IN THE COURT OF APPEAL

ON APPEAL FROM

A2/2015/3762

No 7942 of 2008

THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

COMPANIES COURT

Before: Mr Justice David Richards

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

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

(1) WENTWORTH SONS SUB-DEBT S.À R.L.

Appellant

- AND -

(1) ANTHONY VICTOR LOMAS

(2) STEVEN ANTHONY PEARSON

(3) PAUL DAVID COPLEY

(4) RUSSELL DOWNS

(5) GUY JULIAN PARR

(as the joint administrators of the above named company)

(6) BURLINGTON LOAN MANAGEMENT LIMITED

(7) CVI GVF (LUX) MASTER S.À R.L

(8) HUTCHINSON INVESTORS LLC

Respondents

SKELETON ARGUMENT

ON BEHALF OF WENTWORTH, THE APPELLANT

Introduction

1. Wentworth appeals (with the permission of the Judge) against part of Declaration (i) in the Judge's order of 9 October 2015, and contends that on the true construction of each claims determination deed ("CDD") in which the Agreed Claim Amount (as defined below) is expressed in sterling, the creditor is thereafter precluded from asserting a currency conversion claim.

2. Wentworth also appeals (with the permission of the Judge) against Declaration (iv) in which the Judge concluded that the administrators would have been directed not to enforce any release of currency conversion claims encompassed by Declaration (i), based upon the principle in *ex parte James* and/or paragraph 74 of Schedule B1 to the Insolvency Act 1986 ("Paragraph 74").

3. Although Wentworth has permission to appeal Declarations (i) and (iv) insofar as they deal with the claims resolution agreement ("CRA") and CDDs in which the Agreed Claim Amount (as defined below) is expressed in a foreign currency, Wentworth does not pursue an appeal against those aspects of the Declarations. Nor does it pursue an appeal against Declaration (ii).

Background

4. Prior to being placed into administration on 15 September 2008, Lehman Brothers International (Europe) ("LBIE"), had entered into many thousands of financial transactions with a great number of counterparties. Those counterparties had a mixture of asset claims, client money claims and unsecured claims against LBIE. One of the greatest challenges facing the administrators was resolving the potentially many thousands of complex disputes with counterparties in order to enable the return of assets, the distribution of client money and the payment of dividends in respect of unsecured claims in a timely fashion with the least expense. To this end, from a relatively early stage in the administration the administrators sought to identify ways of resolving creditors' claims otherwise than through litigation. This appeal is concerned with a major part of that process – the agreement of CDDs with a large number of creditors.

5. Each CDD is a bi-lateral agreement between LBIE (acting by its administrators) and a creditor which identifies a single amount agreed to be owing to the creditor (referred to as the "Agreed Claim Amount") and effects a mutual release of all other claims of whatsoever nature between LBIE and the creditor. In each CDD relevant to this appeal the Agreed Claim Amount was a sterling figure.

6. Approximately 1,600 CDDs were entered into between LBIE and creditors. Various forms of CDDs have been developed and used over the years of LBIE's administration. The background to their development is contained in the statement of agreed facts ("SAF"), and in the Judgment at [39]-[56]. The following points are highlighted:

(1) Thousands of LBIE's creditors had claims arising under complex financial trading arrangements, the resolution of which was likely to take years and be vastly expensive (Judgment/40-41).

(2) The administrators therefore pursued an optional claims determination process, aimed at enabling those creditors who agreed the quantum of their claim with LBIE to achieve a much earlier distribution, at far less cost, than if they had litigated their claims (Judgment/43-45).

(3) LBIE, and each creditor which agreed its claim under this process, would achieve certainty and finality as regards the creditor's financial claims against LBIE (Judgment/44). This is achieved in part by the mutual and wide ranging release of claims.

(4) A creditor entering into a CDD would thus obtain significant benefits, including far speedier resolution and payment in respect of its claims and the release of any possible claims against it by LBIE.

(5) The first form of CDD developed was the "Agreed Claims CDD", designed for use where it was unclear whether the creditor's claim was a client money claim or an unsecured claim against the administration estate. The Agreed Claim Amount was denominated in the currency of the creditor's underlying

contractual claim, or in the predominant currency where there were multiple claims in different currencies (SAF/67-73).

(6) An "Admitted Claims CDD" (devised in April 2011 and used thereafter) was used where the creditor's only claim was against the administration estate. The Agreed Claim Amount in every Admitted Claims CDD was denominated in sterling, having been converted prior to the entry into the CDD in accordance with Rule 2.86(1) of the Insolvency Rules 1986 (SAF/74-75).

