afraid the faded letters.

1 A. I see it yes.

2 Q. You will see the release clause itself on the right-hand
3 column, do you have that?

4 A. I do.

5 Q. And that includes the words "known or unknown" in the
6 middle, do you see that?

7 A. Yes.

8 Q. And then if you turn to page 8, please, you will see on
9 the right-hand side in the second paragraph a paragraph
10 that starts with "An expansive release will generally be
11 given its intended effect unless a releasor can
12 demonstrate that it intended a more limited agreement",
13 do you see that?

14 A. I indeed.

15 Q. Then going into that paragraph there is a passage that
16 starts "New York courts have recognised", do you see
17 that?

18 A. I have that.

19 Q. And that is the passage that you quote in your report
20 that we have just looked at at paragraph 37, isn't it?

21 A. Yes.

22 Q. But you do not go on to quote in your report the
23 sentence that follows:

24 "However, the release contained in the Settlement
25 Agreement specifically refers to all actions whether

1 known or unknown, thereby reflecting the clear and
2 unambiguous intent of the settlement parties to bar all
3 uncontemplated transactions."

4 You just don't quote that in your report?

5 A. That is correct.

6 Q. So what we see here is the decision that you are relying
7 on, in fact the courts gave effect to the words "known
8 or unknown" to include all uncontemplated transactions?

9 A. Well my -- my report is already lengthy. I cited that
10 case in part simply to demonstrate that these principles
11 are applied in bankruptcy court as in other courts in
12 the same fashion.

13 Q. Shall we go now to paragraph 34 of your report, please.

14 A. Very good.

15 Q. That is in D1. You set out in paragraph 34 the argument
16 advanced by Deutsche Bank to the effect that where the
17 words of release are of general effect the burden of
18 proof is on the releasor to show that a claim was not
19 released.

20 A. Yes.

21 Q. And you go on to then cite one of your own decisions,
22 the Market Holdings decision, and could we look at that
23 please. That is in bundle D2 at tab 65.

24 A. Just give me one second, yes.

25 Q. Thank you, do you have that decision?

1 A. I have the decision.

2 Q. I appreciate it is your decision. And you see the
3 synopsis, for his Lordship's benefit, on the first page
4 that it is about a Chapter 11 trustee who brought claims
5 in respect of certain transfers to a lender and your
6 judgment concerns the defendant's motion to dismiss
7 certain claims?

8 A. That is correct.

9 Q. And then on page 9 of the report under the heading
10 "Discussion" we have an explanation there that a motion
11 to dismiss is a summary procedure designed to test the
12 legal sufficiency of the compliant without examining the
13 evidence?

14 A. That is correct.

15 Q. And then if you go to page 21, under the heading "Scope
16 of release, which is towards the bottom of the page, the
17 controversy is there defined by you:

18 "The defendants say the release was general, the
19 plaintiffs say it was intended to settle a specific
20 controversy."

21 And then we see the terms of the release which are
22 very broad including again the words known or unknown,
23 suspected or unsuspected.

24 And if you then could read the first paragraph over
25 the page on paragraph 22 please.

- 1 A. Yes.
- 2 Q. You make two points: first that it is well-established
3 under New York law that a clear and unambiguous release
4 will be enforced according to its terms and second that
5 where the words of the release are general the burden
6 rests on the releasor to establish that the general
7 language was not intended to be general and you cite
8 various New York authorities for those propositions.
- 9 A. I cite one case for that proposition.
- 10 Q. Yes. But you agree that is what the paragraph says the
11 two propositions?
- 12 A. Yes, may I add though that this release, like most
13 releases, ends with the words from the beginning of time
14 to the date of the closing --
- 15 Q. Yes?
- 16 A. -- referred to in section 7 of this agreement.
- 17 Q. That is fine. I fully accept those are the terms of the
18 release, but accept that the paragraph I read to you
19 contains those two propositions?
- 20 A. That is correct.
- 21 Q. And then in the next paragraph, you say "the releasor
22 cannot bear this burden" and you make that point that
23 context of the fact that this is a motion to dismiss as
24 you have heard no evidence?
- 25 A. That is correct.

1 Q. But you say that the intent of the parties -- this is in
2 the next sentence for his Lordship:

3 "However, the intent of the parties must be
4 determined in light of the written agreement. The clear
5 unambiguous language contained in the release is of
6 general effect and the range of actions and the time
7 period covered ..."

8 Unknown, suspected or unsuspected and so on which
9 you site. You say:

10 "This broad unqualified language clearly covers
11 actions other than settled litigation."

12 Correct?

13 A. I say that, yes.

14 Q. And you then talk about the commercial context by
15 parties in a roughly equivalent bargaining position with
16 ready access to counsel and you say the general rule is
17 that if the language of the release is clear, the intent
18 of the parties is indicated by the language employed.

19 A. That is correct.

20 Q. So what we see here is you absolutely looking at the
21 four corners of the agreement you don't have any
22 extrinsic evidence about their particular intentions and
23 you look at the rough equivalents of the parties in
24 order to reach your conclusion, correct?

25 A. That is correct.

1 Q. Pausing just there, you say that the burden of proof
2 should not apply in this case because of section 17 of
3 the Settlement Agreement and you make that point?

4 A. You are going now to my opinion?

5 Q. I am.

6 A. Okay.

7 Q. At paragraph 35 of the report. And you say that that
8 means that the burden of proof point that you had
9 referred to in the WorldCom case doesn't apply?

10 A. You mean in the Market XT case?

11 Q. In the Market XT case, I am sorry, yes exactly.

12 A. Yes.

13 Q. And you say that it doesn't apply because of article 17
14 in the Settlement Agreement which is at, if you want to
15 remind yourself, bundle E, tab 16-page 506.

16 A. I quote that section or part of it at paragraph 35 of my
17 report.

18 Q. You do. And that article is concerned with the
19 principles and maxims of construction, isn't it, it is
20 nothing to do with the burden of proof, is it?

21 A. Well, it does have to do with whether an agreement is
22 construed for or against any party "or any rule or maxim
23 of construction to such effect". So when I wrote this
24 I certainly was of the view that this would apply in
25 terms of the burden of proof.

1 Q. But Judge Smith is right to say that it doesn't affect
2 the agreed principle that the releasor has the burden to
3 prove that a claim is excluded from a general release?

4 A. I know Judge Smith says that in his report --

5 Q. You disagree?

6 A. -- and I think we have a disagreement, but I am not sure
7 if disagreement on a material matter, because I would
8 suggest that this case isn't capable of being decided on
9 the question of burden of proof, but now I am I think
10 trespassing on my Lord's prerogative.

11 Q. But what you say in paragraph 34 is that contrary to the
12 clause you were looking at in the market case, you say
13 that the release doesn't contain general language that
14 was meant to be general, the release is a carefully
15 crafted specific release and you say that the recital
16 confirm it was confined to outstanding issues amongst
17 the debtors and the UK affiliates, correct?

18 A. I believe that is demonstrated by the whereas clause
19 that speaks of parties' wish to resolve outstanding
20 issues, yes. That is a point I make several times.

21 Q. And obviously though you remember that the Prosat case
22 referred in its headnote to the reference to outstanding
23 issues and yet a much wider application was given to
24 that, wasn't it?

25 A. I don't recall the word "outstanding" but if you

1 represent that it is in the Prosat case, I certainly
2 have no basis for not accepting that.

3 Q. But you wouldn't change your mind, your conclusion?

4 A. No, I would not.

5 Q. One of the areas on which you and Judge Smith disagree,
6 as his Lordship mentioned before the break, is as to the
7 scope of the parole evidence rule in the context of
8 a release clause?

9 A. That is correct.

10 Q. And your position, as I understand it, is that the
11 parole evidence rule has been frequently modified to
12 permit extrinsic evidence going to what was in the
13 contemplation of the parties to the release?

14 A. In connection with the construction of a release, yes.
15 And I believe the Mangini case that we looked at before
16 says that.

17 Q. Let's have a look at your report at paragraph 39, which
18 is where I think you deal with this point. You say that
19 it is recognised in determining what was in the
20 contemplation of the principles when a release was given
21 the limitations of parole evidence are often subject to
22 special rules and you cite a number of cases. Can we
23 just look at the Actrade case that you mention first.

24 You say that you took several days of testimony
25 without objection to determine what the parties

1 contemplated in negotiating a general release, not only
2 as evidence relating to the negotiation of the release
3 admissible but you go on to say that it is good
4 evidence, et cetera. So this was one of your decisions
5 again and it is in bundle 2, at tab 74.

6 A. Tab 74, yes.

7 Q. So if we look at the headnote here we see that the
8 liquidators of Actrade were seeking to enforce
9 performance bonds granted by sureties and the sureties
10 argued that they had been released, do you see that?

11 A. Yes.

12 Q. And then if we go to page 4 of the report, you see under
13 the heading "The facts established at trial" the court
14 held a 2 day trial on the construction of the release.
15 Now, is this what you meant when you said it took served
16 of testimony, or is this different?

17 A. Exactly what I meant.

18 Q. The two days?

19 A. Yes.

20 Q. And if we then go to page 8 of this report, it is the
21 last paragraph on the page:

22 "The court held on summary judgment that the
23 language of the release when read together with the
24 Settlement Agreement was ambiguous."

25 So just pausing there. You had already determined

1 at a previous hearing that the release clause was in
2 fact ambiguous and that is why you held a trial on
3 parole evidence?

4 A. Yes.

5 Q. So this is actually an example of where parole evidence
6 was admitted to determine the ambit of a clause that was
7 ambiguous, not an example of where it was admissible in
8 any event?

9 A. That would be the implication, yes.

10 Q. Then if we look back again at your paragraph 39 of your
11 report, you also cite the cases Alton Jones and Ocean as
12 well. It may be just --

13 A. No, Alton Jones, in paragraph 39.

14 Q. Exactly. You and Judge Smith disagree about whether
15 post contractual conduct is admissible only in cases of
16 ambiguity because your position is that post contractual
17 conduct is admissible to the construction of a release
18 regardless of any ambiguity in the language?

19 A. I believe that the New York cases loosen the rules on
20 parole evidence in connection with the construction of
21 releases. As for post transaction, post contract
22 conduct there is no question that Judge Smith cites
23 a number of cases, particularly in the appellate
24 division in New York, that say that where there is an
25 ambiguity one can use what he calls or what we both call

1 conduct, post-transaction conduct. And I think that the
2 parole evidence rule strictly speaking, which is an
3 important rule in New York and I think in the
4 United States generally, provides that pre-transaction
5 evidence, evidence of the parties' intent in connection
6 with an agreement, cannot be introduced to alter or vary
7 the provisions of the agreement and it has been
8 frequently applied and I think it is loosened in
9 connection with the construction of releases.

10 As to post-transaction conduct I think it is
11 important to keep in mind that as a matter of contract
12 law, as I understand it, the parties are free to modify
13 to alter or to terminate their contract after it has
14 been entered into and that unless the parties have
15 agreed otherwise, that any such modification has to be
16 in writing, the parties can do that orally. So that,
17 yes, I think the court can take evidence of
18 post-contract conduct. On the other hand an unambiguous
19 agreement is unambiguous and if the court has so held
20 the parties' conduct after the date of the contract will
21 generally be held to be irrelevant.

22 Q. Because what you say in paragraph 39 is:

23 "Notwithstanding the parole evidence rule evidence
24 can be adduced to demonstrate the scope of a release and
25 what was in it within the contemplation of the parties

1 when they executed it."

2 But you accept if it is unambiguous, do you, that
3 parole evidence is required?

4 A. No. I think in a case like Mangini, personal injury
5 case, you had a blanket general release that would have
6 covered the claims that the plaintiff was attempting to
7 pursue and the court nevertheless took evidence as to
8 what was in the contemplation of the parties at the time
9 they entered into the release and that evidence would
10 not ordinarily have been admissible under the parole
11 evidence rule.

12 Q. In Mangini, as we saw, the allegation was that there had
13 been a mutual mistake, wasn't it?

14 A. Yes.

15 Q. And also the clause didn't have the very general
16 language including the words "unknown", did it?

17 A. I don't -- well, you are correct, it did not have the
18 words "unknown".

19 Q. No. So shall we have a look then at the other cases you
20 cite. We have looked at the Actrade case which was
21 a case of ambiguity, so let's look at the Alton case
22 which is in bundle D1 at tab 38, please. So the opinion
23 starts on page 2 in the right-hand column around
24 two-thirds of the way down and the easiest thing may be
25 for you to, Judge Gropper, and his Lordship to read the

1 first five paragraphs up to the heading "Background" on
2 page 3.

3 (Pause)

4 So it was described as a case involving highly
5 unusual circumstances, we see that in the first
6 paragraph, and in short the issue was whether Cities'
7 claims in one set of proceedings had been compromised by
8 the Settlement Agreement in another set of unrelated
9 proceedings brought by its shareholders, correct?

10 A. I believe that is correct.

11 Q. And that in turn depended on whether Cities was in the
12 plaintiff clause in the settled proceedings, correct?

13 A. Yes.

14 Q. And both the judgment in the settled proceedings and the
15 related documents are described as defining the relevant
16 class in an "inconsistent and confusing manner"; you can
17 see that, can you?

18 A. Yes.

19 Q. So if you then go forward to page 7, please, and on the
20 left-hand column half way down at II you see a heading
21 the existence of an ambiguity, do you have that?
22 Judge Gropper do you have that?

23 A. Yes.

24 Q. Now, we see that Gulf argued that the extrinsic evidence
25 as to the parties' intentions was inadmissible except in

1 the case of an ambiguity, citing a case called Levine;
2 can you see that?

3 A. Yes.

4 Q. And there then follows a discussion of whether the class
5 is ambiguously defined and we see the conclusion over
6 the page on the right-hand column the second paragraph
7 that extrinsic evidence is held to be admissible because
8 of the ambiguity?

9 A. Yes.

10 Q. So again, this is a case that demonstrates that
11 extrinsic evidence was admitted because of the
12 ambiguity?

13 A. I am not sure I would agree with your phrase "because of
14 the ambiguity", but certainly you called attention to
15 the fact that there was ambiguity in the record.

16 Q. Does it not say "because of the ambiguity"?

17 A. Where is that?

18 Q. If you look at the bottom paragraph what we can see is:

19 "These observations may be true but they are not
20 determinative. For the purposes of the rule of
21 interpretation that bars consideration of extrinsic
22 evidence for the absence of ambiguity, ambiguity is a
23 practical concept."

24 And then it goes on to discuss the ambiguity here
25 and the resolution of the ambiguity.

1 So it is quite clear in the last paragraph:

2 "We conclude that because of the ambiguity as to
3 whether the plaintiff class included ..."

4 And it goes on:

5 "... to authorise the reference to extrinsic
6 evidence."

7 A. "The extrinsic evidence powerfully supports
8 Judge Mukasey [who was the judge below, the trial court]
9 finding that the Settlement Agreement and the judgment
10 entered on it were never understood to encompass Cities'
11 off-market branches."

12 Q. But you see that there is the reference to the reasoning
13 why the extrinsic evidence was allowed in?

14 A. Yes.

15 Q. Now, if you go back to paragraph 25 of your report,
16 please. You say there that:

17 "Without regard to the question of ambiguity, it is
18 a general principle of New York law that the parole
19 evidence rules do not bar extrinsic evidence of the
20 parties' subsequent conduct under a contract."

21 Now, before I take you to the authorities that you
22 quote here, do you stand by that statement
23 notwithstanding what we have just seen in the Chevron
24 case?

25 A. I do. Although as I said a few moments ago, I agree

1 that there are many cases, particularly in the appellate
2 division, that say broadly that subsequent conduct, the
3 parties practical construction, which is a term that we
4 both use, is admissible only where there is an
5 ambiguity. Many of the New York cases say that. Many
6 are appellate division cases, that tend to be brief and
7 summary, not like the decisions of New York's highest
8 court which is the Court of Appeals. I am not aware of
9 a case which really explores where the question of
10 ambiguity leaves off, and the principle that I mentioned
11 a few moments ago that parties are free to modify their
12 contract and to enter into a new contract, begins,
13 because the parole evidence rule as a rule strictly
14 speaking only applies to evidence that would alter or
15 vary the parties' intent on entering into the contract
16 and doesn't really go to subsequent evidence.

17 So I am not sure that the distinction is critical
18 for purposes of this case, but that of course is up to
19 the judge.

20 MR JUSTICE SMITH: Judge Gropper, let's leave on one side
21 evidence going to establish subsequent variation,
22 because happily that is one the few questions I don't
23 have to consider in this case. But looking at the
24 wording in paragraph 25 of your report, you say that the
25 parole evidence rule does not bar evidence of the

1 parties' subsequent conduct under contract without
2 regard to the question of ambiguity. So I think what
3 you are saying there is that the evidence comes in even
4 though there may be an argument about whether the
5 release is ambiguous.

6 A. But I -- I --

7 MR JUSTICE SMITH: Now, my question is this.

8 A. Yes, sir.

9 MR JUSTICE SMITH: Isn't there simply a practical question
10 here that, as here, there is a debate before the judge
11 as to whether the agreement is or is not ambiguous which
12 the judge is going to have to resolve at some point.
13 Now, assuming a reserved judgment, surely one is going,
14 as a matter of evidence, to admit the material so that
15 the judge has it if and when he or she comes to the
16 conclusion that the agreement is ambiguous. In other
17 words, one gets the evidence in, but if on mature
18 consideration the judge reaches the view that actually
19 the words of the agreement are clear then the parole
20 evidence is simply unhelpful -- well not even unhelpful,
21 is simply not pertinent. Is that a way of squaring the
22 circle in terms of what you say in paragraph 25?

23 A. Well I think that is the way of squaring the circle
24 between what I say and what Judge Smith says on this
25 particular point. I think we both agree that the

1 evidence as to the parties' practical construction --
2 that is the term that we used -- of the contract is, at
3 least as to the Bundesbank agreement and the STG
4 agreement, not consistent or clear enough to be good
5 evidence of the parties' practical construction.

6 When I wrote these words I was very much influenced
7 by the decision of the US Supreme Court going back to
8 1913 which stated flatly:

9 "The parties' interpretation of a contract in
10 practice prior to litigation is compelling evidence of
11 the parties' intent."

12 On the other hand, it is a different question as to
13 whether or not that conduct can prevail over a contract
14 that is unambiguous and clear on its on its face, even
15 though I do believe that parties can terminate
16 a contract, can modify it, subject to an agreement such
17 as we have in the Settlement Agreement that any
18 modification won't be implied and any amendment has to
19 be in writing.

20 MR JUSTICE SMITH: Yes. And again leaving that to one side,
21 I think you and Judge Smith are in agreement, if I may
22 say so, that if the conclusion is that the wording of
23 the agreement is clear then the evidence as to the
24 parties' intentions at the time of contracting and
25 thereafter bow to that construction?

1 A. There is certainly -- there are a number of New York
2 cases to that effect. Yes, sir.

3 MS TOLANEY: None of the ones we have looked at, I think,
4 support your position at the moment, do they?

5 A. The cases do or do not?

6 Q. Do not.

7 A. And my position being?

8 Q. Well your position in paragraph 25 is that ambiguity is
9 not the touchstone and you cite Wall Street as an
10 example of that. It is D1, tab 21.

11 MR JUSTICE SMITH: Ms Tolaney, I do think weight needs to be
12 attached to "does not bar evidence". I took the witness
13 to be accepting that even if you get the evidence in, it
14 is only going to help if the judge reaches a view that
15 the written words are ambiguous. And I don't think that
16 paragraph 25 is saying that if you reach the view that
17 the contract is clear, you can override that.

18 MS TOLANEY: Well paragraph 39 of his report suggests that
19 he is saying that. Judge Gropper is saying that. And
20 so if Judge Gropper is accepting that it is only in the
21 case of ambiguity that parole evidence is inadmissible
22 then I am content, but I had not understood him to be
23 limiting it to that.

24 A. I just agreed with his Lordship, if I -- His Honour,
25 I would say, that where the contract is clear, that

1 should be the end of it.

2 Q. Right.

3 A. Where there is no ambiguity in the contract, there are
4 many New York cases that say that is the end of it. On
5 the other hand, the parole evidence rule as a rule of
6 evidence strictly pertains to evidence of the parties'
7 intent and actions at the time of and prior to entering
8 into the contract.

9 MS TOLANEY: You see my Lord, I am looking at paragraph 29
10 of the experts' joint report, which is at tab 4,
11 Judge Gropper, of D1 and in which it is suggested that
12 whether or not the contract is determined to be
13 ambiguous the rule does not bar evidence.

14 MR JUSTICE SMITH: Yes. Let's take this case. There is an
15 issue before me as to what the release means. I have
16 spent yesterday listening to material going to whether
17 if I find the agreement is ambiguous I should decide one
18 way or the other.

19 MS TOLANEY: Indeed.

20 MR JUSTICE SMITH: And that evidence, as I understand it,
21 will only be deployable in my judgment if I come to the
22 conclusion that there is an ambiguity in clause 8.

23 MS TOLANEY: Indeed, and that is our position, but we had
24 understood that to be opposed.

25 MR PHILLIPS: My Lord, it is what I said in opening, it is

1 in our skeleton.

2 MR JUSTICE SMITH: You see, what Judge Gropper is referring
3 to is to the adduction of evidence and I have omitted it
4 because I don't know what the answer is to clause 8 and
5 I imagine that is the unhappy position of judges
6 generally: they see a clause, they hear argument about
7 it and they are not prepared to say from the get-go:
8 this thing is clear and so I am not going to listen to
9 the evidence. What they say indeed is: there is an
10 issue on which the parties are joined. If my decision
11 goes a certain way then this material may be material,
12 but if it goes another way then it won't be.

13 But because you cannot tell which avenue you are
14 going down, you allow the adduction of the evidence and
15 it does seem to me that that is what Judge Gropper is
16 saying. I mean, you took us to paragraph 39 which again
17 is referring to adducing evidence.

18 MS TOLANEY: But also not only is evidence related to the
19 negotiation of the release admissible.

20 MR JUSTICE SMITH: Yes admissibility. Again, I am now
21 admitting this evidence but whether it actually makes
22 a difference at the end of the day is ...

23 MS TOLANEY: My Lord, that is precisely our position, so we
24 are content with that.

25 MR JUSTICE SMITH: What I am trying to do is slightly

1 shortcut matters because it seems to be that there has
2 been an outbreak of unity on this point.

3 MS TOLANEY: Rare.

4 MR PHILLIPS: My Lord, that is how we put it in our skeleton
5 and I did refer to it in opening, that there are
6 differences between admissibility and weight and we
7 didn't want to waste the court's time on this.

8 MR JUSTICE SMITH: Judge Gropper, you heard that exchange.
9 Have I correctly represented your views?

10 A. Yes.

11 MR JUSTICE SMITH: In that case I hope we can move on.

12 MS TOLANEY: I have one point.

13 MR JUSTICE SMITH: Yes, of course. I don't want to close
14 you out, Ms Tolaney, from anything, but I do want to be
15 helpful: if there is agreement then --

16 MS TOLANEY: It is very helpful, it shortens putting two
17 cases.

18 My Lord I think in answer to your question, which
19 I am just asking my junior to find, Judge Gropper
20 suggested that he and Judge Smith both agreed that the
21 Bundesbank agreement and the STG agreement were
22 unhelpful and I don't believe that to be the position of
23 Judge Smith.

24 MR JUSTICE SMITH: I am not sure it is a matter within the
25 province of expert evidence. That it seems to me is

1 a matter for me.

2 MS TOLANEY: Indeed. I am very grateful for that.

3 I have nothing further then, Judge Gropper, thank
4 you very much.

5 MR JUSTICE SMITH: Thank you.

6 Questions from MR JUSTICE SMITH

7 MR JUSTICE SMITH: Before you rise, Mr Phillips, I want to
8 ask Judge Gropper one question.

9 Could you go to the joint report, tab 4.

10 A. Yes, sir.

11 MR JUSTICE SMITH: Page 5, paragraph 13. This is under the
12 agreed principles of New York law and in paragraph 13
13 you and Judge Smith both agree that a release may be
14 specific or general. But neither of those terms are
15 terms of art --

16 A. Yes, sir.

17 MR JUSTICE SMITH: -- in the sense that if I put into my
18 agreement "I am generally releasing all claims that
19 I have against Judge Gropper", there is some indication
20 as to width but you wouldn't be able to pull down
21 a textbook and say by my use of the word "general" one
22 can immediately ascertain what I mean.

23 A. I think that is absolutely correct, sir.

24 MR JUSTICE SMITH: It would be an appallingly drafted
25 agreement and you would have to work out what I meant by

1 "general".

2 A. Yes.

3 MR JUSTICE SMITH: Equally with "specific", you are there
4 focusing obviously on a narrower claim or claims, but
5 one simply has a construction process to go through.

6 So these are simply labels which go to the width of
7 the release, but there is no particular magic in them
8 beyond that.

9 A. I believe that to be the case, yes, sir. I don't think
10 they are particularly helpful labels. Again we are
11 trying to get at what the parties intended when they
12 entered into the contract.

13 MR JUSTICE SMITH: Thank you.

14 Ms Tolaney if there is anything arising out of
15 that --

16 MS TOLANEY: My Lord, no thank you.

17 Re-examination by MR PHILLIPS

18 MR PHILLIPS: Judge Gropper, just two matters. The first
19 matter, you will reflect my learned friend asked you
20 where you got the \$2 billion figure from.

21 A. That is correct.

22 Q. It was a long time ago but you were asked that question.
23 Could I ask you to go to tab 1 in volume D1, tab 1, your
24 report.

25 A. Yes.

- 1 Q. And could you go to the memorandum towards the back
2 which has a -- it should be page 4 of the memorandum.
3 It is attached to the instructions --
- 4 A. Yes, sir.
- 5 Q. Exhibits to the instructions, do you see that it is
6 a list of exhibits?
- 7 A. Yes.
- 8 Q. And could I ask you just to have a look at number 7,
9 which was a witness statement of the PLC administrators,
10 14 March. Do you see that?
- 11 A. I see that. I don't have the exhibits before me.
- 12 Q. I am going to show you.
- 13 A. All right.
- 14 Q. Could I ask somebody to hand you bundle A, tab 4,
15 please. Do you see a third witness statement of
16 Gillian Bruce?
- 17 A. I do.
- 18 Q. And do you see that that is -- you will see from the top
19 right-hand side that is a witness statement which was
20 filed on behalf of PLC, Lehman Brothers Holdings PLC, do
21 you see that?
- 22 A. I do.
- 23 Q. That is the way we do it here in England. Can I ask you
24 to go to page 30 at the bottom paragraph 36.
- 25 A. Yes.

1 Q. Do you see that in paragraph 36, Mrs Bruce says in
2 36(a):

3 "LBH in the sum of approximately 2.2 billion
4 ... (Reading to the words) ... borrower."

5 Do you see that?

6 A. I do.

7 Q. Does that help refresh your memory as to where you got
8 that \$2 billion figure from -- I am sorry, I showed you
9 the wrong paragraph. I showed you 36(a) and I should
10 have shown you 46(a). And we are bemused as to how that
11 may have happened.

12 I am sorry. 46:

13 "In summary and as described more fully below,
14 LBHI's subordinated liabilities comprise ..."

15 And then you see a description of liabilities in
16 aggregate approximately 1.9 billion on the LBH sub-debt.

17 A. I see that.

18 Q. Does that help refresh your memory as to where you may
19 have got the 2 billion figure from?

20 A. I assume that that is where I learned the number.

21 I obviously have not verified it.

22 Q. Of course not.

23 Judge Gropper, the only other thing I would like to
24 do is that my learned friend, Ms Tolaney, took you to
25 the Prosat case, so if you could be given volume D2.

1 She took you to the Prosat case. Judge Gropper, you can
2 clear away everything else.

3 A. Okay. I have it.

4 Q. She took you to the Prosat case and a number of times
5 you described the commercial context and you wanted you
6 said to bring in the commercial context and my learned
7 friend did not take you through the facts. Can we just
8 unpick the facts of the Prosat decision together and
9 I hope efficiently. Okay?

10 A. Very good.

11 MS TOLANEY: My Lord, is this re-examination when it is not
12 in his report?

13 MR JUSTICE SMITH: You did take the witness to the Prosat
14 decision.

15 MS TOLANEY: I am happy to have it but not a pre-prepared
16 speech like we have seen before.

17 MR JUSTICE SMITH: I am sure Mr Phillips won't be making
18 a pre-prepared speech, but ...

19 MR PHILLIPS: My Lord, can I just go through the facts. And
20 in terms of pre-prepared, frankly my learned friend
21 should know better.

22 MR JUSTICE SMITH: No, no, let us move on.

23 MR PHILLIPS: Really?

24 So if we may just unpick the facts. Can I ask you
25 to look at the background, please, judge, and if you

1 look -- what I want to start with is -- and we know that
2 this is an appeal against the rejection of Shiff's claim
3 number 41.

4 A. Yes.

5 Q. And I want to look at the right-hand side in the
6 background. We start with, do you see the sentence
7 "Prosat contracted with Imagitas to advertise ...", do
8 you see that?

9 A. Yes.

10 Q. "In July 2006 Imagitas sued Prosat for breach of
11 contract for failure to make payments as they became
12 due."

13 Do you see that?

14 A. I see.

15 Q. "Imagitas amended its complaint to include claims for
16 fraudulent transfer against the four Prosat members."

17 Do you see that?

18 A. I see.

19 Q. And that included Mr Shiff?

20 A. Correct.

21 Q. Further down, in February 2007 Imagitas obtains
22 a judgment via stipulation in the case, do you see that?

23 A. I do.

24 Q. And the judgment holds Prosat, Shiff and the three other
25 members jointly and severally liable in the principle

- 1 amount of \$2.9 million, do you see that?
- 2 A. I do.
- 3 Q. In November, going down, Prosat files a Chapter 7
4 bankruptcy petition, do you see that?
- 5 A. I do.
- 6 Q. Then on further down, on April 28 Imagitas files a proof
7 of claim in the Prosat case in the amount of 2.1 million
8 based on the remaining amount of the unsatisfied
9 judgment, do you see that?
- 10 A. I do.
- 11 Q. And that is claim 41. So claim 41 is the amount
12 unsatisfied on the judgment which was obtained against
13 Shiff and Prosat, is that right?
- 14 A. Correct.
- 15 Q. And then you see 12 June, Shiff files a Chapter 11
16 bankruptcy petition, do you see that?
- 17 A. I do.
- 18 Q. Then on 1 October Imagitas files proof of claim in the
19 Shiff case, so this is the Shiff bankruptcy 11, for
20 2.29 million based on the remaining amount of the
21 unsatisfied judgment, do you see that?
- 22 A. I do.
- 23 Q. So, judge, were there two claims at that stage arising
24 out of the judgment?
- 25 A. Apparently.

1 Q. Yes. And what we have got is we have claim 41, which is
2 the Imagitas claim against Prosat for 2.1 million, do
3 you see?

4 A. Yes.

5 Q. And the claim 50 which is the Imagitas claim from Shiff,
6 2.29, on 1 October, yes?

7 A. Correct.

8 Q. As co-obligors did Shiff and Prosat have any rights as
9 between themselves in the event they discharged
10 judgment?

11 A. I assume the answer is yes. That would depend on how
12 California law treats jointly and severally liable
13 parties and I can't -- I cannot speak to that.

14 Q. No. Then if we look on page 2, we see the settlement
15 agreement that is made between the Prosat estate and the
16 Shiff estate, do you see that?

17 A. I do.

18 Q. And I will just pick it up at the bottom where it
19 summarises it. Do you see the relationship between
20 claim 50 and claim 41, refreshing your mind as to how
21 the relationship between claim 50 and claim 41 worked?

22 A. I -- I see the description in the settlement agreement,
23 yes.

24 Q. And then there is the release. Do you mind if we just
25 look at the release and I just want to look at the top.

- 1 Do you see at the top?
- 2 A. I do.
- 3 Q. "Except for the rights and claims affirmed and/or
4 created in this agreement", do you see that?
- 5 A. I do.
- 6 Q. So you see there is a carve-out for the release, do you
7 see that?
- 8 A. Yes.
- 9 Q. And did the agreement provide that if Shiff -- we just
10 looked at this -- if Shiff made a payment on claim 50 it
11 would have a claim under claim 41 by way of claim under
12 41, is that right?
- 13 A. Yes, I assume by way of subrogation, but that may not
14 be -- that is what the word that the agreement uses.
- 15 Q. Absolutely. So we see the release.
- 16 A. Yes.
- 17 Q. We see claims following subrogation. And then I think
18 you referred a few times to the separate acquisition by
19 Shiff of claim 41 as being contrary to the release, do
20 you recollect you said that?
- 21 A. Yes. Well, the bankruptcy judge held it was contrary to
22 the spirit of the agreement, certainly it appears
23 designed or it appears that it undermines the purpose
24 the commercial purpose of the agreement.
- 25 Q. By that what do you mean?

1 A. The agreement was designed differently to deal with this
2 particular claim and provided, if I recall correctly,
3 that if there was a payment immediate then Shiff would
4 have a claim but if there was no payment made certainly
5 the implication the court found that the meaning of the
6 release in this case was that there would be no claim.

7 Q. Yes, and just to help -- this will be the last thing
8 I ask you to look at -- could you just look on page 4?

9 A. Yes.

10 Q. On the right-hand side, you see years later...?

11 A. Yes.

12 Q. And do you see four lines down she held that the release
13 precluded the Shiff estate from recovering on claim 41?

14 A. Yes.

15 Q. "Judge Adler found that the spirit of the agreement was
16 the intended purpose" and so on. Is that the paragraph
17 that you had in mind?

18 A. Yes, I also read the decision of Bankruptcy Judge Adler
19 and I was relying on that.

20 MR PHILLIPS: Thank you very much, Judge Gropper.

21 My Lord, I don't have any further questions for the
22 witness.

23 MR JUSTICE SMITH: Thank you very much, judge, you are
24 released.

25 MR PHILLIPS: My Lord, it is now one o'clock.

1 MR JUSTICE SMITH: Indeed, we will resume with Judge Smith
2 at 2 o'clock.

3 (1.03 pm)

4 (The short adjournment)

5 (2.00 pm)

6 MS TOLANEY: My Lord may I call Judge Smith, please.

7 MR JUSTICE SMITH: Yes, of course. Thank you.

8 JUDGE ROBERT SMITH (affirmed)

9 Examination-in-chief by MS TOLANEY

10 MS TOLANEY: Good afternoon, Judge Smith. Could you be
11 given bundle D1 and be passed D2 which you may be shown
12 later. And if you go to tab 2 in bundle D1, is that
13 your expert report?

14 A. Yes, it is.

15 Q. And could you go to the last page in the tab, page 26.
16 Is that your signature?

17 A. Yes, it is.

18 Q. And could you then go to tab 4, please.

19 A. Tab 40.

20 Q. Tab 4?

21 A. Oh, sorry. Yes.

22 Q. You will see there the joint report of experts and if
23 you go to page 13, which is the last page, is that also
24 your signature?

25 A. Yes, the second signature is mine.

1 Q. Thank you. Do the opinions in both documents represent
2 your opinions in relation to this matter?

3 A. Yes, they do.

4 MS TOLANEY: Thank you. You will be ask asked some
5 questions.

6 Cross-examination by MR PHILLIPS

7 MR PHILLIPS: Good afternoon, Judge Smith. If you still
8 have your report open, I just want to show you a few
9 paragraphs if I may and I want to start with
10 paragraph 37, where you say:

11 "In my opinion the release contained in section 8.02
12 of the Settlement Agreement is clearly a general
13 release."

14 A. I am sorry 27 on 14.

15 Q. 37, page 14.

16 A. What page?

17 Q. 14, bottom right, bottom centre of the page.

18 A. Paragraph 37 --

19 Q. Paragraph 37.

20 A. -- in what I have is not on page 14.

21 Q. Are you looking at your report in tab 2?

22 A. Tab 2? I'm in the wrong tab, that's the problem.

23 Q. I don't want to cross-examine you about Judge Gropper's
24 opinion.

25 A. Yes, I should have suspected that.

1 Q. So do you have 37?

2 A. Yes, I do.

3 Q. "In my opinion the released contained in section 8.02 of
4 the Settlement Agreement is clearly general release."

5 Do you see that?

6 A. Yes.

7 Q. I want you to go forward to paragraph 48. Do you see
8 48?

9 A. Yes.

10 Q. "In my opinion the release contained in 8.02 is not
11 ambiguous and extrinsic evidence would not be admitted
12 to interpret it."

13 Do you see that?

14 A. Yes.

15 Q. Then in 49, just picking up at the bottom:

16 "The language of the section in my opinion
17 unambiguously covers all claims arising from
18 pre-existing facts and circumstances including claims
19 acquired by the releasor after the effective date."

20 Do you see that?

21 A. Yes.

22 Q. Then 51:

23 "My view that section 8.02 encompasses
24 after-acquired claims is reinforced by that sections
25 express inclusion among claims being released of claims

1 based on or asserted by subrogation."

2 Do you see that?

3 A. Yes.

4 Q. Then if you go over the page, 52, you describe the
5 introductory phrase of 802 and then you say at the end:

6 "I find in the opening ..."

7 You see the language, "I find":

8 "... in the opening language of 8.02 no reason to
9 think that after-acquired claims are excluded."

10 Do you see that?

11 A. Yes.

12 Q. And then in 52:

13 "It is my opinion that 8.02 of the Settlement
14 Agreement is unambiguous and extrinsic evidence as to
15 its meaning would not be admitted in a New York court
16 under the plain meaning rule."

17 Do you see that?

18 A. Yes.

19 Q. And then if you can go to 58:

20 "It is my opinion that the instances of post
21 transacting conduct on which the parties rely do not
22 establish the sort of consistent and long-continued
23 conduct that could justify the name of practicable
24 construction."