(7) There were many other variant CDD templates, designed for use in specific circumstances, including for example for use by an "Aggregator" which had bought other creditors' contractual claims against LBIE. It was common ground before the Judge that nothing turned on the language of these different forms of CDD template.

(8) The CDDs were developed (like the CRA before them) in negotiation with representatives of creditors, and their legal representatives, many creditors being represented by a small group of law firms (Lomas 10, at [42] and [58]; Pearson 7, at [36]-[38]). In short, they were the product of careful negotiation and drafting with sophisticated and legally represented counterparties. While the administrators aimed to achieve consistency as between the various template CDDs, and the templates were intended to be non-negotiable, they did consider amendments proposed by creditors on a bi-lateral and case by case basis (SAF/83-84).

(9) The purposes of entering into a CDD included: to provide an efficient process for agreeing the amount of the creditor's claim such that distributions could be expedited; ensuring that once the creditor's claim was agreed it could not be re-opened; providing certainty to the creditor as to the amount of its claim and thus being entitled to share in dividends; and to facilitate the transfer of the creditor's claim in the market (SAF/63-66).

(10) The possibility of a currency conversion claim was first mooted in about March 2013, when raised by a creditor of LBIE. Subsequently, from 31

October 2013, following uncertainty as to whether a CDD had the effect of releasing currency conversion claims, language was incorporated into many CDDs expressly preserving a currency conversion claim (SAF/90). Many hundreds of CDDs had been entered into prior to March 2013.[1] The Court found that currency conversion claims existed in the *Waterfall I* judgment,[2] upheld on appeal (the *Waterfall I Appeal*).[3]

7. The remainder of this skeleton is divided into two parts. Part 1 deals with the appeal against the Judge's conclusion in Declaration (i) as to the construction of the CDDs, and Part 2 deals with the Judge's conclusion in Declaration (iv) based on *ex parte James* and paragraph 74 of Schedule B1 to the Insolvency Act.

Part 1: Construction

8. Since this appeal is limited to CDDs where the Agreed Claim Amount was denominated in sterling, Wentworth's submissions will focus primarily on the Admitted Claims CDD (in each of which the Agreed Claim Amount was denominated in sterling).

9. The Judge concluded, at [163]-[170] of the Judgment that an Admitted Claims CDD did not have the effect of releasing a currency conversion claim. Wentworth's appeal against that conclusion can be summarised in four points.

10. **First**, a currency conversion claim does not exist as an independent or free-standing claim, but is merely a remission to that part of the underlying contractual right of the creditor that is not satisfied by payment of dividends pursuant to the insolvency

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1 See the table at paragraph 64 of Mr Lomas' 11th witness statement, noting that the language preserving statutory interest was introduced in July 2012 and that some 650 CDDs had been entered into prior to that.

2 [2015] Ch 1.

3 [2015] 3 WLR 1205.

scheme.[4] Specifically, it consists of such part of a creditor's original contractual claim payable in a foreign currency that is not discharged by the payment of dividends on its sterling proof of debt once those dividends are converted back into the foreign currency at the date of each payment.[5]

11. **Second**, the Admitted Claims CDD expressly and unambiguously limits the creditor's claim to a specified sum in sterling, and releases each and every conceivable other claim of the creditor against LBIE, including any claim arising under the underlying contract.

12. **Third**, nothing in the background to, or purpose of, the Admitted Claims CDD impacts on the clear and unambiguous language of the contract in this respect. On the contrary, the background factors that creditors could, by entry into the CDD, achieve the significant advantage of a speedier resolution of their claims, the avoidance of cost and delay of litigation, and certainty so as to facilitate the trading of their claim in the market point towards the language being afforded its plain meaning.

13. **Fourth**, accordingly, the necessary premise of a currency conversion claim – namely a continuing contractual right to payment of a foreign currency amount different (because of exchange rate movements) to the specified sterling sum to which the creditor could be remitted – is missing, such that no currency conversion claim can thereafter be brought.

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4 See the definition of a currency conversion claim in the order of David Richards J of 9 October 2015 relating to Waterfall IIA. See also Briggs LJ in the Waterfall I Appeal at [136].

5 Briggs LJ in the Waterfall I appeal, [2015] 3 WLR 1205 at [137] described it as: "*the balance of the creditor's original contractual claim which has not been discharged by the process of early conversion, proof and dividend under the relevant part of the insolvency scheme*".

The language of the CDD

14. The starting point in construing the Admitted Claims CDD is the words used. In the words of Lord Neuberger (delivering the majority judgment) in *Arnold v Britton:*[6]

    (1) reliance on commercial common sense and surrounding circumstances "*should not be invoked to undervalue the importance of the language of the provision which is to be construed*";

    (2) "*The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision*"; and

    (3) "*The clearer the natural meaning [of the words used] the more difficult it is to justify departing from it.*"

15. The language of the Admitted Claims CDD expressly and unambiguously limits the creditor's claim arising out of its original contractual claim to a fixed amount expressed in sterling, and releases each and every other conceivable claim of the creditor against LBIE, including under its original contractual claim.

16. By Clause 12 the creditor agreed that the CDD contained the whole agreement between it and LBIE relating to the subject matter of the CDD at the time of its entry to the exclusion of any implied terms, and that it superseded any prior written or oral agreement.

17. Accordingly, following entry into an Admitted Claims CDD, the creditor no longer has any subsisting contractual right to be paid in a foreign currency to which it can be remitted if and when all proved debts, and all statutory interest on those proved debts, are paid in full, and thus has no ground to assert a currency conversion claim. Put simply, having agreed to accept payment in sterling, and having waived any other

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6 [2015] 2 WLR 2593, at [17]-[18].

possible claim arising out of its underlying contract it may otherwise have had, the creditor has no grounds for complaint if any part of its underlying contractual right, beyond the sterling Agreed Claim Amount, is not satisfied in full.

18. The relevant operative provisions of the Admitted Claims CDD are in Clause 2, the preamble to which states that agreement of its terms between the Creditor and LBIE is made "*irrevocably and unconditionally*" and "*notwithstanding the terms of any contact to which the Creditor and the Company are party (including the Creditor Agreement)*". ("*Creditor Agreement*" refers to the relevant underlying contract between LBIE and the creditor. In the example CDD before the Court it is a "*FBF*[7] *Master Agreement*".)

(1) By Clause 2.1, the Creditor shall have an "*Admitted Claim*" in an amount equal to the "*Agreed Claim Amount*".

(a) "*Admitted Claim*" is defined as an unsecured claim of a creditor "*which qualifies for dividends from the estate of the Company available to unsecured creditors pursuant to the Insolvency Rules and the Insolvency Act (or, if applicable, as amended and replaced pursuant to the terms of, inter alia, a scheme of arrangement or a company voluntary arrangement)*".

(b) "*Agreed Claim Amount*" is defined as a specified sum of money denominated in pounds sterling.

(2) By Clause 2.2 the Admitted Claim is fixed at the Agreed Claim Amount "*and shall constitute the Creditor's entire claim against the Company*".

(3) By Clause 2.3, both LBIE and the creditor are "*irrevocably and unconditionally released and forever discharged from...*" a comprehensively wide definition of claims against each other.

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7 Federation Bancaire Francaise.

(4) In particular, the definition of released claim includes those "*whether known or unknown*", and "*whether arising under the Creditor Agreement or not, whether in existence now or coming into existence as some time in the future and whether or not in the contemplation of the Creditor and/or the Company and/or the Administrators on the date hereof.*"

19. The plain and unambiguous effect of the words in Clause 2 of the Admitted Claims CDD is to preclude the creditor (among other things) from ever asserting against LBIE any part of its original contractual claim save only for a claim to a specified sum denominated in sterling. Accordingly, and in particular, it is precluded from ever asserting a right to be paid any part of its original contractual claim in any foreign currency. It necessarily follows that it is precluded from making any claim for the shortfall (if any) between the foreign currency equivalent of dividends received by it on its proved debt and the amount of its original contractual claim to be paid in the foreign currency.

20. This consequence is entirely in keeping with the purpose of the agreement, as set out in Recital (B). This identifies two key aspects to the agreement. First, the agreement that the creditor's claims against LBIE are "*fixed at the Agreed Claim Amount*" and, secondly, that in consideration of this LBIE and the creditor agree to a mutual release and discharge of all claims against each other, very broadly stated, and "*howsoever arising*".

The Judge's reasoning

21. While Wentworth accepts that the words used by the parties to a contract must be construed against the relevant background and purpose of the contract, in an iterative process (*Arnold v Britton* (above), at [15]), the Judge's conclusion pays insufficient regard to the clear wording summarised above. The reasons given by the Judge for construing the words of the Admitted Claims CDD otherwise than in accordance with their natural meaning are addressed in the following paragraphs.