25 You see all of those?

- 1 A. Yes.
- 2 Q. Now, you will be pleased to know, judge, that I am not
3 going to be suggesting that you are acting as an
4 advocate and nor am I going to be suggesting that you
5 have gone outside your instructions. It is what it is
6 and those are the things you have said. What we are
7 going to look at together, judge, this afternoon is we
8 are going to look at Lucid Technologies, we are going to
9 look at Mangini, we are going to look at Cahill v Regan,
10 we are going to look at Mercer, we are going to look at
11 Long v O'Neill.
- 12 A. Sorry, what was that?
- 13 Q. Long v O'Neill?
- 14 A. Okay, I am not forgetting what that is, but I will --
- 15 Q. Don't worry, I will refresh your memory. We are going
16 to look at Hack, Innovus and Prosat.
- 17 But before we go on to the cases, there are a few
18 building blocks that I just want to lay down before we
19 look at the cases. Do you follow?
- 20 A. Yes.
- 21 Q. Okay. I want to look at the situation -- you are not
22 going to need any paper for this -- I want to look at
23 the situation on 6 March 2012, yes?
- 24 A. Yes.
- 25 Q. Which is the effective date of the Settlement Agreement.

1 A. Yes.

2 Q. PLC has a facility with LBUKH, that is the PLC sub-debt,
3 yes?

4 A. Yes.

5 Q. LBUKH had claims against PLC on the terms of those three
6 facilities, yes?

7 A. Yes.

8 Q. One was due in 2010. Did you know that?

9 A. I had not remembered the year but I will take your word
10 for it.

11 Q. So that is a matured claim, yes?

12 A. I -- I assume that's correct, yes.

13 Q. And two were not due until 2014, so they were unmatured
14 claims?

15 A. Yes.

16 Q. LBUKH's claim against PLC would arise from or be based
17 on or connected with facts or circumstances that were in
18 existence prior to the 6 March 2012, correct?

19 A. Yes.

20 Q. And we agree that on 6 March 2012, LBUKH could have
21 agreed to release the claim against PLC if it had chosen
22 to do so?

23 A. Yes.

24 Q. We agree that LBUKH did not release its claim against
25 PLC?

- 1 A. Yes.
- 2 Q. And we agree that on 6 March 2012, LBHI did not have
3 a claim against PLC on the PLC sub-debt?
- 4 A. I am sure that's correct.
- 5 Q. Could you be given bundle E. If you could turn up
6 tab 16. We won't have to look at any detail at this
7 stage. Do you see the Settlement Agreement?
- 8 A. Yes.
- 9 Q. Okay. Now, LBHI entered into the Settlement Agreement
10 with, amongst others, PLC, yes?
- 11 A. Yes.
- 12 Q. And that Settlement Agreement that we are looking at
13 here was approved by the bankruptcy court in the
14 Southern District of New York, yes?
- 15 A. Yes, I am sure that's true.
- 16 Q. On 6 March 2012, the effective date of the Settlement
17 Agreement, LBHI did not have a claim against PLC on the
18 sub-debt?
- 19 A. Yes, I think we said that before.
- 20 Q. And we have agreed that there were facts and
21 circumstances in existence prior to the 6 March 2012 out
22 of which LBH UK's claim against PLC arose was based on
23 or connected with, yes?
- 24 A. Yes.
- 25 Q. And that was LBH UK's claim against PLC on the sub-debt,

1 yes?

2 A. Yes.

3 Q. LBHI was not a party to the PLC sub-debt agreement?

4 A. I actually haven't looked at the agreement but I am sure

5 that's correct.

6 Q. Let me just show you because I don't want there to be

7 any ambiguities.

8 A. I have no doubt you are correct but am happy to look at

9 it if you want me to.

10 Q. Yes let's do that. If you would just turn back to

11 tab 6, please, in that bundle and I will only show you

12 one. Do you see, judge, this is an agreement for

13 a long-term subordinated loan facility and it is between

14 LB UK H and Lehman Brothers Holdings plc, do you see

15 that?

16 A. Yes, I do.

17 Q. And you can see that LBHI was not a party to that

18 agreement?

19 A. Yes, I can.

20 Q. And we agree that the PLC sub-debt, that debt, had not

21 yet been assigned to LBHI?

22 A. Yes.

23 Q. And so on the effective date, 6 March 2012, there was in

24 existence no agreement for LBHI to take an assignment of

25 the PLC sub-debt?

- 1 A. I assume that's correct.
- 2 Q. And on the effective date, which is 6 March 2012, LBHI
3 had no legal interest in the claim against PLC?
- 4 A. I am sure that's right.
- 5 Q. For LBHI to release PLC from the sub-debt, it could have
6 agreed that in the event that LBHI acquired claims
7 against any of the released parties, including PLC, it
8 would release those claims on acquisition. Do you
9 agree?
- 10 A. Yes, that could have been -- that could have been
11 include the in the language yes.
- 12 Q. And you agree that there could have been and express
13 term to that effect in the Settlement Agreement?
- 14 A. Yes, I do.
- 15 Q. And such a term would unambiguously have been an
16 agreement to release an after-acquired claim?
- 17 A. Yes, although I do not necessarily accept the
18 implication that absent such a term the agreement is
19 ambiguous, but yes you are correct.
- 20 Q. Yes, I am correct. Thank you.
- 21 A release in those terms might have been subject to
22 carve-outs, for example it might have been subject to
23 a carve-out of any future acquired claim that related
24 to, say, regulatory sub-debt; that would have been
25 possible, would it not?

- 1 A. Yes, certainly.
- 2 Q. We agree that the Settlement Agreement does not
3 expressly refer to after-acquired claims?
- 4 A. Yes, we do.
- 5 Q. And we agree that for the settlement agreement to apply
6 to after-acquired claims, you have to find an intention
7 to release after-acquired claims in the language of
8 clause 8.02?
- 9 A. I would not entirely agree with that.
- 10 Q. Why not?
- 11 A. My -- my view of the agreement is not -- I would not
12 phrase it as an agreement to acquire -- to release
13 after-acquired claims. I would -- I would think --
14 I would treat it as an agreement that the risk of claims
15 we have not thought of and have not expressly included
16 falls on the -- falls on the releasor. That is what the
17 words of whether foreseen or foreseeable means. I --
18 I assume that the parties just did not think and did not
19 talk about after-acquired claims at the time they made
20 this deal, but they did talk about what they -- they
21 said: what are we missing and who is going to take the
22 risk of what we are missing? I don't know if they
23 talked about it, but it's in the agreement: the risk of
24 things that were missing fell on the releasor.
- 25 Q. Okay let's try again.

1 You agree that for the Settlement Agreement to apply
2 to after-acquired claims you have to find an intention
3 to release those claims in 8.02, which is the release?

4 A. It depends on what you mean by that.

5 Q. Well, what I mean by that is you have got a release,
6 judge, yes? You need to find an intention to release
7 a particular type of claim?

8 A. No.

9 Q. No you don't need to find an intention to release
10 a particular type of claim?

11 A. No, that is what a general release is, it does not
12 identify particular types of claims and the parties may
13 not have thought about all particular types of claims.

14 Q. Okay, let's row back. One of the things we are going to
15 have to avoid is treating the language of "general
16 release" as if it is some technical special thing?

17 A. I understand, yes.

18 Q. There are after-acquired claims, there are claims which
19 may be acquired some time in the future?

20 A. Yes.

21 Q. We agree about that?

22 A. Such things exist, yes.

23 Q. Good. And we have a Settlement Agreement?

24 A. Yes.

25 Q. In that Settlement Agreement, there is a release clause?

- 1 A. Yes.
- 2 Q. And you have to spell out of the Settlement Agreement an
3 intention to release after-acquired claims?
- 4 A. When you put it exactly that way I think I can agree
5 with it, yes. But I would with the caveat that that
6 does not mean we have to spell out the conclusion that
7 the parties thought about after-acquired claims and
8 specifically intended to release those claims. My view
9 of the intention expressed in the release is an
10 intention to release all claims whether foreseen or
11 unforeseen foreseeable or unforeseeable.
- 12 Q. Let's not worry about how you get to the conclusion and
13 let's actually focus on what we are trying to do.
- 14 A. Okay, that is fine.
- 15 Q. A contract contains -- let us just talk about the
16 language. The contract evidences the intention of the
17 parties; agree?
- 18 A. Yes.
- 19 Q. Right. And what we are looking for is we are looking
20 for an intention that will include releasing
21 after-acquired claims?
- 22 A. Yes.
- 23 Q. Thank you. And if you can find that intention in
24 clause 8.02, your evidence is, is it, that there is no
25 carve-out from that release which excludes

1 after-acquired claims from the scope of the release, is
2 that right?

3 A. Well, I -- not just my evidence I think, I -- I do not
4 see how you could say there is a carve-out. But maybe
5 you do, maybe you can. Go ahead.

6 Q. That is your opinion, that is what I am --

7 A. Yes, it is my opinion. I had not thought that opinion
8 would be controversial but if it is go ahead.

9 Q. Okay. Let's go to your report please, at paragraph 20,
10 which is on page 6, and go to divider 2.

11 A. Let me get the right tab this time. Wrong book. I want
12 bundle D, volume --

13 Q. Do you have bundle D1. Put bundle E to one side at the
14 moment and I will call for it again if we need it.

15 A. You said page 20, or paragraph 20?

16 Q. Paragraph 20.

17 A. On page 7.

18 Q. Page 6.

19 A. Page 6, so it is.

20 Q. There you say:

21 "The disputed issue turns on whether the release in
22 section 8.02 includes what I will refer to as
23 after-acquired claims, i.e. claims against a UK
24 affiliate that arise from events that preceded the date
25 of the Settlement Agreement but were acquired by

1 a debtor [in this case LBHI] after the 6 March 2012."
2 Yes?
3 A. Yes.
4 Q. Okay. So you there do agree that that is the disputed
5 issue?
6 A. Yes.
7 Q. Which is the proposition I put to you.
8 A. I am not sure it is but I do agree -- I do agree with it
9 now.
10 MS TOLANEY: Let him finish, please.
11 MR PHILLIPS: Let him finish what?
12 MS TOLANEY: I think he was trying to speak.
13 A. I am finished.
14 MR PHILLIPS: Was there something -- I do apologise. If
15 I do cut you off, you tell me. I thought you had
16 finished.
17 A. You are correct, I have.
18 Q. Okay. Paragraph 30 if we may, judge. Do you have
19 paragraph 30?
20 A. Yes, I do.
21 Q. Thank you very much.
22 "In determining what claims are covered by
23 a release, New York courts will consider the purpose for
24 which the release is executed and the intention of the
25 parties as expressed by the language of the release."

1 And then you go on to say:

2 "The scope of the release depends on the intentions
3 of the parties as determined by the language employed,
4 if clear."

5 A. Yes, that last sentence being a quotation from a case
6 which --

7 Q. Absolutely. So what you tell us is you tell us that the
8 purpose is important to construction?

9 A. Yes.

10 Q. You tell us that the intention and the context are
11 important to construction as well?

12 A. That that's true and it is more or less what I said,
13 yes.

14 Q. And you say that you find that in the language of the
15 release?

16 A. Yes.

17 Q. So we are looking to see if the purpose and intention
18 was for LBHI to release after-acquired claims against
19 a debtor released party?

20 A. That is correct, with the caveats I have expressed
21 before.

22 Q. Let's not go through the caveats every time.

23 Could you look at bundle D2, please. I would like
24 to start by looking at Lucent Technologies, please.

25 A. Which?

- 1 Q. It is in divider 66, judge.
- 2 A. Thank you.
- 3 Q. I don't think you will be particularly assisted by the
4 synopsis on the background, but if I could ask you to go
5 to paragraph 3 which is on page 2, please.
- 6 A. Paragraph 3 on page.
- 7 Q. It is holding 3 and please correct me if
8 I misdescribe -- when I say it is holding 3, do please
9 correct me.
- 10 A. Page 2 of the?
- 11 Q. Page 2, top left happened corner. There is a (iii).
- 12 A. Oh, I see. Yes, this is the -- this is the synopsis,
13 this is not the opinion of the court.
- 14 Q. I am told that they are called headnote 1 and headnote 2
15 and this is headnote 3.
- 16 A. Yes, and in fact it is not practice to read them, so
17 I probably have not read them, but I ...
- 18 Q. Okay, if you don't mind reading it now. It says:
19 "Under New York law a release, like other contracts,
20 should be interpreted to give effect to the intent of
21 the parties as indicated by the language used in the
22 agreement."
- 23 And you would agree with that?
- 24 A. Yes, I would.
- 25 Q. Then if you look at 4:

1 "Under New York law where the release presents
2 a specific context the released claims are interpreted
3 in this light. Mere use of general language is not
4 sufficient to evidence a release of unrelated claims."

5 Do you see that?

6 A. I see it.

7 Q. What that is basically essentially telling us is that no
8 contract is entered into in a factual vacuum and I am
9 sure you would agree with that?

10 A. I would agree with that, I don't necessarily agree with
11 the with the headnote as stated, at least certainly not
12 in all circumstances.

13 Q. I see. Well, that is what it says. If we just look at
14 the background, which I said I was not going to look at,
15 but the text in the agreement in Lucent Technology
16 established an unambiguous context. It was given in the
17 context of maintenance service payments and did not
18 extend to patent infringement claims. I hope that is
19 clear enough --

20 A. Yes.

21 Q. -- that is the context.

22 A. Yes.

23 Q. So it was given in the context of maintenance services
24 payments, it did not extend to patent infringement
25 claims. So patent infringement claims were outside what

1 the parties intended and it was no part of their purpose
2 to release the patent infringement claims.

3 So that is the context. Are you comfortable with
4 the context judge?

5 A. Yes. I seem to remember that there was more context,
6 but yes, what you have said seems correct.

7 Q. Okay. And we both agree that the starting point is to
8 look at the wording of the contract which is your plain
9 meaning rule?

10 A. Yes.

11 Q. And if I can ask you to then just look over into the
12 analysis which is on page 5, do you see there is
13 a heading B, "Applicable law"?

14 A. Yes.

15 Q. And what you seem to get in the head notes is you seem
16 to get the key passages which are then repeated in the
17 headnote in summary form?

18 A. I think that is often correct; I prefer to read what the
19 court said rather than what the person writing the
20 headnote said.

21 Q. I quite understand. They do seem to be verbatim, but
22 anyway.

23 Paragraph 3:

24 "Under New York law a release, like other contracts,
25 shall be interpreted to give effect to the intent of the

1 parties as indicated by the language used in the
2 agreement. The Court of Appeals of New York has
3 cautioned that a release should not be read to cover
4 claims which the parties clearly did not intend to
5 waive."

6 And that is Mangini. We are going to look at
7 Mangini.

8 A. Yes.

9 Q. And for the proposition that releases may not be read to
10 cover matters which the parties did not intend to
11 release, they then refer to some cases and then in 4 is
12 where you get the context:

13 "New York law considers the context is a key factor
14 in interpreting a release. Where the release presents
15 a specific context, the release claims are interpreted
16 in this light."

17 So what we get there is that you give effect to the
18 intent of the parties and you have a look at the context
19 and I think we have agreed with all of that?

20 A. I agree with that.

21 Q. Okay. So let's just go back to paragraph 15 of your
22 report which, is on page 5, where you say the Settlement
23 Agreement -- do you have that judge?

24 A. I have it.

25 Q. "The Settlement Agreement was entered into in 2011 to

1 resolve all disputes and all other outstanding
2 issues~..."

3 So you pick up the language there:

4 "... among the debtors including LBHI and the UK
5 affiliates including PLC. Subject to express exceptions
6 not applicable here, section 8.02 contains a release by
7 the debtors in favour of the affiliates."

8 Which we will come back to.

9 So that is the context, is it not, of the Settlement
10 Agreement, do you agree?

11 A. Well. That is certainly -- actually that is --

12 I wouldn't call that context, I call that text. That is
13 part of the text of the Settlement Agreement.

14 Q. Okay, it is describing a context and the context that
15 the text is describing is that the Settlement Agreement
16 was resolving all outstanding issues between the
17 debtors, the US entities, and the UK affiliates, who are
18 the UK entities, do you follow?

19 A. Yes.

20 Q. So from that text you can see that context?

21 A. I that certainly is a significant part of what is going
22 on, yes.

23 Q. And we can agree it is a significant part of what is
24 going on because what you have got, the context that you
25 get is a transatlantic settlement in the sense that the

1 debtors who are the US entities released the debtor
2 released parties who were the UK entities, do you
3 follow?

4 A. Yes.

5 Q. And also going the other way, the UK affiliates released
6 claims against the US entities?

7 A. Yes.

8 Q. Could I ask you to take up bundle E, which is the
9 Settlement Agreement, which is in divider 16.

10 A. It is tab 2 --

11 Q. Tab 16, judge.

12 A. Tab 16. Thank you.

13 Q. Would you mind -- you can see we have looked at the
14 front. Would you mind going to the third page which is
15 in the recitals.

16 A. Yes.

17 Q. Would you mind looking at the first recital at the top
18 of the page where it says:

19 "Whereas the UK affiliates filed the proofs of claim
20 listed on schedule 1 attached hereto, collectively
21 proofs of claim against certain debtors ..."

22 So that is the UK affiliates filing proofs against
23 the US entities.

24 A. Yes.

25 Q. "... on behalf of themselves and/or to reserve the

1 rights of certain other entities with beneficial
2 interest held through certain of the UK affiliates."

3 So that is the first. So those are --

4 A. First on that page yes.

5 Q. Yes, absolutely -- those are the claims that the UK
6 affiliates have against the US debtors?

7 A. Yes.

8 Q. And we then have the second recital:

9 "Certain of the debtors [that is the US entities]
10 have asserted that they have claims against certain of
11 the UK affiliates including claims of asserted by LBHI
12 against LBIE and certain other UK affiliates in respect
13 of intercompany funding".

14 So those are the intergroup claims of the US debtors
15 against the UK affiliates, yes?

16 A. Yes, I -- I -- I assume that intergroup means the same
17 thing as intercompany; that is fine.

18 Q. All I am trying to do is describe the UK making claims
19 against US and the US making claims against the UK.

20 A. Yes, that is right.

21 Q. And as a matter of context of this Settlement Agreement
22 it describes the fact that each side had filed claims in
23 the other estates?

24 A. Yes. The second -- the second "whereas" doesn't really
25 say they filed claims, it says they asserted that they

- 1 have claims --
- 2 Q. Have claims.
- 3 A. -- but I don't think that is a significant difference.
- 4 Q. And the reason for that, judge -- and this is really to
- 5 help you. The reason for that, judge, is that at that
- 6 stage, the UK companies had not asked for formal proofs
- 7 of debt.
- 8 A. Okay.
- 9 Q. So there is a slightly difference in procedure.
- 10 A. Yes.
- 11 Q. Then if we can look at the recital second one up from
- 12 the bottom, please. "Whereas", do you see that judge?
- 13 "Whereas the debtors and the UK affiliates desire to
- 14 resolve all disputes and all other outstanding issues
- 15 among them except as expressly excluded and to avoid
- 16 extensive and expensive litigation thereon."
- 17 Yes?
- 18 A. Yes.
- 19 Q. So you can see that it is referring to resolving all
- 20 disputes and all other outstanding issues between the
- 21 debtors and the UK affiliates?
- 22 A. Yes.
- 23 Q. So that is disputes between them, disputes among them,
- 24 yes?
- 25 A. Yes.