22. At [165] the Judge relied upon all of the contextual considerations which he set out at [64]-[76]. These are considered in turn.

23. **First**, the Judge relied (at [65]-[68]) on the fact that the administrators were acting in accordance with their statutory duties, to administer and realise the property of LBIE, distribute the proceeds of sale, after expenses, in accordance with the statutory scheme, and act in the interests of the general body of creditors. This, he concluded (at [68]) puts the CDDs in a very different position from an ordinary bilateral contract between parties with competing commercial interests.

24. This was wrong because, although administrators undoubtedly owe a duty to carry out their functions in the interests of the general body of creditors, this has no relevance to the construction of a bilateral agreement negotiated between LBIE (acting by its administrators) and a single creditor designed to achieve certainty and finality as to the creditor's claims against LBIE.

25. Indeed, in the context of such a bilateral transaction with a single creditor, the administrator's duty is to represent the general body of creditors by ensuring that the single creditor's claim is compromised at an appropriate figure and that there is proper consideration received by LBIE in return for the benefits conferred on the creditor by the agreement.[8] In relation to each transaction with each separate creditor, the administrators are both as a matter of legal form and commercial substance on the opposite side of that transaction from the particular creditor. Moreover, creditors of the estate as a whole (including creditors with non-provable or subordinated claims), in whose interests the administrators are obliged to act, benefit from the release of claims (both provable and non-provable) given by the particular creditor. The absence of a profit-motive on the part of the administrator does not lessen the adversarial nature of the negotiation between the administrator for the general estate, on the one hand, and the creditor in question, on the other hand.

26. It is not (and could not be) suggested that merely because administrators owe a duty to act in the interests of the general body of creditors they are disabled from executing a full and final mutual release of all claims as between the company and the creditor, as part and parcel of an agreement to compromise the creditor's claims. Moreover,

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[8] Those benefits included: certainty in respect of its claims against LBIE; an earlier distribution from the administration estate than it would otherwise have obtained; and finality in its relationship with LBIE including by the release of any other conceivable claims that LBIE may have against it.

there is no logical reason why the existence of that duty should have a bearing on the construction of the agreement giving effect to such mutual release.

27. **Second**, the Judge (at [69] and [165]) said that the purpose of the CDDs was to simplify and accelerate ascertainment of unsecured claims against LBIE and payment of dividends, and that the release of currency conversion claims was wholly irrelevant to the achievement of those purposes.

28. The Judge's concern stemmed from the fact that a currency conversion claim is not provable, and thus is only paid after all dividends on proved debts (and statutory interest on those debts) have been paid in full. Thus it was not inherently necessary, in order to ensure a speedier distribution of dividends in respect of proved debts, to release a non-provable debt. But the fact that it was not inherently necessary to do so does not mean that, properly construed, such a release did not form part of the bargain reached with the creditor.

29. In the first place, the terms of the CDD clearly include other matters which were not *necessary* to achieve an earlier distribution in respect of proved claims, including the following releases in clause 2:[9]

    (1) a release *by* LBIE of any conceivable claim, known or unknown, *against* the creditor, whether or not within the scope of insolvency set-off (i.e. a claim by LBIE that is mutual to a claim against LBIE);[10]

    (2) a release of all claims "*whether in existence now or coming into existence at some time in the future*", i.e. including claims which would not be provable on any basis; and

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9 The Judge also concluded, on a preliminary basis, that if there existed any non-provable claims to interest then the CDDs (and indeed the CRA) had the effect of releasing such claims. This issue is the subject of further submissions to the Judge and a supplemental decision dealing with it is expected to follow.

10 The release of claims *by* LBIE cannot, therefore, be regarded as merely providing certainty as regards the extent of insolvency set-off.

(3) a release of proprietary claims (since "*Claim*" is defined to include proprietary claims) which stand outside the process of proof and distribution altogether.

30. The fact that the parties expressly agreed to releases which went beyond a release of provable claims, including the release of claims *by* LBIE means that the fact that a currency conversion claim is itself not a provable debt, and only falls for payment after payment of proved debts, is not a relevant consideration in determining whether it is precluded by the terms of the CDD. In this respect, it is important to note that the majority of CDDs were entered into after it was generally known that there could be a surplus in the LBIE estate after payment of all creditors in full,[11] such that it would have been in the parties' contemplation from that time that a release of all and any claims that extended to non-provable claims would have practical significance to the extent that any such claims either existed or might later emerge.

31. Secondly, it is an inaccurate over-simplification to describe the CDD as having 'released currency conversion claims'. The CDD said nothing about currency conversion claims. It has the *consequence* of releasing currency conversion claims through the combination of the creditor agreeing that its entire claim against LBIE would be limited to a sterling sum and the mutual release of all other claims between it and LBIE. In other words, currency conversion claims are released because they fall within the broad scope of the mutual release of all claims.

32. The Judge had, therefore, distinguished currency conversion claims as claims unaffected by the compromise and the release under the CDDs – which he said were concerned with proof only – by reason of the ranking of currency conversion claims relative to the proved debts. The CDDs however draw no distinction in terms of proof or ranking. The distinction drawn in the CDDs is between the creditor's claim limited in a sterling sum, which is its entire claim against LBIE, and any other claims, which are released.

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[11] The possibility of a surplus was being discussed in the market from early 2012 (SAF/[16]). It is clear from Lomas 11, at [64] that over £6.5 billion worth of CDDs were entered into after June 2012 when the language preserving statutory interest claims was first inserted (see Lomas 10, at [68]).

33. **Third**, the Judge considered (at [70]) that currency conversion claims, and claims to statutory interest, shared a close connection with the proved debt. It appears that the Judge placed significance on this point because Wentworth accepted that the CDD did not release claims to statutory interest.

34. The two claims are, however, fundamentally different, and the difference underpins precisely why a currency conversion claim is precluded by the terms of the CDD.

35. The foundation of a claim to statutory interest is legislative, i.e. Rule 2.88. It has no foundation in the underlying contractual right. Contrastingly, the foundation of a currency conversion claim is the underlying contractual right. Indeed, it is precisely because it is an aspect of the underlying contractual right (being the right to be paid a particular amount denominated in a foreign currency, which arises solely from the underlying contract) that a currency conversion claim is precluded following execution of an Admitted Claims CDD: as noted above, Clause 2 of the CDD defines the claim to the Agreed Claim Amount as the creditor's *entire* claim against the Company and, save for that claim, releases every other conceivable claim of the creditor including any arising under the underlying contract.

36. **Fourth**, the Judge relied (at [71]) on the fact that no indication was given by the administrators that the CDDs would have the effect of releasing currency conversion claims.

37. This is irrelevant. It operates on the assumption that LBIE, the administrators and all creditors who entered into an Admitted Claims CDD were aware at the time of the existence of currency conversion claims. There is no evidence that they were. On the contrary, the only evidence as to the knowledge of currency conversion claims is that the first time the administrators were made aware of their possible existence was in March 2013, when a creditor raised it for the first time, and by which time many hundreds of CDDs had been entered into: see above at paragraph 6(10).

38. Moreover, once the possibility of currency conversion claims was contemplated, although Mr Copley initially indicated otherwise, following consultation with the other administrators and legal advisors it was decided not to make a publicly available

statement on the PwC website that the administrators considered that CDDs did not have the effect of releasing currency conversion claims, as the CDDs might on the contrary have the effect of releasing such claims, and he informed various creditors of that fact: Statement of Agreed Facts for Issue 36A, at [15]-[17].

39. For all those creditors who entered into a CDD prior to currency conversion claims being in anyone's contemplation, it would have been impossible for the administrators to have explained that the CDD had the effect of waiving any such claim, just as it was impossible for them to have explained to creditors that any other particular uncontemplated claim was released. The wording of the releases in Clause 2.3 of the Admitted Claims CDD could not be clearer in expressing an intention to waive *all* claims that were not then in the parties' contemplation.

40. It is wrong to construe the terms of a release that covers all claims not currently contemplated, by reference to the nature and circumstances of one such particular claim when it subsequently emerges. Such matters by definition cannot form part of the admissible factual matrix at the time that the agreement was entered into. On the other hand, it is permitted, indeed necessary, to enquire whether a particular claim, asserted later, falls within the scope of the release language. There can be no doubt that a claim to recover such part of the creditor's underlying contractual right as is not discharged by the payment in full of the Agreed Claim Amount falls within the scope of the comprehensive release language in the Admitted Claims CDD which expressly extends to claims arising under the underlying contract.

41. So far as creditors who entered into a CDD *after* the existence of currency conversion claims was contemplated, the possibility that the CDD did, as a matter of construction, release currency conversion claims was indeed expressly contemplated (see above), such that creditors who entered into a CDD in those circumstances took the risk that it did so. It was always open to creditors to refuse to enter into a CDD unless and until appropriate carve out language was included (as many did).