- 1 Q. That are outstanding?
- 2 A. It says issues that are outstanding, but I am --
- 3 probably not a significant difference. The adjective
- 4 "outstanding" applies to issues not the disputes, but
- 5 I am being picky.
- 6 Q. So arising out of pre-existing facts?
- 7 A. Yes, although that paragraph doesn't say it but that is
- 8 certainly what the deal was.
- 9 Q. I am looking at the word and I am looking at the
- 10 context.
- 11 It was comprehensive, it was to avoid litigation in
- 12 the future, yes?
- 13 A. Yes.
- 14 Q. And it was to implement the plan of reorganisation
- 15 in the US?
- 16 A. I am sure that is true.
- 17 Q. And this contemplated disputes between the debtors,
- 18 which was the US on the one hand, and the UK affiliates
- 19 who were the parties to the settlement, those two groups
- 20 were the parties to the Settlement Agreement?
- 21 A. Yes.
- 22 Q. Can we then have a look at 8.02.
- 23 A. I am not good at these bundles.
- 24 Q. I am sorry, clause 8.02 which is page 498. It is in the
- 25 same Settlement Agreement, judge.

- 1 A. Same, okay. 498. 8.02, got it.
- 2 Q. Okay.
- 3 We can see 8.02 is the debtors release and we can
4 see that it starts with "Upon occurrence of the
5 effective date", but we will come back to that. And we
6 then get to "hereby fully and forever releases
7 discharges and agrees each debtor released party". Now,
8 the party that is being released is defined on 462, and
9 that is the UK entities, from all causes of action and
10 we can ignore the brackets, and it then goes on to deal
11 with whether at law and so on.
- 12 A. I am sorry, I have lost you on this.
- 13 Q. Have you? I am sorry. Okay.
- 14 A. "On the occurrence of the effective --"
- 15 Q. At the moment what we are doing is we are skating over
16 so that I can get to the point I want to get to.
- 17 A. No problem. Which language should I look at?
- 18 Q. So we start with "Hereby fully and forever releases,
19 discharges and acquits all debtor released party from
20 all causes of action ..."
- 21 A. Okay, I am sure it is there, just give me a minute.
- 22 Q. Then we get --
- 23 MR JUSTICE SMITH: Six lines up from the bottom of the page?
- 24 A. All right.
- 25 MR PHILLIPS: Then we get the brackets. I am not worried

1 about that.

2 "Whether at law or in equity, whether based on
3 contract, including quasi contract guarantee, indemnity
4 or estoppel, statute, regulation tort or otherwise."

5 There is then a fraud exception. We then get on to
6 the accrued/unaccrued, foreseen/unforeseen,
7 foreseeable/unforeseeable, known/unknown,
8 procured/unprocured, fixed or contingent, liquidated or
9 unliquidated, certain or contingent then I want at this
10 point to look at this:

11 "... in each case that arise from, are based on,
12 connected with, alleged in or related to any facts or
13 circumstances in existence prior to the date hereof."

14 You see that language?

15 A. Yes.

16 Q. So it refers to facts and circumstances in existence at
17 prior to the date of the agreement yes?

18 A. Yes.

19 Q. And that is actual disputes -- when you read that
20 together, actual disputes between the parties that exist
21 because of pre-existing facts?

22 A. Well.

23 Q. I will take out the word "actual disputes" --

24 A. What it says is causes of action that are -- arise from
25 based on, et cetera.

1 Q. Yes, it is causes of action. So we have then got the
2 language in the middle and it is causes of action. In
3 each case. So you have to have a cause of action, it
4 has to fall within one of the headings and then in each
5 case it has to arise from based on, connected with
6 alleged in or related to facts or circumstances in
7 existence prior to the date of the agreement.

8 A. I think that sounds right.

9 Q. Yes. And that is prospective or future disputes. So it
10 can be existing disputes, actual existing disputes yes?

11 A. Yes.

12 Q. That exist because of pre-existing facts, it could be
13 prospective or future disputes between the parties that
14 exist because of pre-existing facts?

15 A. Yes.

16 Q. And it could include contingent or potential disputes
17 that exist because of pre-existing facts?

18 A. Yes.

19 Q. And the point of this, which we saw from the recital, is
20 that it is to avoid expensive future litigation?

21 A. Yes.

22 Q. So what the Settlement Agreement does is it contemplates
23 litigation between the parties arising out of facts and
24 circumstances in existence prior to 6 March 2012?

25 A. Yes.

1 Q. The search for purpose, intention and contexts starts
2 with the language agreed?

3 A. Yes.

4 Q. But you can go outside the words of the contract where
5 the release clause is ambiguous, agreed?

6 A. Yes.

7 Q. So let's just have a look at a couple more of the cases.
8 Can we first of all have a look at Schaffer please which
9 is in D1.

10 A. D1.

11 Q. D1 at divider 15.

12 A. Okay.

13 Q. You have that?

14 A. Yes.

15 Q. Unfortunately we have your reports and some of the cases
16 in the same bundle which makes it slightly difficult.
17 Do you have that, judge?

18 A. Yes, I do.

19 Q. Okay. If you don't mind I would just like to look at
20 the synopsis, which I call the headnote, just to pick up
21 the facts.

22 A. Okay.

23 Q. "The bank received all the assets of the estate of
24 a deceased endorser or a note and executed a release
25 stating it was in full satisfaction of the claim

1 representing the liability of the deceased endorser as
2 endorser of the note. Thereafter the estate of the
3 deceased endorser received other assets and the bank
4 claimed the after-acquired assets. The surrogates court
5 [and it identifies the court] entered a decree awarding
6 the after-acquired assets to the bank and legatees of
7 the deceased endorser appealed."

8 And then we get an appeal and then we get the
9 court of appeals five lines down:

10 "Mr Justice Scileppi held that where a bank accepted
11 assets of the estate of a deceased endorser of a note
12 held by the bank in full satisfaction of the claim
13 representing liability of the decease endorser as
14 endorser on the note, the bank released the estate from
15 all liability arising out of the note and was not
16 entitled to assets that thereafter came into the
17 estate."

18 Yes?

19 A. You have read it correctly.

20 Q. Yes, thank you, no, I wasn't asking you to comment on it

21 I just wanted to make sure we got to the same point.

22 But I am very pleased that you have noted that I can
23 actually read accurately, thank you judge.

24 A. The reason I gave that kind of answer is I am not able
25 to gather much from a one paragraph synopsis of a case

1 and this case, I have to tell you, I do not -- have not
2 read recently and don't remember so if you are going to
3 ask me much about it I want to take a minute to look at
4 it.

5 Q. Okay. So the payment to the bank -- and this is the
6 important point and you do see it from there -- the
7 payment to the bank was in full satisfaction of the
8 claim filed against the estate and let's pick it up. If
9 you go to page 3, we see Judge Scileppi's opinion.

10 A. Yes.

11 Q. And I just wanted to pick up, do you see there is a star
12 316 on the left?

13 A. Yes.

14 Q. In that paragraph, nine, and it refers to a decree and
15 it says that they were awarded the balance of the assets
16 that were on hand, \$22,000, after payment of other
17 obligations to the bank in full satisfaction of the
18 claim filed against the estate and that is the important
19 point.

20 A. Okay can I just take a minute to read a sentence or two?

21 Q. Yes, of course. (Pause).

22 A. Okay.

23 Q. And then all I wanted to show you was in the second
24 column they say the question is whether the release
25 contained in that decree, which is that release,

1 relieved the estate of all liability, do you see that?

2 A. No, I do not. Where?

3 Q. On the right-hand side, first break second break third
4 break, "The question".

5 A. "The question on this appeal".

6 Q. They say the question is whether the release relieved
7 the estate of all liability and then if you track it
8 down, do you see the words "The meaning"?

9 A. Meaning and scope of release.

10 Q. Yes:

11 "The meaning and scope of release must be determined
12 within the context of the controversy being settled.
13 The release presently under consideration contains two
14 essential recitals. The bank accepted the assets in
15 full satisfaction of the claim."

16 And so on and then it says:

17 "In our opinion this language is unmistakably clear.
18 The word 'claim' is modified by the words
19 'liability'~..."

20 And so on. So this was a simple claim case of
21 a payment being made in full and full satisfaction of
22 a claim against a claim that had been filed. Clear
23 language and the court has no difficulty with that, so
24 that is a nice clear case; agreed?

25 A. I can't agree with that it is a nice clear case --

1 Q. Really?

2 A. -- but it may well be. It doesn't look difficult from
3 what you have just shown me. I would need to -- I would
4 need to -- I mean I believe, if I am remembering now
5 I think I cited this case simply for the sentence that
6 said the fact that the bank may have intended something
7 else is irrelevant. I frankly remember nothing else
8 about the case until today. I would need -- if you want
9 me to say it is a nice clear case I would need to take
10 a minute.

11 Q. No, let's move on. That is something that I can submit.
12 I don't need you to do that.

13 Now, we agree that the parole evidence rule operates
14 to preclude evidence of negotiation?

15 A. Yes.

16 Q. And if we look at Judge Gropper's opinion at
17 paragraph 26, which is in divider 1.

18 A. Tab 26 Volume I.

19 Q. No, it is divider 1, paragraph 26.

20 A. Divider 1.

21 Q. Which is on page 14.

22 A. Page 14. Yes.

23 Q. Okay. And he there says:

24 "The parole evidence rule does not bar testimony as
25 to what was within the contemplation of the parties in

- 1 agreeing the release."
- 2 Do you see that?
- 3 A. I remember him saying it. Which paragraph? 27?
- 4 Q. 26.
- 5 A. 26, no wonder I could not find it. Okay. Yes, I see
- 6 it.
- 7 Q. You don't disagree with that, do you?
- 8 A. I think it's -- I think it is too sweeping a statement.
- 9 Q. You don't disagree that you can consider evidence that
- 10 deals with the context of an agreement, can deal with
- 11 what was within the contemplation of the parties?
- 12 A. I do disagree that you can always put in parole evidence
- 13 to any release. If that is what he means, I do
- 14 disagree.
- 15 Q. But you don't construe these agreements in a vacuum,
- 16 do you?
- 17 A. No.
- 18 Q. No. And we will look at some of the cases for example
- 19 dealing with settlement of court cases where what we see
- 20 is that the court asks itself what is it that the
- 21 parties were settling, yes?
- 22 A. Yes, yes.
- 23 Q. So it is not an absolute prohibition, it is something
- 24 that depends on the circumstances?
- 25 A. Well, the -- the parole evidence rule is often stated as

1 an absolute prohibition, that is: if the agreement is
2 unambiguous, we cannot look at anything else. Yes. You
3 suggest to me that you can at least look at what the
4 deal was, what the parties were trying to accomplish and
5 I say yes, yes indeed you can. That does not mean that
6 it is always free play to have everything that everyone
7 says and was said in the negotiations come into
8 evidence. It sometimes --

9 Q. No, what it comes down to is that the court needs to
10 understand the context so that it can understand what
11 was in the contemplation of the parties. Of course not
12 interested in the parties' subjective intentions, but
13 the court does need to understand the context in which
14 an agreement is made?

15 A. I agree that the court should understand the basic
16 context in which the agreement was made. I agree with
17 that. That is inseparable. The words "the
18 contemplation of the parties" are very often used.
19 I find I -- they can be confusing, because it doesn't
20 mean that you are free to examine everything that might
21 cast a light on what the parties were contemplating.

22 Q. Okay. Let's just have a look if we may at the joint
23 report, paragraph 28.

24 A. The joint report.

25 Q. I am sorry that is in divider 4. Do you see that, and

1 you see -- do you want to just cast your eye over that?
2 You say in your opinion Judge Gropper overstates the
3 willingness of New York courts to limit the scope of
4 a release that is unambiguous on its face in light of
5 what the parties contemplated and you then say that
6 generally occurs where 1) the release was given as part
7 of the settlement of a particular controversy then being
8 litigated, or 2) the release was given in a personal
9 injury case and the releasor later discovers injuries
10 not known to exist when the release was given. Do you
11 see those two?

12 A. Yes, I do.

13 Q. So what you are suggesting, as I understand it, judge,
14 is that the cases which Judge Gropper has cited about
15 the contemplation of the parties can universally fit
16 into two categories; one is settlement of particular
17 controversy being litigated and the second one is
18 personal injury. Is that right, that is what --

19 A. No you substituted the word "universally" for
20 "generally". I said generally.

21 Q. Generally?

22 A. Yes.

23 Q. So when you say generally and not universally, do you
24 mean that actually this is not a principle restricted to
25 those two categories?

1 A. It may -- I mean I would not be shocked to find an
2 occasion case that didn't fit the categories. What I am
3 really saying is that the -- the New York courts do
4 sometimes depart significantly from the parole evidence
5 rule in releases cases. I am saying that that is not
6 a universal rule, that the parole evidence rule isn't
7 universally put aside in release cases. It is sometimes
8 put aside and by far the most frequent if not the only
9 cases are in the two categories I have identified.

10 Q. Okay. Because if you look at the end of 28 it says:

11 "Judge Smith's opinion is that, with these
12 exceptions, the parole evidence rule applies as fully to
13 releases as to other contracts."

14 A. Yes.

15 Q. And that suggests that you are limiting it to those two
16 expectations but I think what you are telling his
17 Lordship is that it is not necessarily just limited to
18 those two categories?

19 A. I suppose -- I see your point. I am hedging a little
20 bit. I am saying I wouldn't be shocked if you showed me
21 one case that was outside the categories, but generally
22 that is true.

23 Q. Right. And just to explore this a little bit. We can
24 see the principle behind the two categories that you
25 have spoken of. First of all the settlement categories.

1 When parties settle litigation over a particular matter,
2 you can see what it was they contemplated when they came
3 to settle the matter?

4 A. Well, to me it is a more specific issue than that. If
5 I can explain?

6 Q. Of course.

7 A. And of course say a category of release given is part of
8 the settlement of a particular controversy, that is not
9 a small category, that is a lot of releases, most
10 releases.

11 Q. Absolutely.

12 A. What very often happens is the parties settle a case
13 maybe a small case and a general release is a normal
14 part of it and all of -- and six months later someone
15 discovers a quite -- or realises or notices a quite
16 significant claim that he or she did not intend to
17 release, and frequently, especially if the parties are
18 not terribly sophisticated and this wasn't a very highly
19 lawyered settlement, frequently the courts will say
20 "I am going to let him out of it. I am not going to
21 hold you to the letter of your release". That is --
22 that is contrary to the usual practice of the New York
23 courts -- we are very strict about holding parties to
24 the letter of their bargains. But there are quite
25 a number of cases, Mangini is one of them, in which the

1 courts have said: we are not going to hold you to things
2 that you did not intend, we will -- we will look very
3 carefully at whether you were trying to buy general
4 peace.

5 I guess what I am trying to say is I would think
6 this what I have just stated really has no application
7 in a situation where you have a huge transaction with no
8 single controversy at its core that was lawyered to the
9 hit. I think that seems to me the least likely case for
10 a New York court to say oh well I am not going to pay
11 attention to the strict language.

12 Q. Let's suppose you have an agreement between two sets of
13 parties where one party says yes, I am releasing claims
14 against this lot of parties and the other says yes, I am
15 releasing claims against that lot of parties. You are
16 not saying that the New York courts would not look at
17 that context when it came to construe the release, are
18 you?

19 A. Not at all.

20 Q. No.

21 Just in relation to the personal injury cases,
22 because we have a look at Mangini in a minute, we see
23 a number of cases that limit the release to what was in
24 the contemplation of the parties in the context of
25 personal injury, so that there may be -- I think one of

1 the questions one sees is there is an accident and there
2 may be another injury that comes out of the accident and
3 we see that happening in the context of personal injury.

4 Judge, could you just help me with this, what is the
5 principle that makes a personal injury case different
6 from other cases when it comes to the principles of
7 construing a contract? Can you just help me with that?

8 A. Well, very often in personal injury cases releasor is an
9 unsophisticated, often uncounseled person, who may have
10 signed the release in exchange for relatively small
11 payment at a very early stage and the courts frankly are
12 compassionate in that situation and not as strict as
13 they are in most business contexts about holding them --
14 holding the parties to the terms they have signed.
15 There are also business contexts where they are not so
16 strict, I am not saying it is only personal injury
17 cases, but personal injury cases are particularly good
18 cases for being frankly indiligent to a releasor who may
19 have imprudently signed something that was broader than
20 he or she intended.

21 Q. Let's turn to Mangini if we may, which is in divider 18.

22 A. Same book?

23 Q. Yes. Just looking at the synopsis, it is an action to
24 set aside the general release and to recover for
25 injuries sustained by a minor in an automobile accident

1 and if I can pick it up further down:

2 "The Court of Appeals Judge Breitel held that the
3 issues were presented ... (Reading to the words) ...
4 precluding summary judgments for the defendant."

5 So that was the context. I will skip past the
6 recitals. If I can take you to page 5.

7 A. Yes.

8 Q. This is in Judge Breitel decision and do you see on the
9 left-hand column there are numbers 1 and 2, and it
10 starts "It is true ..."?

11 A. Yes.

12 Q. It says:

13 "It is true that a general release is governed by
14 principles of contract law. There is little doubt
15 however that its interpretation and limitation by the
16 parole evidence rule is subject to special rules."

17 So that is there saying there are special rules in
18 relation to releases?

19 A. It does say it. I think you have to consider the
20 context in which it is said, but yes.

21 Q. I see. These rules are based on a realistic recognition
22 that releases contain standardised even ritualistic
23 language given in circumstances where the parties are
24 sometimes looking no further than the precise matter in
25 dispute that is being settled. Thus while it is being

1 held that an unreformed general release will be given
2 its full literal effect, where it is directly
3 circumstantially evident that the purpose is to achieve
4 a truly general settlement the cases are many in which
5 a release has been avoided with respect to
6 uncontemplated transactions despite the generality of
7 the release form."

8 Do you see that?

9 A. Yes, the language in the release form.

10 Q. So the New York Court of Appeals asks if the release was
11 intended to apply to uncontemplated transactions?

12 A. Yes, and I think it is also important that it is talking
13 about releases that contain standardise even ritualistic
14 language and are given in circumstances where the
15 parties are sometimes looking no further than the
16 precise matter in dispute that is being settled.

17 Q. I absolutely understand, but first of all you have to
18 identify what the contemplated transactions are so that
19 you can work out what the uncontemplated transactions
20 are; agree?

21 A. Well, I don't -- I don't disagree with that. But I what
22 we are sparring about I think is I do not think that
23 Mangini is -- that the principles stated in Mangini have
24 much application to a huge, heavily lawyered commercial
25 transaction.

1 Q. Yes, you have said that. But the point is if you are
2 going to identify what was contemplated, what the
3 context was or the matrix was, to identify what is
4 contemplated you have actually got to look at the
5 matrix, you have to look at what the parties were trying
6 to do, what they contemplated? You can't do it in
7 a vacuum?

8 A. I do agree that you have to -- to interpret any contract
9 you have to have some understanding what the deal was
10 and I do not adhere to the extreme form of the parole
11 evidence rule which is you can never raise your eyes
12 from the paper.

13 Q. No, absolutely.

14 A. You do have to have some sense of what was going on.

15 Q. Then just over the page, bottom of page 5, paragraph
16 number 7, it starts "The principle spilled over into the
17 personal injury field." Then it says the problems
18 present special difficulty, but it is really that:

19 "Nevertheless the courts have applied the special
20 rules by way of analogy to unknown injuries, treating
21 them as matters not in contemplation at the time of the
22 settlement."