42. **Fifth**, the Judge relied (at [72]-[76]) on the fact that the conversion of foreign currency claims into sterling for the purposes of proof was mandatory, that it took place pursuant to the statutory scheme, including Rule 2.86, and that this had been

made clear by the administrators to creditors. Moreover, at [169], the Judge concluded that:

(1) the correct approach to construction of the Admitted Claims CDD was to "*have regard to the process by which the Agreed Claim Amount is agreed and converted into sterling*";

(2) creditors were required to submit proofs in the original foreign currency, and the Agreed Claim Amount which appears in the CDD was such amount as had been agreed, in the foreign currency, converted into sterling pursuant to Rule 2.86; and

(3) accordingly, the Agreed Claim Amount is properly to be read as a reference to the creditor's agreed claim converted into sterling under Rule 2.86.

43. Wentworth contends that this reasoning and conclusion is wrong. The fact that the creditor's claim has been converted into sterling, prior to the entry into the Admitted Claims CDD, because it was necessary to convert it into sterling for the purposes of admitting the claim to proof in the administration, has no impact on the construction of the language of the CDD. The CDD starts from the premise that the Agreed Claim Amount it denominated in sterling, whatever may have been the prior currency or currencies of the underlying contractual claims, and states that it is that sum, and that sum alone, which will be the entire claim of the creditor against LBIE.

44. In this respect, it is important to note that, according to the reasoning of the Court of Appeal in the *Waterfall I* appeal, a currency conversion claim exists because the conversion into sterling pursuant to Rule 2.86 is for a limited purpose, namely for the purpose of proof, and does not effect a permanent change in the creditor's underlying contractual rights: see [2015] 3 WLR 1205, per Briggs LJ at [148]-[152].

45. The terms of the Admitted Claims CDD, however, very clearly effect a permanent change in the creditor's underlying contractual rights. Thus:

(1) the Admitted Claim, in the Agreed Claim Amount (a sterling sum), is identified as the "*entire*" remaining claim of the creditor against LBIE;

(2) the release of any other claim – including any other claim under the underlying contract – is made "*irrevocably*"; and

(3) LBIE is "*forever discharged*" from (among other things) any claim under the underlying contract save for the specific sterling sum identified as the Agreed Claim Amount.

46. This language is wholly inconsistent with the suggestion that the creditor has agreed to denominate its claim in sterling as a temporary measure, or has reserved to itself the right to re-assert a claim in the foreign currency at any point in the future.

47. **Sixth**, the Judge (at [166]-[168]) considered that Wentworth's construction would result in discrimination between creditors, that it was never contemplated or suggested that a different form of CDD would have a different effect on currency conversion claims, and that such distinctions should only be made with the knowledge and consent of the affected parties.

48. The Judge was wrong to take account of these considerations for reasons touched on above. Principally, it is impermissible to construe any CDD entered into at a time before the emergence of currency conversion claims as a possibility, by reference to differences between creditors in relation to such claims when they later emerge. Such matters cannot form part of the admissible factual matrix.

49. Secondly, the proper construction of a wide release of any and all uncontemplated claims cannot be affected by the fact that one such claim, when it later emerges, affects only some of the creditors who entered into an agreement in that form. Wherever multiple parties enter into separate agreements in the same form, containing a release of <u>all</u> claims, it is inherently likely that some only of those parties would subsequently turn out to have claims that were caught by the release.

50. Equally, as also noted above, any creditor that entered into an Admitted Claims CDD after the possibility of currency conversion claims arose did so in knowledge of the risk that agreeing to the terms of the CDD might preclude it from later asserting a currency conversion claim.

51. The Judge referred (at [63]) to passages from the speeches of Lord Bingham and Lord Nicholls in *BCCI v Ali* [2002] 1 AC 251, which warned against construing release clauses as releasing claims of which a party could not have been aware, in the absence of clear language. Those passages are irrelevant here, however, for two reasons:

(1) The release language in the CDDs is incontrovertibly both clear and wide enough to encompass claims of which the parties were unaware and could not have been aware. The language was no doubt adopted to cater for the comments of the House of Lords in *BCCI v Ali.*[12]

(2) While there may always be room for debate as to the *scope* of a release clause, which will be determined by the context in which it appears,[13] there can be no doubt that the release language in the CDDs covers at the very least any claims arising under the creditor's underlying contract, since that is specifically referenced by the clause. In other words, the release language clearly covers a currency conversion claim.