23 Now, what is interesting is that there it identifies
24 there is a principle and it says that that principle has
25 spilled over into the personal injury field.

1 A. Yes.

2 Q. It does say that the courts have applied the special
3 rules by way of analogy in the permanent injury field,
4 but what it is describing, judge, it is describing
5 a general rule that then applies in the personal injury
6 field, as opposed to a rule in the personal injury field
7 that may be applied elsewhere; do you understand?

8 A. I agree that is the tenor of the sentence you read, yes.

9 Q. Could we then have a quick look at Cahill v Regan, which
10 is in tab 14. This was a patent dispute between a chap
11 called Roberts through his executor and a former
12 employee and the employer claimed that he was entitled
13 to the patent to a new can, which his former employee
14 had designed whilst working for him, and he was held the
15 employee was held entitled to the patent for the can he
16 had invented. So that is just the background.

17 If I could take you to page 5 in the opinion of
18 Judge Fuld, please, on the right-hand side. Do you see
19 a paragraph, judge, that starts 10/11 on the right-hand
20 side at the very bottom?

21 A. Right hand side of page 5, yes.

22 Q. "The defendants urges however that the general release
23 executed by Roberts extinguished any and all rights or
24 claims which the employer might have had, including
25 a claim to the patent or to the shop right. Although

1 the effect of the general release in the absence of
2 fraud or mutual mistake cannot be limited or curtailed,
3 its meaning and coverage necessarily depend, as in the
4 case of contracts generally, upon the controversy being
5 settled and upon the purpose for which the release was
6 actually given."

7 Do you see that?

8 A. I see.

9 Q. Do you disagree with that?

10 A. I do not disagree with it, although I -- I do not
11 disagree with it: I do not interpret it as giving
12 carte blanche in all cases to go beyond the text.

13 Q. No, yes. And then it goes on:

14 "Its meaning ...(Reading to the words)... settled."

15 And then:

16 "Certainly a release may not be read to cover
17 matters which the parties did not desire or intend to
18 dispose of. In the case before us the defendant without
19 the knowledge of his employer applied the patent in July
20 of 1950."

21 So that was what happened. And then it says this
22 four lines down:

23 "When the releases were executed it is clear that
24 the parties were solely concerned with settling the
25 controversy then being litigated, the ownership of

1 machinery in the employer's possession, a subject having
2 no relation to the invention or the patent. Indeed not
3 only was no patent then in existence but the employer
4 was not even aware that one had been applied for. In
5 the light of such facts the appellate division was fully
6 justified in concluding the Roberts release covered and
7 barred only those matters about which there had been
8 some dispute".

9 So do you see, judge, what was being decided there.
10 You had a release which would have gone wider than just
11 the litigation about the employer having some assets?

12 A. Yes. So it was a release given in an action by the
13 employee against the employer.

14 Q. Yes, you can see. And what the court did is it said:
15 I am looking outside the language of the release, I am
16 looking at what it was what the parties contemplated,
17 what they were actually settling?

18 A. Yes, yes, they did indeed do that in this case.

19 Q. So the court identifies the context in which the release
20 was given?

21 A. Yes.

22 Q. Yes. Okay. Can I then just go back to paragraph 36 of
23 your opinion, which is in divider 2.

24 A. What paragraph?

25 Q. Paragraph 36, judge. It is on page 14 again.

1 A. Yes.

2 Q. And you talk here about the use of broad language. So
3 in paragraph 36 you say:

4 "Parties' use of broad language such as including
5 any claims and causes of action, all claims that were or
6 could have been made, all matters whether known or not
7 known, all manner of actions of any kind whatsoever and
8 all claims between parties typically implies an
9 intention to give a general release and is usually given
10 effect."

11 A. Yes.

12 Q. And you use the word "typically". So you are not saying
13 always?

14 A. No, not at all.

15 Q. No.

16 MR JUSTICE SMITH: Judge Smith, "general release" it is not
17 a term you would want to give precise definition to, it
18 is more a concept where what is being released is
19 a class of claim; would that be a fair way of describing
20 it?

21 A. Well that is fair. It's a descriptive term, but in
22 normal speech there is a -- almost every release we have
23 seen and talked about, in this, in Judge Gropper's
24 testimony and mine, was in form a general release.
25 A specific release is one limited on its face to

1 a specific a specific claim and that doesn't usually
2 raise any problems.

3 So in many of these we have releases that are
4 general in form and in some of them the court says: it
5 may be general in form, but that is really not what the
6 parties intended to do. This one is in a sense the most
7 general release I have ever seen because there is no --

8 MR JUSTICE SMITH: Don't go to the wording on this one,

9 I just want to understand more particularly your
10 understanding of general release because you are
11 obviously attaching some significance, both in terms of
12 burden of proof and waiver or release of unforeseen
13 claims when something is a general release as opposed to
14 when it is a specific release, but couldn't one have for
15 instance instances where there are -- well, let's say
16 there is a dispute about intellectual property rights
17 between two companies and they effect a very broad form
18 of release which is on the face of it confined to IP
19 rights. I quite understand that where one has got
20 an intellectual property claim that neither party has
21 thought of, chances are it will have been released.

22 A. Yes.

23 MR JUSTICE SMITH: But it wouldn't extend to let us say
24 a tortious claim for personal injury or damage to
25 property or anything like that.

1 A. Yes, but it is says it is limited to intellectual
2 property claims then it is, yes.

3 MR JUSTICE SMITH: Yes, but would you call that a general
4 release or specific release?

5 A. I think I would call it a specific release, but, yes,
6 I -- I see your Lordship's point. I mean there is no
7 magic to these terms.

8 MR JUSTICE SMITH: No. The fact is one might easily have an
9 argument, I suspect might have, about whether that
10 example was a general or specific release.

11 A. Yes, you could to a New York lawyer -- general release,
12 as Judge Gropper testified this morning, general release
13 calls to mind the old Blumberg form and it used to be
14 quite common, even for very sophisticated lawyers in
15 large money cases, to take the printed form which had
16 all that wonderful archaic language, from the beginning
17 of the world, from the date of the day, any manner or
18 thing, and -- and to execute that. And that is -- that
19 is sometimes marking it up to make exclusions and that
20 is what I -- and if you have a language like that in
21 there, that to me is the hallmark of what I would call
22 a general release.

23 THE COURT: Yes, thank you.

24 MR PHILLIPS: Judge, isn't what it comes down to is you
25 actually have to construe the clause the release in

- 1 question, yes?
- 2 A. Well yes.
- 3 Q. You have to construe the language you have to construe
4 it in its context, yes?
- 5 A. Yes.
- 6 Q. And you have to look at what it was that was in the
7 contemplation of the parties, in other words what they
8 were trying to release, what they were trying to settle,
9 yes?
- 10 A. Yes. But in most cases even the release area, where
11 there has been more indulgence to parole evidence than
12 others, even in the release area, in most cases the
13 text, if clear, is conclusive.
- 14 Q. But you are still encaged in that question of
15 interpretation, yes, and putting labels on it really
16 doesn't advance matters, does it?
- 17 A. Well, putting labels on things as a normal rule does not
18 advance matters. Sometimes a descriptive term helps to
19 understand.
- 20 MR PHILLIPS: My Lord, I am wondering about the transcript
21 writers.
- 22 MR JUSTICE SMITH: Yes, indeed. I think now is a good time
23 if it suits you to rise.
- 24 We will rise for five minutes.
- 25 (3.10 pm)

1 (A short break)

2 (3.15 pm)

3 MR PHILLIPS: Judge Smith, could you go back to the
4 Settlement Agreement, which as you know is in
5 divider 16. I hope it hasn't gone anywhere. Divider 16
6 of bundle E. Have you not got bundle E any more?

7 A. I think not.

8 MR PHILLIPS: Can the judge be handed bundle E please and
9 can you please not taken away.

10 A. It is already open to the agreement.

11 Q. Excellent.

12 So section 8.02, which is the release, which we have
13 looked at before, and the two parts that we wanted to
14 look at is all causes of action and then it identifies
15 the type of law it may arise out of: equity, contract
16 and so on and so forth. Then it goes on:

17 "... accrued/unaccrued, foreseen/unforeseen,
18 foreseeable/unforeseeable, known/unknown,
19 procured/unprocured, fixed or contingent, liquidated or
20 unliquidated, certain or contingent."

21 So that is the sorts of things it can be, yes?

22 A. Yes.

23 Q. And in each case -- we have already looked at this --
24 that arise from or connected with alleged and related to
25 any facts or circumstances in existence prior to the

- 1 date hereof. Okay?
- 2 A. Yes.
- 3 Q. And I just want to look at the facts and circumstances
4 in exist technicians prior to the date thereon. We
5 discussed them a little bit. Can I ask you to be given
6 bundle A, please. I want you to turn to tab 8. This is
7 Deutsche Bank's position paper.
- 8 A. Yes.
- 9 Q. And if you look at page 137. This is a document that
10 you have read, we know that from your instructions.
- 11 A. I am not sure I read every word but I am sure I have
12 read the parts that have anything to do with my --
- 13 Q. Okay. Well you will have read this. 31.2, okay.
- 14 A. Yes.
- 15 Q. "Any claim in respect of the PLC sub-debt ..."
16 Yes?
- 17 A. Yes.
- 18 Q. "... arises from, is based on, connected with, alleged
19 in or related to facts or circumstances in existence
20 prior to the date of the Settlement Agreement because
21 such claims arise from sums advanced to PLC prior to the
22 Settlement Agreement under facility agreements entered
23 into prior the Settlement Agreement".
- 24 Do you see that?
- 25 A. I do.

1 Q. Okay. So we have agreed, and it says there, that money
2 was advanced to PLC under the sub-debt facility
3 agreements yes?

4 A. Yes.

5 Q. We have agreed that the money was advanced by LBUKH to
6 PLC under the sub-debt agreement, yes?

7 A. Yes.

8 Q. We have agreed that LB UK H was not a party to or bound
9 by the release, yes?

10 A. Yes, in the -- yes, in the relevant sense 8.02 release
11 certainly.

12 Q. Yes. So let's think about the pre-existing rights
13 between LBHI and PLC. Yes? Let's think about --

14 A. Pre-existing rights between those two parties, yes,
15 pre-existing the settlement.

16 Q. Pre-existing rights, because we just looked at the
17 language and it all has to exist before the Settlement
18 Agreement. There were no facilities between LBHI and
19 PLC before the agreement, were there?

20 A. Between LBHI and PLC, no.

21 Q. There was no intercompany claim on this PLC --

22 A. None that I know about.

23 Q. LBHI wasn't a party to it, we established that?

24 A. Yes, I understand.

25 Q. At the time of the agreement there was the mutual

1 release obligation and that was a fact existing at the
2 time of the settlement, yes?

3 A. The mutual release obligation.

4 Q. The release obligations we see in clause 8?

5 A. All the releases in clause 8. I suppose they didn't
6 exist before the Settlement Agreement because they came
7 into existence with the Settlement Agreement.

8 Q. But there were no facts or circumstances connecting that
9 release given the release obligation given by LBHI to
10 the debt claim by LBUKH?

11 A. There were no facts or circumstances ...

12 Q. Connecting --

13 A. The LBHI's release in 8.02 to the debt claim as of the
14 time of the Settlement Agreement, I think that's
15 correct.

16 Q. So there was nothing that existed that related to facts
17 or circumstances that existed prior to the date hereof
18 on which that release could bite?

19 A. Well, all you are saying is that the -- that that claim
20 could not have been released in 2011 or 2012, I agree
21 with you.

22 Q. It could have been released by LBUKH?

23 A. By LBUKH, okay, but it wasn't. Okay, if that is all you
24 are saying I agree with you.

25 Q. Now let's look at Long v O'Neill. If you can go to

1 bundle D2 at tab 86.

2 A. 86.

3 Q. Yes.

4 A. This is another one that I think I may be cold on but
5 I will certainly try to answer your questions.

6 Q. Okay. Let's just look at the holdings, at the synopsis.

7 "An investment fund director commenced an action
8 against other ...(Reading to the words)... Settlement
9 Agreement established defined terms for each."

10 Do you see that?

11 A. I see it.

12 Q. So the plaintiff claims that there was an agreement that
13 he was going to be fairly compensated for his efforts in
14 a lawsuit against an agent, yes?

15 A. You may be right but I do not remember the case and
16 I cannot get that out of what I just read, but you may
17 well be right.

18 Q. Take it from me, because nothing turns on that actually,
19 judge.

20 A. Okay.

21 Q. He claimed that there was an agreement he would be
22 fairly compensated and he claimed one-third the
23 performance fees. Those were the claims.

24 But if we can look on page 2, halfway down there is
25 a paragraph that starts "The Settlement Agreement

1 contained a release ...", do you see that, judge?

2 A. Yes.

3 Q. So:

4 "The Settlement Agreement contained a release
5 ... (Reading to the words) ... claims, rights, demands,
6 suits charges ..."

7 Do you want to just cast your eye over that and then
8 I want to pick it up on the third line. Tell me when
9 you get to the third line.

10 A. The third line, I am there.

11 Q. "... whether known or not known, arising from or
12 resulting from or in connection with any act, omission,
13 event, transaction, occurrence, agreement, contract or
14 relationship concerning the fund, its investments,
15 business or affairs, including without limitation the
16 matters alleged in the lawsuits."

17 Do you see that?

18 A. Yes.

19 Q. So you will agree that that sort of language is similar
20 to the language we have got here?

21 A. There is certainly some resemblances.

22 Q. And the plaintiff then sued his fellow defendants, as
23 I have said, for one-third of the performance fee?

24 A. Might have sued his fellow what?

25 Q. He sued his fellow defendants.

1 A. As a crossclaim? No, the plaintiff does not have fellow
2 defendants, he is a plaintiff.

3 Q. Yes. But let's just pick it up at the bottom:

4 "The IS court granted both defendants' motions to
5 dismiss. In doing so ...(Reading to the words)...
6 release indicated the parties intended to leave no loose
7 ends."

8 Okay? So the parties intended to leave no loose
9 ends. He then refers to the breadth of the release and
10 then in the middle of page 3:

11 "Despite the plaintiffs contention otherwise
12 ...(Reading to the words)... from or in connection with
13 any act concerning the fund."

14 Do you see that?

15 A. Yes.

16 Q. And so it talks about unripe and contingent claims. So
17 an unripe claim is a claim that has not yet matured,
18 agreed?

19 A. Agree.

20 Q. A contingent claim is a claim that is contingent on an
21 uncertain future event, agreed?

22 A. Yes.

23 Q. Whether known or unknown? That is the language of the
24 release.

25 A. Where? Yes, I seem to remember it was in there.

- 1 Q. Yes, it is in there. And both depend on there being
2 a pre-existing legal right and obligation, yes?
- 3 A. I am a little lost. What depends on there being
4 a pre-existing legal right or obligation?
- 5 Q. Either an unripe or a contingent claim, both would
6 depend on there being a pre-existing legal obligation?
- 7 A. Well, whether the obligation exists you can quibble
8 about some pre-existing relationship, yes.
- 9 Q. The propositions I am putting to you and I think you are
10 agreeing is that to have a contingent claim or to have
11 an unripe claim there has to be a pre-existing
12 obligation; there has to be some sort of right?
- 13 A. Yes. Some kind of relationship where the obligation
14 exists, or --
- 15 Q. Absolutely.
- 16 A. -- later comes into existence, as a quibble.
- 17 Q. And that is a relationship between the parties to the
18 release?
- 19 A. Well yes.
- 20 Q. So you agree that the release in Long v O'Neill is very
21 broad?
- 22 A. Well, I guess the language you read looked broad to me.
23 Again I do not have a recollection of the case.
- 24 Q. And I put it to you that it cannot extend to
25 after-acquired claims, because there was no pre-existing

1 obligation?

2 A. I disagree.

3 Q. You disagree?

4 A. I mean I can't disagree with Long v O'Neill, I don't
5 know what that tells, but as a general proposition I do
6 not agree.

7 Q. We are talking about Long v O'Neill.

8 A. Then I -- are you telling me there was some issue as to
9 after-acquired claims in Long v O'Neill?

10 Q. No. But if there were after-acquired claims, they
11 couldn't have been caught on this reasoning?

12 A. I have no idea.

13 Q. I see.

14 Let's go to the joint report in paragraph 25.

15 A. The joint report which is tab?

16 Q. Tab 4.

17 A. Tab 4 in -- sorry. D1?

18 Q. In D1, yes. So we have looked at this I think already.
19 This is where you say claims that mature or accrue after
20 the date of a release are not limited to those that are
21 later liquidated or become fixed or known. They may
22 include for example unripe --

23 A. Sorry you are in which paragraph?

24 Q. Paragraph 25, judge, I do apologise. Do you have 1that.

25 A. Yes, I do.

1 Q. "In judge Smith's view claims that mature or accrue
2 after ... (Reading to the words)... held at the time the
3 release was granted.

4 So we are talking about claims that depend upon the
5 passage of time that are unaccrued or unmatured, yes?

6 A. Yes.

7 Q. And you also talk about claims that depend upon the
8 occurrence of an event not certain to occur; that is
9 contingent claims, yes?

10 A. Yes, yes.

11 Q. So claims that depend upon the passage of time, those
12 are unaccrued or unmatured claims, agreed?

13 A. Sounds right.

14 Q. But in each case --

15 A. Certainly "unmatured" is probably a better word than
16 "accrued".

17 Q. Not a problem, I understand.

18 In each case, and I think you have already explained
19 this, you have some sort of existing right that will
20 mature either by the passage of time or by the
21 occurrence of an event?

22 A. Yes.

23 Q. And in each case the release sought holds that right at
24 the time when the release is granted?

25 A. Yes.

- 1 Q. And in each case the releasor can release the claim
2 because he holds that right?
- 3 A. Well, I -- yes, yes all right. Yes.
- 4 Q. Yes, thank you.
- 5 Unknown or unforeseen. So a claim that is unknown
6 or unforeseen is a claim based on an existing right that
7 is either not known to the party entitled to the claim,
8 yes?
- 9 A. Unknowns means not known if that is what you are asking
10 me, yes.
- 11 Q. Yes.
- 12 A. Unknown does mean not known.
- 13 Q. But it is a claim based on an existing right that the
14 party does not know about?
- 15 A. I would think that would be normally true.
- 16 Q. Yes. And unforeseen is a claim that the party entitled
17 to it does not foresee: unforeseen?
- 18 A. Yes, but that does look to the future.
- 19 Q. It does, but it is looking to the future and it is an
20 unforeseen claim that the releasor has, agreed?
- 21 A. It is hard to take it out of the context of this case.
22 It is an unforeseen -- it is a claim that the releasor
23 does not foresee. Whether he or she has it at the
24 moment of the foresight is not expressed.
- 25 Q. How does a releasor release something he doesn't foresee

- 1 if he doesn't have it?
- 2 A. Well, I -- that is hard to foresee. But if -- but we
3 know of one case because it happened here, he can fail
4 to foresee that he will acquire a claim in the future.
- 5 Q. Well first of all we are talking at the moment in
6 hypotheticals, but --
- 7 A. I understand.
- 8 Q. You are saying that someone has a legal right that he
9 can release if he does not foresee that he is going to
10 acquire a legal right in the future; is that your
11 evidence?
- 12 A. No, no, I am saying that you can release -- when you are
13 releasing unforeseen claims, one of the many things that
14 you don't foresee might be the future acquisition of
15 a claim. That is all I am saying, I am saying those
16 words comfortably read on that situation.
- 17 Q. Let's try again. You have already said that in order to
18 release something you have to have some sort of legal
19 relationship?
- 20 A. I don't think I did, I don't think I said that.
- 21 Q. Well, you did. Let's try again. Do you think that you
22 can release something that you do not have a legal right
23 to?
- 24 A. Okay in general -- in general obviously no you can't
25 release a claim you don't you don't own. You can agree

- 1 to release a claim you subsequently acquire.
- 2 Q. Yes, and we discussed that at the beginning. You could
3 agree that in the event that I acquire a claim against
4 you, Judge Smith, I will release it.
- 5 A. Yes.
- 6 Q. We agreed that at the beginning.
- 7 A. Yes.
- 8 Q. Absolutely. So if the party said to be entitled to the
9 claim does not have any pre-existing legal righted
10 giving right to the claim it is not an unknown claim, it
11 is a claim he doesn't have. Do you follow?
- 12 A. Well, it can be both.
- 13 Q. If he does not have any pre-existing legal right to the
14 claim, he does not have the claim?
- 15 A. It's true.
- 16 Q. Right. It is not an unknown claim, it is a claim he
17 doesn't have?
- 18 A. It might also be an unknown claim, but it certainly is
19 a claim he doesn't have.
- 20 Q. I see, because he doesn't know that his legal rights are
21 going to change in the future?
- 22 A. It could be an unknown claim for a thousand reasons.
- 23 Q. But it is an unknown claim in the sense that he does not
24 know that he is going to acquire a legal right to the
25 claim in the future?

- 1 A. I -- it could be an unknown claim because he doesn't
2 know it exists. I am not really seeing your point.
- 3 Q. And it is not an unforeseen claim, or is your evidence
4 that he does not foresee that he is going to acquire
5 a legal right to the claim in the future?
- 6 A. That essentially is my evidence, that among the -- among
7 the things that are unforeseeable -- not just unforeseen
8 but unforeseeable can describe is the future acquisition
9 of a claim.
- 10 Q. I see, so at the heart of your evidence is the
11 proposition that the claim does not exist in the hands
12 of the party who is releasing the claim?
- 13 A. I don't know whether it is the heart of my evidence or
14 not, but I do say that language -- that the language of
15 the kind used here to my mind unambiguously includes all
16 unforeseen or unforeseeable claims including those
17 subsequently acquired.
- 18 Q. What you are saying is that it is not foreseen at the
19 time, but you will acquire a right some time in the
20 future?
- 21 A. Well yes. Yes.
- 22 Q. And so you are saying that the language
23 "unforeseen claim" means that the releasing party is
24 agreeing that if he acquires a right in the future, even
25 though totally unforeseen, that that is unforeseen

1 claim?

2 A. It means that among other things obviously, yes.

3 Q. Now, a claim is a legal right that arises in certain
4 circumstances, do you agree?

5 A. Sounds like a truism.

6 Q. And if a party doesn't have the legal right that gives
7 right to the claim, he can't assert the right?

8 A. That sounds like a tautology, yes.

9 Q. He cannot make the claim?

10 A. Okay.

11 Q. Would you agree, judge?

12 A. I think so. I mean it is all abstract but I am
13 wondering exactly where it is going but it seems right
14 that you cannot assert a claim you don't own, except
15 with exceptions that we don't care about because they
16 are not relevant.

17 Q. Let's strip it back to its basics. If you have no
18 right, you Judge Smith, have got no legal right,
19 circumstances have not arisen that you have given you
20 a legal right to sue me, you cannot sue me?

21 A. That is that is that seems right.

22 Q. Yes. And equally, you cannot release a claim against me
23 because it doesn't exist?

24 A. I am not sure that follows.

25 Q. Really?

1 A. Really.

2 Q. And even if you put the widest words possible into
3 a contract -- this is you, Judge Smith, put the widest
4 words into a contract that say "I am releasing my claims
5 against Mark Phillips that arise out of events that have
6 happened before he cross-examined me, but after that all
7 bets are off", if you said "I release all claims that
8 I have against Mark Phillips whatsoever, howsoever they
9 may have arisen" and all the rest of it, how could you
10 do that if you do not have a legal right -- how would
11 that get rid of a claim that does not exist?

12 A. Well, it is not a claim that doesn't exist, it is
13 a claim that doesn't exist in my hands. Assume this
14 really happened. Assume we had some dispute which ended
15 the day you cross-examined me and we decide that we are
16 going to exchange releases and we decide, even though we
17 might have some particular controversies in mind we are
18 going to have the broadest release we can, we are going
19 to negotiate for total peace and we sign the release and
20 the next date day I go over to your learned friend over
21 here and I purchase from her a claim against you and sue
22 on it. You would say: that is not what I bargained for.
23 That is not total peace.

24 Q. And you don't think that what I would say is: I entered
25 into a release with you, you have released any claims

1 you may have against me?

2 A. I know.

3 Q. That is the contract you just described.

4 A. I am fairly confident what position you would take, but

5 I actually even think you would be right, that you would

6 say: oh, no, that wasn't our deal.

7 Q. No, I would say that: you released your claims against

8 me. If I owe somebody else a claim and you happen to

9 acquire it ... anyway, let's move on. This is becoming

10 too much fun.

11 Can we go back to your report at paragraph 38,

12 please.

13 A. My report?

14 Q. Do you have paragraph 38?

15 A. I have it now.

16 Q. I think it is on page 14.

17 A. I got it.

18 Q. You see there you say in paragraph 38.

19 "Where particular claims are not explicitly carved

20 out of a general release they will be deemed to be

21 included within it."

22 Yes?

23 A. Yes.

24 Q. That is the proposition that you make. And in the joint

25 report, which is in tab 4, at paragraph 21, last

1 sentence:

2 "Where particular claims are not explicitly carved
3 out of a general release they will be deemed included in
4 it."

5 And then you refer back to paragraph 38.

6 A. Yes.

7 Q. Okay and you rely on two cases which are Hack and
8 Innovus?

9 A. Yes.

10 Q. I was going to take you to both but time is pressing so
11 I am going to have a look at Hack and Hack is in
12 divider 42.

13 A. Same book?

14 Q. Yes, please, thank you very much.

15 A. Thank you very much.

16 Q. Do you have that, judge?

17 A. I do.

18 Q. Let's just look at the synopsis just to give us some
19 shape:

20 "A former shareholder sued a corporation to recover
21 their costs of defending ...(Reading to the words)...
22 action arose barred the claim."

23 And if I can go to page 2, to the memorandum of the
24 decision, do you have that judge?

25 A. Yes.

1 Q. And if you see at the end of the second break, five
2 lines up "In the broadest language ..."?
3 A. Which column?
4 Q. In the left-hand column, I do apologise.
5 A. Left-hand column, "In the broadest language", okay.
6 Q. "In the broadest language the parties released each
7 other from any and all claims that each might have
8 against the other by reason of any matter, cause or
9 thing whatsoever from the beginning of the world to the
10 date hereof."
11 A. Yes.
12 Q. Which is the famous language.
13 A. Yes. Not quite as horrid as the original Blumberg form,
14 but pretty close.
15 Q. And it applied to all claims they might have against
16 each other?
17 A. Yes.
18 Q. Yes?
19 A. Yes.
20 Q. Then if we can go over to the right-hand column I want
21 to pick up the second paragraph:
22 "Plaintiffs contend that the release does not
23 encompass their claim ...(Reading to the words)...
24 securities litigation was established."
25 So they contended that the release didn't encompass

1 a claim for reimbursement because they say the claim
2 didn't accrue until 1993. And just picking it up at the
3 bottom, very bottom where it has 2 and 3 and it starts
4 "There is no merit", do you see that judge?

5 A. Yes.

6 Q. "There is no merit to the plaintiff's contention that
7 claims did not accrue ...(Reading to the words)... as
8 a result of pre-existing controversies."

9 So do you see, that is "pre-existing controversies",
10 you see the language that they use there judge?

11 A. I see it.

12 Q. That is controversies and causes of action between the
13 releasor and the releasee, yes?

14 A. Certainly in most -- it doesn't actually say that and
15 I am sure that is -- obviously in 99 per cent of the
16 cases, that is what it is. I don't think this case is
17 at all that the 1 per cent or whatever which is of great
18 interest to everyone now.

19 Q. Let's just look at what this case deals with, because it
20 arose out of a pre-existing legal right. Do you follow?

21 A. I follow that -- I follow that it says that the words
22 "pre-existing controversies" are there.

23 Q. Exactly, because the legal right must be the right of
24 the releasor at the time he releases it?

25 A. I do not think that this case particularly stands with

1 that proposition.

2 Q. And I should just point out that on the right-hand
3 column, at the end of the right-hand column on page 3,
4 it says:

5 "Finally, had the plaintiffs wished to limit
6 application of the release, it would have been a simple
7 matter to include language to that effect."

8 In other words, you could carve it out?

9 A. Yes.

10 Q. Let us have a look at Innovus, because we did that quite
11 efficiently. Could we go to tab 67, which is in
12 volume 2.

13 A. Yes.

14 Q. This concerned:

15 "The purchaser of a phosphate business brought an
16 action for breach of contract ...(Reading to the
17 words)... to contest the assessment, the seller was
18 obliged to provide it."

19 So that is the context.

20 A. Yes. I know I have a memory when I was in the
21 Court of Appeal we reversed this decision but probably
22 not on the point -- maybe not this decision, but I do
23 remember a case where -- no, I think we affirmed.

24 Q. This is one of the authorities that you cite in your
25 opinion which is where I got it from, so if you have

1 overturned it, I certainly don't know.

2 A. If I cite it, it must be good law. The issue that the
3 Court of Appeals decide had nothing to do with what we
4 are concerned with.

5 Q. Okay, good. Let's look at page 1. You can see this is
6 the opinion and I want to look at the paragraph
7 in August 1994 and I want to pick up the next sentence:

8 "The purchase and sale agreement requires the
9 defendant indemnify plaintiff for all taxes assessed for
10 periods prior to the closing date."

11 So that is the relevant sentence.

12 A. Yes.

13 Q. And then page 2. Do you see the indemnification
14 agreement and what the indemnification agreement did was
15 it defined tax or taxes very, very broadly?

16 A. Yes.

17 Q. And the issue was whether or not the CNA -- that
18 I understand is the Commission Nationale d'Ague --
19 assessment is considered a tax within the term defined
20 and you can see that where it says the relevant issue.
21 And the words that you rely on in your report is if you
22 look into the next paragraph, do you see it starts off:

23 "When a written agreement is clear and unambiguous
24 on its face ... (Reading to the words)... parole evidence
25 not admissible."

1 And then if you can pick up after the citation of
2 some authorities it says "Had the parties ...", do you
3 see this?

4 A. Yes.

5 Q. "Had the parties wished to limit this expansive verbiage
6 by requiring ...(Reading to the words)... agreed to
7 assume such an enormous obligation post closing."

8 So you see the points you get from that is they
9 could have included exceptions, yes?

10 A. I do see that.

11 Q. And the court noted the commercial absurdity of the
12 plaintiff intending to occur a prior debt of
13 \$130 million that the defendants knew about and failed
14 to divulge that pre-dated the closing, so it was
15 something certainly unknown to the purchaser, yes?

16 A. Yes, I don't remember the context I mean I understand
17 what you are saying. Yes, it does say that.

18 Q. Yes, and then if we can go back to paragraph 39 of your
19 report, just to see what you take from this, which is
20 in --

21 A. I think it was if they wanted to limit it they could.
22 But I probably shouldn't speak without looking.

23 Q. Just turn up 39 so you can see what it is that --

24 A. I have to go to the report first.

25 Q. Have you got that?

- 1 A. My report, paragraph 39.
- 2 Q. Actually I am looking at the time, I am going to move
3 on. Can you turn up the joint report, please.
- 4 A. Which tab?
- 5 Q. 4, and I want to go to paragraph 31. We are moving on
6 to subrogation, okay?
- 7 A. Yes yes.
- 8 Q. "In Judge Smith's opinion claims based on rights of
9 subrogation ...(Reading to the words)... subsequently
10 acquired by the releasor."
- 11 So we see that.
- 12 Now, can I ask you to look at D2, 91.
- 13 A. That is the Settlement Agreement.
- 14 Q. No, it is not the Settlement Agreement. This is in
15 bundle D2, judge.
- 16 A. D2.
- 17 Q. Yes.
- 18 A. Which is volume 2, number? I am sorry?
- 19 Q. Tab 91. Pretty close to the back.
- 20 A. Okay. Yes that is statute.
- 21 Q. This is part of the bankruptcy code.
- 22 A. Yes.
- 23 Q. And you will remember that the recitals referred to the
24 proofs of claim against the debtors in the US
25 bankruptcy?

- 1 A. The recitals in the Settlement Agreement.
- 2 Q. Yes, the recitals in the Settlement Agreement.
- 3 A. I do remember.
- 4 Q. I want just to look at the definition, if you turn over
5 the page, the definition of a claim in the bankruptcy
6 code. A claim means a right to payment, yes?
- 7 A. Yes.
- 8 Q. "... whether or not such right is reduced to judgment,
9 ... (Reading to the words) ... secured or unsecured, or
10 the right to an equitable remedy."
- 11 And you can cast your eyes over that, which of
12 course is similar to the broad definition of cause of
13 action in the Settlement Agreement and what you can see
14 is a claim is a right to payment however it may arise
15 and you have to have a claim in order to file. This is
16 what you have to have in order to file a claim in the
17 bankruptcy. Do you follow?
- 18 A. Yes.
- 19 Q. And claims based on guarantee rights and obligations
20 would be included, do you follow that?
- 21 A. No doubt true. Where is it?
- 22 Q. Contingent?
- 23 A. Contingent, yes.
- 24 Q. You can file where a claim is unmatured, you cannot file
25 a claim for an after-acquired claim, do you see there

- 1 absolutely is no reference to after-acquired claims?
- 2 A. I would -- I would think you cannot file a claim before
3 you acquire it, that is probably true.
- 4 Q. Which certainly suggests that an unmatured claim and an
5 after-acquired claim are different things?
- 6 A. I agree they are different things.
- 7 Q. And what is different is that there is a pre-existing
8 legal right. You have to have the legal right to file
9 the claim in the bankruptcy. Agree?
- 10 A. Well I agree that an -- yes, obviously after-acquired
11 and unmatured do mean different things, I never
12 suggested they meant the same thing, and you are
13 probably right about -- I am sure you are right that you
14 can't file -- well, you have to have the claim before
15 you file it whether it is you might file an
16 after-acquired claim depending on what was acquired
17 after. I don't know. It's hard for me to get my mind
18 around that.
- 19 Q. Judge, what all of these claims have got is that they
20 are based on a pre-existing legal right, correct?
- 21 A. Any claim has to be based on a legal right, I think.
- 22 Q. Yes.
- 23 Then if we can just look again at the joint report
24 at paragraph 25, if you still have that there?
- 25 A. Joint report paragraph 25. Yes.

- 1 Q. And it is just the next sentence in paragraph 25:
- 2 "It would not be accurate to say that such claims
- 3 were claims that the releasor held at the time the
- 4 release was granted."
- 5 A. Yes.
- 6 Q. We have seen that a proof of debt can be filed for
- 7 unripe and unaccrued or contingent claims, yes?
- 8 A. Yes.
- 9 Q. And a creditor can only file a proof in respect of
- 10 a claim that he holds. So to say that claims that
- 11 are -- because you are talking about unripe and
- 12 unaccrued claims at the time of the release in
- 13 paragraph 25. To say that they are not claims the
- 14 releasor held at the times the release is granted is not
- 15 right, is it?
- 16 A. No, I think it is right, but I assume you are right that
- 17 it obviously depends on how you are using the words.
- 18 But I would not say that I held a claim I cannot sue on.
- 19 It is not yet a claim -- an unmatured claim is not yet
- 20 a claim. But I am sure you are quite right I can file
- 21 it in a bankruptcy case.
- 22 Q. I am sorry, we have looked at what a claim is in
- 23 bankruptcy --
- 24 A. Yes, you are right within the bankruptcy definition. If
- 25 you are saying what I say there may be inconsistent with

1 the bankruptcy definition of claim, you may be correct.

2 Q. And we have agreed that the reason for that is in order
3 to make a claim in a bankruptcy you have to have
4 a pre-existing legal right?

5 A. Well I don't know if -- the reason for that is that you
6 showed me the definition and unmatured claims are in
7 there.

8 Q. They are, they are all in there. Contingent, matured,
9 unmatured, they are all there.

10 A. Yes.

11 Q. Can we just go over the page in D2 to tab 92, please.

12 A. Yes.

13 Q. And this is the allowance of claims or interest and if
14 you could turn over to the page 2 and it deals with
15 estimating claims in a US bankruptcy, do you see that?
16 This is section 502C:

17 "There shall be estimated for the purpose of
18 allowance under this section 1) any contingent or
19 unliquidated claim, the fixing or liquidation of which
20 as the case may be would unduly delay the administration
21 the case, or 2) any rights to payment arising from
22 a right to an equitable remedy."

23 They are estimated. So the way the bankruptcy
24 claims system works is that if you have a claim, be it
25 contingent, mature, future and so on, you can make that

1 claim in the bankruptcy and the value of your claim is
2 estimated to take account of the fact it is either
3 contingent future or so on, yes?

4 A. Yes.

5 Q. Now, a claim based on a guarantee, that is a contingent
6 claim, yes?

7 A. Yes, assuming the debtor has not yet defaulted, yes.

8 Q. That is a contingent claim based on a pre-existing legal
9 obligation, yes?

10 A. Yes.

11 Q. It is an existing liability that depends on future
12 events; agreed?

13 A. Yes.

14 Q. You say that they are originally owned by one person and
15 acquired by another?

16 A. That is what I say about subrogation claims.

17 Q. So in relation to a subrogation claim, that is a claim
18 that results from a pre-existing legal right, in other
19 words you are the guarantor, a subrogation claim is what
20 the guarantee gets, yes?

21 A. I see. I was -- I mean I wasn't -- I didn't have in
22 mind a claim by the guarantor against the principal,
23 which is a subrogation claim. I thought we were talking
24 about a claim on the guarantee.