Agreed Claims CDD

52. The operative provisions of the Agreed Claims CDDs are materially the same as those of the Admitted Claims CDDs. In the small minority of cases where the Agreed

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12 The release clause in the CDDs releases claims unknown to law but which may be declared in the future as well as claims that were unknown to the parties at the time the contract was made, whether or not in their contemplation. In each respect, the release clause is broader than the release clause in *BCCI v Ali*, which was in the following terms (at [3]):

> "*The applicant agrees to accept the terms set out in the documents attached in full and final settlement of all or any claims whether under statute, common law or in equity of whatsoever nature that exist or may exist and, in particular, all or any claims rights or applications of whatsoever nature that the applicant has or may have or has made or could make in or to the industrial tribunal, except the applicant's rights under [the bank's] pension scheme.*"

13 See Lord Nicholls at [29], quoted by the Judge at [63] of the Judgment.

Claim Amount in an Admitted Claims CDD was denominated in sterling, therefore, the arguments set out above apply equally to such CDDs.

Conclusion

53. The plain and unambiguous language of each Admitted Claims CDD (and each sterling denominated Agreed Claims CDD) is to the effect that the sole remaining claim of the creditor against LBIE is the sterling denominated Agreed Claim Amount and that any and all other claims, in particular those arising under the underlying contract between the creditor and LBIE, are released. Contrary to the conclusions of the learned Judge, there is no ground for construing the language otherwise than in accordance with such plain reading and, accordingly, on their true construction, a creditor who entered into such CDD is precluded thereafter from asserting a currency conversion claim.

Part 2: *ex parte James* and Paragraph 74

54. The Judge concluded that, had any of the CDDs, as a matter of construction, released currency conversion claims, then he would have directed the administrators not to enforce such releases, either pursuant to the principle in *ex parte James* or pursuant to Paragraph 74.

55. Wentworth contends that the Judge both (a) stated the jurisdiction under *ex parte James* and paragraph 74 too broadly, and (b) erred in applying that principle to the enforcement of the releases of currency conversion claims.

The legal principles

56. The Judge concluded (at [183]) that "*unfairness*" was a sufficient ground for the application of the principle in *ex parte James*, such that it was applicable if the court thinks fit, in all the circumstances, that it is right to apply it.

57. This formulation is overly broad and substantially understates the requirements of the principle. The breadth of the Judge's conception of "*unfairness*" is in part apparent

from his explanation of "*unfairness*" as a ground of restraint distinct from an "*unlawful*" breach of statutory or other duty (Transcript Day 4/Page 87/Lines 12 to 22):

> "*I should have thought the concept of unfairness is being used in distinction to unlawfulness ... So there's an analogy, clearly, with unfairly prejudicial conduct in the company context, or indeed in the context of employment law. The interesting thing about fairness is that in the last 30 or so years unfairness has become the source of substantive rights in a way which largely didn't exist before.*"

58. The Judge relied principally on passages from *Re Clark* [1975] 1 WLR 559 and *Re Nortel GmbH* [2014] AC 209. Neither of these passages supports such a broad statement of the principle.

59. While it is true that Walton J in *Re Clark* described the principle in terms of it being "*unfair*" for the trustee to take full advantage of his legal rights, it is important to note that this was in the context of the principle being dependent upon four conditions being present before it could operate at all: (1) there being some form of enrichment of the assets of the bankrupt by the person seeking to have the rule applied; (2) the claimant must not (save in the most unusual case) be able to submit an ordinary proof of debt; (3) if in all the circumstances an honest man, personally affected by the result, would be bound to admit that it was not fair that he should "*keep the money*"; and (4) it only applies to the extent necessary to nullify the enrichment of the estate.

60. Subsequent authority has undermined the dependence on those conditions (see, for example, *Re Collins & Aikman Europe SA* [2006] BCC 861, per Lindsay J at p.866E). Walton J's reference to "*unfairness*" cannot be divorced from his prescriptive approach to the principle.

61. In the case of *Nortel*, although Lord Neuberger (at [122]) also referred to the principle in *ex parte James* as one applying "*where it would be unfair*" for a trustee in bankruptcy to take full advantage of his legal rights, this was in a summary description of, and not intended to be a definitive statement of the requirements of, the principle. It was in the context of a clear case for rejecting the application of the principle, however broadly stated, (at [123] – "*none of these cases begins to justify the*

contention..."). Moreover, Lord Neuberger cited in the same passage a number of cases where the test is clearly more stringently described, including two leading cases in the Court of Appeal: *Re TH Knitwear (Wholesale) Ltd* [1988] 1 Ch 275 and *Re Wigzell* [1921] 2 KB 835.