25 Q. You say a subrogation claim is by its nature a claim

- 1 a claimant has acquired from someone else.
- 2 A. Yes.
- 3 Q. That is what you say in your report.
- 4 A. Yes.
- 5 Q. The subrogation claim arises out of the guarantee?
- 6 A. Well it can arise out of a number of things. I am more
7 used to it in the insurance context, but certainly, yes,
8 let's see how does it arise out of the guarantee. You
9 pay -- yes, the guarantor pays the creditor and thereby
10 succeeds to the creditor's right against the principle,
11 yes.
- 12 MR JUSTICE SMITH: In exactly the same way as an insurer.
- 13 A. Yes, yes, I agree.
- 14 MR PHILLIPS: So in one case it arises out of a pre-existing
15 guarantee and in the other case it arises out of
16 a pre-existing contract of insurance?
- 17 A. Yes.
- 18 Q. Someone who has not yet acquired a claim, okay, someone
19 who buys somebody else's claim, does not have a right to
20 those claims?
- 21 A. Yes, that is true.
- 22 Q. In the present case, 6 March 2012, LBHI had no right to
23 the sub-debt?
- 24 A. That's correct.
- 25 Q. It could not have submitted claims against PLC and PLC's

- 1 insolvency on the sub-debt?
- 2 A. Yes.
- 3 Q. The claims on the sub-debt were LB UK H's, yes?
- 4 A. I am sorry?
- 5 Q. The claims on the sub-debt belonged to LBUKH?
- 6 A. Yes.
- 7 Q. Now can we have a look at the Prosat case, please, which
- 8 is -- the first thing I want to do is just to go to the
- 9 joint report and you will need two things, we are going
- 10 to need bundle D2 and you are going to just briefly need
- 11 the joint report which is in D1, tab 4. Would the
- 12 gentleman assisting you mind removing D2. Thank you so
- 13 much.
- 14 So if we can look at paragraph 35.
- 15 A. I am sorry, is there some other document besides --
- 16 Q. No, it is tab 4 in bundle.
- 17 A. No, I have the joint report.
- 18 Q. Okay, let me do the joint report first and then we are
- 19 going to turn up Prosat.
- 20 Paragraph 35:
- 21 "In Judge Smith's opinion the decision in Prosat,
- 22 while not binding on New York courts, is well reasoned
- 23 and will be accepted by a court applying New York law."
- 24 A. Yes.
- 25 Q. Yes, thank you very much.

1 Then if we can look at two propositions from your
2 report, which is as you know in divider 2, first of all
3 on page 17-paragraph 43:

4 "I have not found any case under New York law
5 addressing the question ... (Reading to the words)... if
6 anything less strict than New York courts, the plain
7 meaning rule.

8 You then deal with that and say:

9 "In my opinion a court applying New York law would
10 accept the holding in the Prosat case."

11 A. Yes.

12 Q. So we have established there are no New York cases and
13 you rely on Prosat for the proposition that a general
14 release will include claims acquired by the releasor
15 after the release is executed?

16 A. Yes.

17 Q. Okay. So now let's have a look at Prosat. Do you have
18 Prosat? It is in divide 90, in the thin file there,
19 judge.

20 A. Okay I have got it.

21 Q. What I want to do is I want to unpick the facts with
22 you, okay?

23 We know that this was an appeal against the
24 rejection of Shiff's claim on claim 41, yes?

25 A. Yes.

1 Q. So let's just go through the facts and we will see where
2 we end up, okay?

3 Were you here this morning when I took Judge Gropper
4 through the facts?

5 A. Yes, I was.

6 Q. Okay, excellent. It might make this a little quicker.

7 A. Don't -- I am paying even closer attention now than
8 I was then.

9 Q. Okay. Let's go to "Background", right-hand side. So we
10 see that Prosat was a California limited company, wholly
11 opened and controlled by four individuals and one of
12 them was Shiff. Do you see that from the first
13 sentence?

14 A. Yes.

15 Q. From 1997 to 2007 Prosat was an authorized dealer for
16 direct TV subscriptions.

17 A. Yes.

18 Q. Prosat contracted Imagitas to advertise direct TV
19 services. So that is the contract. Yes?

20 A. Yes.

21 Q. In July 2006 Imagitas sued Prosat for breach of contract
22 for failure to major payments as they became due.
23 Straightforward contractual dispute. Do you see that,
24 judge?

25 A. Why he.

1 Q. Imagitas amended its complaint to include claims for
2 fraudulent transfer against the four Prosat members, and
3 that includes Shiff.

4 A. Yes.

5 Q. On 26 February Imagitas obtained a judgment by
6 stipulation in the case. The judgment holds Prosat,
7 Shiff and the three other members jointly and severally
8 liable in the principal amount of 2.9 million. Do you
9 see that?

10 A. Yes.

11 Q. Then in November 2007, Prosat files for Chapter 7
12 bankruptcy and Chapter 7 is compulsory liquidation, that
13 is the equivalent?

14 A. I -- think I know that, yes.

15 Q. Okay. And so they commenced the case which was then on
16 appeal. The assigned trustee in the case assigned to
17 Judge Adler and then we get this:

18 "On 28 April, 2008 Imagitas filed a proof of claim
19 in the Prosat case in the amount of 2.1 million based on
20 the remaining amount of the unsatisfied Imagitas
21 judgment."

22 So we know that Imagitas had a judgment against
23 Prosat, yes, and they filed a claim for 2.1 million on
24 that judgment?

25 A. Yes.

- 1 Q. And that claim is claim 41, okay?
- 2 A. Yes.
- 3 Q. Then on 12 June 2008, Shiff files for Chapter 11
4 bankruptcy in the Southern District of California.
5 Okay?
- 6 A. Yes.
- 7 Q. That is one of the other people against whom the
8 judgment had been obtained, yes?
- 9 A. Yes. The original judgment was -- was Prosat, Shiff and
10 two other people.
- 11 Q. Exactly. The case then is assigned to the particular
12 judge. Imagitas filed a proof of claim in the Shiff
13 case in the amount of 2.2 million based on the remaining
14 amount of the unsatisfied Imagitas judgment. So
15 Imagitas have filed in the Prosat insolvency and they
16 file in the Shiff insolvency and it is explained
17 a little later that the difference in sums relates to
18 interest?
- 19 A. Yes.
- 20 Q. Okay. That is claim 50. And it then says the
21 difference between the claims is the interest.
- 22 After that, Shiff, who is of course debtor in
23 possession of the Shiff estate, because it is Chapter 11
24 so Shiff is debtor in position, and Wolf, who is the
25 trustee of the Prosat estate, negotiated a settlement of

1 various disputes, so there was a settlement agreement
2 negotiate between the Prosat and the Shiff estate, yes
3 judge?

4 A. Yes.

5 Q. Those are the two debtors who are jointly and severally
6 liable on the judgment debt to Imagitas; yes?

7 A. Yes.

8 Q. Okay. Now if we can pick it up a little further down,
9 the Settlement Agreement governs the treatment of claim
10 41 and claim 50, do you see that?

11 A. Mm-hm.

12 Q. And it allowed the following claim and it then says:

13 "So to the extent that the Shiff bankruptcy estate
14 makes a distribution in payment of the Imagitas claim,
15 claim 50 ..."

16 So that is to the extent that Shiff makes a payment
17 on the claim made in the Shiff bankruptcy, do you agree,
18 judge?

19 A. Yes.

20 Q. "... which such payment will result in a credit against
21 the allowed amount of the Imagitas Prosat bankruptcy
22 claim ..."

23 Which is claim 41, yes?

24 A. Yes.

25 Q. "... then the Shiff bankruptcy estate will subrogate to

1 the part of the Imagitas bankruptcy claim so-credited
2 and a general unsecured claim without priority by the
3 Shiff bankruptcy estate shall be deemed allowed in the
4 amount of such credit resulting from the allowed amount
5 of the Imagitas Prosat bankruptcy claim."

6 And then it explains this:

7 "In other words, if the Shiff estate makes a payment
8 on claim 50 in the Shiff bankruptcy estate that reduced
9 claim number 41 to the extent of the payment, the Shiff
10 estate acquires a general unsecured claim in the Prosat
11 estate in the amount of reduction claim 41."

12 Do you see that?

13 A. Yes.

14 Q. So what you had was two claims; yes judge?

15 A. Yes.

16 Q. Arising out of the same judgment, for which Prosat and
17 Shiff are jointly and severally liable?

18 A. Yes.

19 Q. Yes?

20 A. Yes.

21 Q. There is claim 41, which is Imagitas's claim against
22 Prosat for 2.1 million US Dollars, yes?

23 A. Yes.

24 Q. And there is claim 50, which is Imagitas's claim against
25 Shiff for \$2.29 million, yes?

- 1 A. Yes.
- 2 Q. As co-obligors Shiff and Prosat had a right of
3 contribution from the other in the event that they
4 discharged all or part of the judgment debt due to
5 Imagitas?
- 6 A. Sounds like it might be right. Does it say that here
7 somewhere?
- 8 Q. It doesn't, I am talking about a legal proposition and
9 I am sure that you know that that is correct?
- 10 A. Well, you give me too much credit, but it may well be
11 correct.
- 12 Q. Okay. So we get to the settlement agreement and what
13 the settlement agreement provides, as you can see, is
14 that to the extent that Shiff pays down the judgment on
15 claim 50, Shiff can prove in the Prosat estate on claim
16 41?
- 17 A. Yes.
- 18 Q. That is what they put in the settlement agreement?
- 19 A. Yes.
- 20 Q. And there is also a release. Could you look at page 2
21 at the top. You see the release?
- 22 A. Yes.
- 23 Q. "Except for the rights and claims affirmed and/or
24 created in this agreement ..."
- 25 Yes? So except for rights and claims affirmed or

1 created. And what we have seen is that the claim that
2 Shiff would have against Prosat in the event that he
3 paid down claim 50 is you would either describe it as
4 affirmed, or possibly created but I suggest to you
5 affirmed, but nothing turns on that.

6 Then it goes on:

7 "In consideration of the rights and claims created,
8 the releases ...(Reading to the words)... hereby
9 releases and forever discharges the Prosat
10 bankruptcy~..."

11 So this is releasing the claims against the Prosat
12 bankruptcy, judge, yes?

13 A. Yes.

14 Q. "... wolf and any other of her employees ..."

15 Wolf was the trustee.

16 A. Yes.

17 Q. "... and/or assigns from any and all claims ...(Reading
18 to the words)... the Prosat Chapter 7 case, the Wolf v
19 Shiff ..."

20 And so on and so on. So we there see the release
21 and it includes causes of action of any character,
22 nature and kind whatsoever. And Shiff's claims, judge,
23 against Prosat are comprehensively released, I think we
24 will agree about that -- I don't want to use the word
25 "general" -- they are released save for where Shiff has

1 a claim under 41 if he makes a payment on claim 50, yes?

2 A. Yes.

3 Q. So that is what I am -- so page 2 bottom right, picking
4 up at the top:

5 "The settlement Agreement is intended to cover and
6 does cover ...(Reading to the words)... ascertained all
7 the rights ..."

8 And so on. And then there was an order by which
9 that was put through. And if I can pick it up the
10 potential claims for subrogation set forth to the extent
11 the Shiff bankruptcy pays and so on. And then we get to
12 this. In October 2009, Shiff as debtor in possession
13 and Imagitas enter into an agreement stipulation in the
14 Shiff case and Judge Taylor approves it and the
15 stipulation gives Union Bank and Imagitas the exclusive
16 right to direct and control the marketing sale and lease
17 of the real property and the stipulation provides for
18 how claim 50 will be treated and Imagitas agree 1) to be
19 treated as fully secured to a particular property, 2) to
20 accept proceeds of sale of the premises in full
21 satisfaction of all claims, 3) waive its rights against
22 collateral and any other property of the estate, and 4)
23 waive any right to claim to any deficiency. And then
24 this:

25 "The stipulation acted as an assignment of the

1 Imagitas claim against Prosat."

2 Do you see that, judge?

3 A. Yes.

4 Q. That is claim number 41. That is Imagitas assigned
5 claim 41 to the Shiff estate. And then the Shiff estate
6 filed a transfer of that claim, the bankruptcy court
7 issued a notice of transfer, and there is then
8 objection. Okay? And the trustee of the Prosat estate,
9 which is the estate facing claim 41, objected that Shiff
10 was seeking to enforce claim 41 without having made the
11 payments in respect of claim 50 that he had agreed to
12 pay and that were carved out of the release. Do you
13 follow?

14 A. Well yes.

15 Q. Yes. And if I can go to paragraph 7 at the bottom of
16 page 5, it says this:

17 "Moreover, when Shiff agreed to release he was aware
18 of Imagitas's claim 41."

19 Well, of course he was, because he was jointly and
20 severally liable on that claim to Imagitas under the
21 same judgment, yes?

22 A. Well so you have told me and I think that is probably
23 right. Certainly he was aware of it, he had gotten
24 a piece of it by subrogation -- he had a right to get
25 a piece of it by subrogation.

- 1 Q. Absolutely.
- 2 "He later acquired that claim through an assignment
3 ... (Reading to the words) ... ever made a payment on
4 claim 50."
- 5 Then they go through that.
- 6 So the Settlement Agreement that we have looked at
7 specifically governed the treatment of claims 41 and
8 claim 50; we have seen that.
- 9 A. It certainly discussed them both.
- 10 Q. Yes. And if Shiff made a payment in relation to
11 claim 50 that reduced claim 41, he would subrogate to
12 claim 41 and acquire an unsecured claim against Prosat
13 in the correspondence amounts that is what we have seen,
14 yes?
- 15 A. Yes.
- 16 Q. And the Settlement Agreement addressed Shiff's
17 pre-existing rights in respect of claim 41 because he
18 was one of the defendants on the same judgment, do you
19 follow?
- 20 A. His pre-existing rights in respect of 41.
- 21 Q. Well, his pre-existing right to contribution?
- 22 A. I do not see anything about contribution in there.
- 23 Q. That is a legal proposition, judge.
- 24 A. Well, you are asking about the Settlement Agreement
25 addressed ... I don't remember it addressing his right

- 1 to contribution, but if you want to show me something
2 I am happy to --
- 3 Q. I will remind you the Settlement Agreement dealt with
4 the rights to his claim arising out of the judgment and
5 it provided that if a payment was made under claim 50
6 that reduced claim 41, he would be subrogated?
- 7 A. Yes.
- 8 Q. And Shiff had agreed the only circumstances in which he
9 would make a claim on 41, yes?
- 10 A. Well I think that is the -- I think that certainly the
11 bankruptcy court and very likely the district court
12 thought that was the tenor of the agreement.
- 13 Q. And all other routes to make a claim were released by
14 the Settlement Agreement yes?
- 15 A. Yes. By the release in the Settlement Agreement, yes.
- 16 Q. So the purpose of the Settlement Agreement was very
17 clear, yes?
- 18 A. Well. Not so clear that it wasn't litigated. Shiff
19 took the position that nothing in the Settlement
20 Agreement prohibited him from going out and buying
21 claim 50 if the court said otherwise.
- 22 Q. Let's have a look at -- I am just going back to page 4.
- 23 A. I am sorry, I said claim 50, I meant claim 41. Yes.
- 24 Q. Yes. Go back to page 4, on the right-hand column -- do
25 you see that it says years later they talk about the

1 release and:

2 "[Judge Adler] held the release precluded the Shiff
3 estate ...(Reading to the words)... spirit of the
4 Settlement Agreement and her order disallowed claim 41
5 in its entirety."

6 And that was upheld.

7 So she said that violates the spirit of the
8 agreement.

9 A. Yes.

10 Q. Do you agree with that, judge?

11 A. I am not crazy about I -- I actually have to confess
12 I didn't read Judge Adler's decision, I am going by the
13 quotations here. In reading the District Court's
14 decision I prefer the District Court's approach which
15 doesn't resort to the spirit of the agreement, it relies
16 more on the release.

17 Q. Let's say "the purpose of the release", let's take the
18 word "spirit" out?

19 A. Well all I can say is that I do agree with the decision
20 in Prosat. Both the bankruptcy court and the
21 District Court reached the same conclusion and I agree
22 with it. I agree with the reason with Judge Benitez
23 I believe it is in the Prosat District Court opinion.
24 I do not feel I can fairly comment on whether I agree
25 with all of Judge Adler's reason.

1 Q. I see. And what we can see the Settlement Agreement did
2 is it prohibited any other claim by Shiff arising out of
3 claim 41 other than making a distribution under claim 50
4 that reduced the claim on 41, yes?

5 A. Well, that certainly was the effect. But as I remember
6 Judge Benitez's decision, he attributes that to the
7 broad language of the release.

8 Q. Yes.

9 Now, I think there is something we can agree on.
10 Prosat is not a simple case?

11 A. I agree with that.

12 Q. Yes. It is not a simple case in which a completely
13 separate claim was acquired many years later by
14 a creditor who had released other claims against
15 a debtor; I am sure you can agree with that?

16 A. I do agree that the post-transaction events in the two
17 cases are quite different.

18 Q. Yes.

19 A. I would suggest to you that that does not -- that the
20 interpretation of the release should be the same in
21 either case, what governs one should govern the other
22 and indeed shall I say on your client's reading of
23 section 8.02 it would have permitted LBHI to do
24 something that -- to do something that anyone would
25 agree was an abuse. I am not suggesting that what your

1 client in fact did was an abuse. But that
2 Judge Gropper's -- I won't blame Judge Gropper -- LBHI's
3 interpretation of section 8.02 would open the door to
4 abuses perhaps as flagrant as the abuse that happened in
5 Prosat.

6 Q. You will agree that the interpretation of any release
7 has to take place in its factual context and the factual
8 context in the Prosat case was very particular?

9 A. The factual context in the Prosat case was particular
10 and complicated. I do -- I -- and I do not agree that
11 the interpretation of a release always depends on all
12 the surrounding details I think that depends primarily
13 on its text.

14 Q. Judge, I am focusing on Prosat and I think we have
15 agreed that the interpretation occurred in that case on
16 its facts and they are very particular?

17 A. If you are implying that the particular facts of the
18 Prosat case may have influenced the result, I can't say
19 that that's impossible, but I do think that the district
20 judge, I think correctly, chose to rest the result on
21 the text of the release, which is not dissimilar from
22 the text in this case and I think he was right.

23 Q. And what you say about this is a court applying New York
24 law would accept the holding, yes?

25 A. Yes.

- 1 Q. We know New York would not be bound by it, yes?
- 2 A. Yes.
- 3 Q. And you don't say that the New York court would follow
4 the decision other than on its facts?
- 5 A. I -- it would follow -- I say it would follow the
6 holding and I take the holding to be that a release so
7 worded as in Prosat release includes after-acquired
8 claims. I understand your point that the facts are
9 complicated and that what Shiff did in Prosat, to be
10 frank it smells bad and I am not attributing anything
11 that smells bad to your client, but I am saying that the
12 principle established by the Prosat case should apply to
13 any similarly worded release, in part because the
14 opposite interpretation opens the door to abuse, whether
15 the abuse was committed or not.
- 16 Q. It should apply to any similarly worded release that
17 comes up to be considered in similar circumstances?
- 18 A. No, I do not go that far.
- 19 MR JUSTICE SMITH: What you said, Judge Smith, is that you
20 will find the holding is that a release so worded as in
21 Prosat includes, that is to say releases after-acquired
22 claims.
- 23 A. Yes.
- 24 MR JUSTICE SMITH: And do I take it then that you would say
25 that that holding holds good for any after-acquired

1 claim irrespective of the factual context?

2 A. I hate to make sweeping statements like that.

3 I would -- your Lordship, I would rephrase it to say
4 that it generally holds good and I do not know whether
5 there are circumstances which might be exceptions.

6 MR JUSTICE SMITH: I think what you are accepting, quite
7 properly, is that one cannot divorce the wording of the
8 release from the underlying facts of the claim that is
9 being released.

10 A. There is -- I -- it is -- that is both true -- as
11 always, your Lordship, that is both true and not true.
12 You can never divorce a holding from its facts, except
13 you have to because otherwise no holding has any value
14 as precedent. My view of the Prosat case is that
15 despite the rather complex facts in the case, the basic
16 holding should generally hold good and it is just on
17 general principles of caution I don't want to say
18 absolutely absolutely every time there would be no
19 exceptions, but maybe there were.

20 MR JUSTICE SMITH: I understand. So the holding you extract
21 is never say never, there may be exceptions, but you
22 would say that where you have this wording it will as
23 a general proposition -- exceptions may exist -- serve
24 to release an after-acquired claim?

25 A. Yes, sir.

1 MR PHILLIPS: My Lord, I apologise for the lateness. I can
2 rest there, no further questions.

3 MR JUSTICE SMITH: Thank you, Mr Phillips.

4 Ms Tolaney you probably have some re-examination,
5 I am sure.

6 MS TOLANEY: I have one short point, my Lord.

7 MR JUSTICE SMITH: Judge Smith, it is late, would you like
8 to rise for five minutes?

9 A. I'm fine. I can go along as you like.

10 Re-examination by MS TOLANEY

11 MS TOLANEY: I simply have one point, Judge Smith.

12 You were asked by Mr Phillips about whether
13 a subrogation claim could arise out of a guarantee, do
14 you remember that?

15 A. Yes, and the answer -- I took longer than I should have
16 to answer, but the answer is yes.

17 MS TOLANEY: That for your Lordship's note was at 165
18 line 17 of the transcript.

19 When would the guarantor acquire the claim by
20 subrogation, would it be before or after the guarantor
21 made a payment under the guarantee?

22 A. It would be upon the making of the payment of the
23 guarantee.

24 MS TOLANEY: Thank you very much.

25 MR JUSTICE SMITH: Thank you very much, Judge Smith. You

1 are released and safe journey back.

2 Housekeeping

3 MR PHILLIPS: My Lord, may I just touch base in relation to
4 housekeeping?

5 MR JUSTICE SMITH: Yes, I thought we ought to have
6 a session.

7 MR PHILLIPS: My Lord, we are now all going to take the
8 extraordinarily lengthy time of three days to produce
9 our closings and I anticipate that some of my learned
10 friends and indeed we will endeavour to produce some
11 material in writing. That is obviously a difficult ask.
12 We have previously discussed this and your Lordship has
13 indicated that you are happy, content possibly not happy
14 to receive material as people are speaking.

15 MR JUSTICE SMITH: Yes.

16 MR PHILLIPS: Speaking from our perspective, we go first and
17 it will be enormously helpful to us to know what it is
18 that my learned friends are going to say before we go
19 first, because otherwise what we are going to find is
20 that we are going to find that we get to the end of the
21 oral closings and we have only got 45 minutes for
22 a reply. And the fact is that in particular -- not in
23 particular but by way of example, in the case of GP1 we
24 have not actually had an oral opening. We obviously
25 have everybody's skeleton arguments, but we have not had

1 anything oral and what we would ask to assist not only
2 us but also your Lordship in the first instance is we
3 would ask my learned friends if they could produce, even
4 if it is on a drip-feed basis, if they can produce
5 written materials during Monday that will be of great
6 assistance and if they could on any view produce some
7 written material -- no I can see everybody is --

8 MR JUSTICE SMITH: I don't think that will work. Timing is
9 too tight.

10 MR PHILLIPS: No?

11 MR JUSTICE SMITH: What I think I would be inclined to
12 suggest is that in terms of when the parties serve
13 anything in the course of next week, I am going to
14 declare it a free-for-all, you can do it when you like.
15 But I think that the points that you may find that you
16 are not taken by surprise but perhaps feel that you have
17 not been given the full opportunity to address a point
18 when you front loaded your own submissions is a fair
19 point and so exceptionally I think I would allow,
20 subject to what the other parties have to say, that you
21 put in as it were written reply submissions a little bit
22 later than next week.

23 MR PHILLIPS: That, my Lord, gives rise to a problem and it
24 is a real problem and it is the problem that I was
25 possibly going to come and see your Lordship about. If

1 I can leave it like that for this purpose.

2 MR JUSTICE SMITH: I see.

3 MS TOLANEY: My Lord, can I just rise on one point.

4 MR JUSTICE SMITH: Yes.

5 MS TOLANEY: It is not suggested I don't think that there is
6 going some form of detailed written closings because
7 there have been such detailed openings, so as
8 I understand it there is a speaking note which some
9 parties may produce, some parties may not.

10 MR JUSTICE SMITH: Indeed.

11 MS TOLANEY: It may be we do very likely little on that,
12 I don't know about GT1 as well. Some parties, maybe my
13 learned friend, want very long notes. That has to be
14 done as a speaking note when one is speaking.

15 It does seem to me, though, that Mr Phillips is
16 a very, very large amount of time front loaded and it is
17 up to him if he reduces his front-loaded time by say an
18 hour and takes slightly longer in reply and therefore he
19 gets a two hour reply if he wishes to do so, because it
20 does seem that the length of time that all parties
21 frankly have for closing is very long indeed and I would
22 be surprised if anybody occupied the full slots that
23 they have been allocated.

24 MR JUSTICE SMITH: Mr Phillips, there is some worth in that.

25 You have 7 hours 30 minutes.

1 MR PHILLIPS: Yes, I have got 40 per cent of the speaking
2 time, in fact it is 41 per cent I am told by Mr Wilson.
3 And it will not have been lost on your Lordship that it
4 is me against the rest in very simple terms, so I have
5 to address absolutely every issue --

6 MR JUSTICE SMITH: No, I understand that. All I was
7 wondering was whether you mightn't say six hours
8 30 minutes and an hour 45-minutes in reply?

9 MR PHILLIPS: In a sense the best I can -- I absolutely hear
10 what your Lordship says and the best I can do at this
11 point is, we are going to be working in the next three
12 days, clearly, and if I form the view that I can deliver
13 our submissions -- that we can take less time, yes. It
14 will be very helpful if another 30 minutes could be
15 found because we know that there is a lot of material,
16 but I think what I wanted to do is I wanted to put down
17 a marker, a request if you like to my learned friends,
18 in this context.

19 This is not the sort of adversarial litigation that
20 one often sees between two adversarial parties in which
21 you have pleadings and have all sorts of allegations
22 this is a application for directions in the various
23 estates. Actually, our job -- we have all been
24 allocated slightly different issues that we are all
25 dealing with and our job is to say assist your Lordship.

1 It would be enormously helpful -- I can't put it any
2 higher than this, I am not inviting your Lordship to
3 direct my learned friends to do this -- it would be
4 enormously helpful if my learned friends could indicate
5 or could let me have anything that they can let me have
6 so that I can deal with it before I get to the reply
7 submissions. I can't put it higher than that.

8 MR JUSTICE SMITH: No, I am sure that everyone will be
9 working very hard and I am sure that they will produce
10 for my reading and for yours material that they feel is
11 worth reading. But I think one must be realistic about
12 this. The fact is, as you said right at the outset, you
13 have three days, two of which are the weekend. It is
14 a tall order pulling something coherent together
15 particularly, as I have made clear, if it is short. It
16 is harder to produce a short piece of written advocacy
17 than a long piece.

18 So I think we will see how we go. I don't think you
19 need commit today as to how much of your 7 hours
20 30 minutes you want it use. I think you can take it
21 that, and this goes for all parties, that I will be as
22 flexible as I can be in terms of stretching the court
23 day, subject to the interests of both other court users
24 and more particularly the people taking a note of our
25 transcripts. So it may be that other parties including

1 yourself will get a little bit more time if I feel that
2 they are using their time appropriately and efficiently.

3 So I think that is all I can say in terms of next
4 week.

5 MR PHILLIPS: Yes.

6 MR JUSTICE SMITH: If you wish to hand up a speaking note
7 and a reply note, then of course feel free. But it may
8 be that Ms Tolaney's suggestion of a shifting of time
9 between your closing submissions and your reply
10 submissions actually works rather well. Often it is
11 better it address a point when one knows what the
12 controversy is, having heard the response to it before
13 you reply, but I leave that in your capable hands.

14 MR PHILLIPS: Absolutely, my Lord.

15 Mr Ardon says he has two housekeeping points.

16 MR ARDON: Two relatively minor matters. My Lord earlier in
17 the week your Lordship asked for corporate structure
18 charts.

19 MR JUSTICE SMITH: Yes, I did.

20 MR ARDON: Which we have done. If I can hand up those.

21 (Handed).

22 The first one in the clip is in fact something
23 your Lordship has already seen but it has been amended
24 and can I just tell your Lordship the amendment relates
25 to the PLC sub-notes and Ms Tolaney's team pointed out

1 in the original we had those designated as US Dollars
2 whereas in fact they were euros and so we have amended
3 that to 790 million euros, and then that is obviously
4 had a knock-on effect to the calculations in the sort of
5 yellow orange box just below, although I think overall
6 the result doesn't make a difference and essentially if
7 the sub-notes are senior to the sub-debt then the
8 sub-notes are principal to exhaust only the surplus into
9 PLC no matter if it takes the other form.

10 So I am sorry about that. An earlier draft of that
11 went round this morning. I think my friends will have
12 sub-notes designated in a new currency US euros. We are
13 sorry for that.

14 We have this in soft copy and we can circulate that.

15 That is in Word form.

16 MR JUSTICE SMITH: Thank you.

17 MR ARDON: There are then three corporate structure charts
18 and what we have done here is to take -- it's a very
19 simplified version and it is confined only to the
20 relevant companies, but we have taken what we think are
21 the three relevant periods, so it starts July 2004 and
22 it is all relatively straightforward. My Lord, we have
23 not tried to include funds or flows anything like that
24 we have just left it simple.

25 MR JUSTICE SMITH: Fund flows, in a sense I have -- this is

1 exactly what I was looking for.

2 MR ARDON: Your Lordship has that. And my Lord this has
3 already been reduced. This started off as PowerPoint
4 and that is what your Lordship is looking at the moment,
5 but it has been reduced to Word. It looks almost
6 identical but there may be some changes in the
7 transposition. My Lord, these are available and they
8 are all available in Word and we will circulate them to
9 your Lordship and to my learned friends in the course of
10 hopefully today.

11 My Lord, that is the first point. The second point
12 is that your Lordship raised with Mr Beltrami a point
13 about the availability of electronic bundles.

14 MR JUSTICE SMITH: Indeed.

15 MR ARDON: My Lord, those are available and your Lordship
16 can have them at any time, but it comes with this
17 qualification: they are being regularly updated.
18 Your Lordship could have them today but they might be
19 updated on Monday or your Lordship could have them at
20 the end of Monday in time for Tuesday, or your Lordship
21 could have them at the end of closing submissions. So
22 of course your Lordship will get the updates but then it
23 involves certain matters of deletion and so we are in
24 your Lordship's hands. They are available whenever you
25 want them.

1 MR JUSTICE SMITH: If I may could I have a set now and
2 perhaps update when we close a week today. That
3 certainly helps thank you. We may need to transport
4 less back to Cambridge than I otherwise would have to
5 do.

6 MR ARDON: Certainly my Lord, we will do that today.

7 MR JUSTICE SMITH: Thank you very much.

8 For my part I suggested or indicated that I would
9 identify things that I would be greatly assisted if they
10 were addressed.

11 MR PHILLIPS: If your Lordship is able to do that, that
12 would be enormously helpful.

13 MR JUSTICE SMITH: It seems to me that the issues we have
14 addressed this week are hard-edged. The one point that
15 quite understandably has not been addressed very much
16 this week is the point -- it surfaces in various of the
17 written opening submissions but I am looking at
18 Mr Arden's opening at tab 1, page 11, paragraph 23,
19 which is the dispute, as it is put there, over the order
20 in which the applications are addressed and it seemed to
21 me that that was a point that was difficult but at the
22 moment not very hard-edged in terms of what the rule is,
23 in terms of --

24 MR PHILLIPS: My Lord, I had assumed we had gone past that,
25 because that was one of the points which had been

1 addressed in the early CMC.

2 MR JUSTICE SMITH: Right.

3 MR PHILLIPS: And frankly, your Lordship has heard all the
4 arguments, your Lordship has heard all the evidence and
5 your Lordship, if I can put it this way, you have got to
6 determine the PLC issues before you get to the LBHI2
7 issues simply as a matter of chronology but also as
8 a matter of understanding how these contracts work,
9 because chronologically, as your Lordship has seen, one
10 starts off with the use of the standard forms, the IPRU
11 scenario, the waivers, and as one goes through the
12 history one can see slight differences in the forms.
13 And therefore, it seems to me that that is an
14 overwhelming argument. We have dealt with it in our
15 skeleton in paragraphs 4 to 6 and frankly I can't see
16 any logical response to that.

17 One has to be realistic as well. I don't know how
18 many waterfall applications there have been but
19 your Lordship has seen that they seem to make their way
20 to the higher courts and it would obviously be less than
21 ideal result if for example your Lordship were to
22 determine one particular point on one particular
23 application and then decide not to go on to deal with
24 the other points because if the higher courts took
25 a slightly different view, that --

1 MR JUSTICE SMITH: No, I understand that point. Although it
2 is early days, my inclination would be the easiest thing
3 would be to deal with all the points, whichever way
4 I decide. But I am not sure that that actually answers
5 the point, which is that let us assume I decide
6 everything including alternatives, there nevertheless
7 remains the dispute, unless it has gone away, as to how
8 one orders the issues, assuming I have looked at all of
9 them.

10 MS TOLANEY: My Lord, on our side of the court and I will be
11 corrected if I am wrong, everybody else takes the
12 opposite view to Mr Phillips and there is a dispute that
13 we think the LBHI2 application should be dealt with
14 first, so there is still a dispute.

15 MR JUSTICE SMITH: I am not surprised. It seems to me that
16 for the same reasons that I have heard effectively
17 de bene esse the evidence yesterday because I can't
18 decide the 8.02 point without careful thought, this was
19 a similar issue: we were hearing everything but the
20 point was still alive, which is why I raised it because
21 it seems to me that it is live, obviously it is live and
22 so it is a point where I feel that I have not yet been
23 addressed on the principles that ought to advise me,
24 inform me as to the order. It seems to me it is rather
25 depressingly similar to the case of Mr Justice Saville

1 was faced with the Lloyd's litigation where the question
2 was who got past the post first the point is it needs to
3 be addressed.

4 MR PHILLIPS: My Lord, but we are making our submissions in
5 the chronological order for reasons that your Lordship
6 understands.

7 MR JUSTICE SMITH: Yes.

8 MR PHILLIPS: This point only arises if for example you were
9 to take the view that there is a winning point in LBHI2
10 that means that nothing arises in PLC.

11 MR JUSTICE SMITH: Yes.

12 MR PHILLIPS: I will address you on whether or not we are
13 going to get there, but even if you were to take that
14 view, your Lordship needs to deal with those issues as
15 well anyway. But the underlying answer to the order in
16 which you should hear the argument and it is absolutely
17 the way in which I opened the case, it is the way my
18 skeleton works and it is the way I will close the case,
19 is that you have to start at the beginning and I will
20 take your Lordship through the various clauses and that
21 is the way to understand them. What the economic
22 consequences are of various different points being won
23 or lost along the way are really immaterial to the order
24 in which your Lordship should be addressed on them. And
25 I am doing it that way for that reason.

1 MR JUSTICE SMITH: I think, Mr Phillips, I really am not
2 raising a question of the order in which I am being
3 addressed. I don't mind your taking a chronological
4 approach on the basis that that is the best way to
5 articulate your case to me, that is absolutely fine.

6 MR PHILLIPS: Right.

7 MR JUSTICE SMITH: What I think is still in dispute though,
8 is that when considering the priorities that arise in
9 this case one has got a priority question, not simply
10 between rival claims against a single debtor but one has
11 got at a level above that a priority dispute as between
12 the two administrations. And it may be that you are
13 right, that this is to be dealt with chronologically,
14 when one is working out who is entitled to what, but
15 I don't think that is common ground. If it is not then
16 I have to resolve it.

17 MR PHILLIPS: My Lord, there are two things. One, the order
18 in which your Lordship wishes to write your Lordship's
19 judgment is entirely a matter for you.

20 MR JUSTICE SMITH: Yes.

21 MR PHILLIPS: We can perhaps address this when we come to
22 the end of the oral arguments because I don't think this
23 point is going to make any difference to the order in
24 which people address your Lordship.

25 MR JUSTICE SMITH: No, to be clear that is really at the

1 very bottom of my concerns. I think Ms Tolaney --

2 MS TOLANEY: I understand what your Lordship is saying and

3 I think -- but why don't we take it away given the time.

4 MR JUSTICE SMITH: Yes.

5 MS TOLANEY: I am not sure that there is going to be an

6 issue for your Lordship as between the competing --

7 between the two applications. I think the point is that

8 there has to be a certain order at the LBHI2 level in

9 order for there to be any recoveries at the PLC level

10 for certain parties.

11 MR JUSTICE SMITH: Yes.

12 MS TOLANEY: So I think that is the essential point and

13 I don't think it matters for that purpose.

14 MR JUSTICE SMITH: If that is the position then it would

15 appear that paragraph 23 is raising an issue that

16 I don't need to trouble myself with.

17 MS TOLANEY: I think there has just been a dispute over what

18 order you should be addressed in because some parties

19 had been suggesting that you might not get to some of

20 the PLC issues on a particular analysis. If

21 your Lordship is minded to determine every point in any

22 event --

23 MR JUSTICE SMITH: Yes.

24 MS TOLANEY: -- then that point falls away and how people

25 present their case is a matter for them.

1 MR JUSTICE SMITH: That is clear.

2 MS TOLANEY: So I don't think this point comes into
3 your Lordship's judgment but we will confirm that
4 perhaps and if I am wrong then perhaps the parties can
5 e-mail your Lordship's clerk on Monday and just set out
6 very shortly what the point is on that before closings
7 begin.

8 MR JUSTICE SMITH: I think that is important because
9 I confess I had read paragraph 23 as going a little
10 further than simply who would address me and in what
11 order, but if it is no more --

12 MS TOLANEY: I will take that away --

13 MR JUSTICE SMITH: I have raised the point.

14 MR PHILLIPS: At the risk of my learned friend Ms Tolane
15 falling over, she put the point far more elegantly than
16 I did.

17 MS TOLANEY: Miracles happen.

18 MR PHILLIPS: It is about the order in which we address you.

19 MR JUSTICE SMITH: If that is common ground then I am
20 content. It is just if it is not, I would be troubled.
21 In that case, thank you all very much. We will
22 resume at 10.30 on Tuesday. I was just pausing because
23 I was wondering whether we should start at 10.

24 MR PHILLIPS: My Lord, my may I respectfully suggest that
25 that is a good idea.

1 MS TOLANEY: I am content with that.

2 MR JUSTICE SMITH: We will start at 10 o'clock. Thank you

3 all very much I will see you Tuesday.

4 (Hearing adjourned until 10.00 am on Tuesday,

5 19 November 2019)

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