62. In *TH Knitwear*, Slade LJ described the principle as "*anomalous*" and one which ought not to be extended: *TH Knitwear*, per Slade LJ at p.289F-G. The main issue in the case was whether the principle applied to a voluntary liquidator (the Court held it did not). At p.289 Slade LJ described the principle as follows: "*The entire basis of the principle, as I discern it from the cases, is that the court will not allow its own officer* ***to behave*** *in a* ***dishonourable*** *manner*" (emphasis added). At p.290 he cited with approval the description of the principle by Scrutton LJ in *Re Wigzell* as depending on conduct which was not "*honourable*", which was "*contrary to natural justice*" or which amounted to a "*dirty trick*".

63. Scrutton LJ, in *Wigzell* (above, at p.859), also noted the inherent difficulty in applying the principle, founded as it was in morality and not law: "*it is very difficult to call upon judges, who may be assumed to know the law, to lay down standards of high-mindedness or honour as to which perfectly honest and honourable persons may take entirely different views*". This provides a compelling reason to ensure that the principle is not extended, and is confined to clear cases of dishonourable conduct analogous to prior authorities, as opposed to a broad and undefined concept of "fairness".

64. So far as Paragraph 74 is concerned, although "*unfairly*" is one of the operative words (the other being to "*harm*"), this too cannot be allowed an unlimited scope. As Lord Hoffmann noted in *O'Neill v Phillips* [1992] 1 BCLC 1, 7 (in the context of the meaning of "*unfairly prejudicial*" in s.459 of the Companies Act 1985): "*The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles.*"

65. Importantly, it is "*exceedingly difficult*" to see how conduct which falls within the statutory powers of the administrators could be said to constitute "*unfair*" harm within

the provision: *Four Private Investment Funds v Lomas* [2009] BCC 632, per Blackburne J at [37]-[39].

66. In *BLV Realty Organisation Ltd* [2009] EWHC 2994 (Ch), Norris J found that the obligation of an administrator to perform his functions in the interests of "*the creditors as a whole*" does not mean that the obligation falls to be performed in an identical way in relation to each and every constituent of the class (at [20]). Moreover, unequal or differential treatment is not necessarily unfair treatment. Where the decision is a commercial one for an administrator and there is a rational explanation for the approach taken by the administrator, then any harm caused by differential treatment is not unfair as required by Paragraph 74 (at [22]).

67. Norris J in *Re Coniston Hotel (Kent) LLP (in liquidation)* [2013] EWHC 93 (Ch) (at [36]) concluded that the provision would ordinarily require the applicant to establish unequal or differential treatment which disadvantaged the applicant and which could not be justified by reference to the interests of the creditors as a whole or the achievement of the objective of administration.

68. This conclusion is consistent with the established principle that the Court will only interfere with commercial decisions of an administrator where the applicant can demonstrate "*plainly wrongful*" conduct by the administrator: see *Four Private Investment Funds v Lomas*, at [48]; see also *Re CE King Ltd* [2000] 2 BCLC 297.

Application of the legal principles

69. Wentworth contends that neither the principle in *ex parte James* nor Paragraph 74 is capable of applying to the administrators' proposed decision to enforce the terms of CDDs which have, as a matter of their true construction, had the effect of precluding the creditor from asserting a currency conversion claim, for the following reasons.

70. **First**, there is no question of there being any vitiating factor, such as misrepresentation, mistake, fraud or duress in relation to any of the CDDs. On the contrary, the CDDs are fully enforceable according to law and equity and there is nothing to suggest anything other than that the creditors entered into them of their

own free will, with the benefit of whatever legal advice they were free to obtain. Indeed each creditor gave an express warranty to the effect that it had made its own independent decision to enter into the CDD based upon its own judgment and the advice from its own independent advisors: see, e.g. Clause 8.2 of the Admitted Claim CDD.

71. Recognition that the rule in *ex parte James* has an 'extra-legal' application insofar as it can apply to produce a result different from the parties' legal rights does not require or permit the disregard by the court of the terms of a freely made bargain between a creditor and an officeholder: of the reported cases in the *ex parte James* line to date, none concerns the restraint of a bargain which a creditor had freely accepted with the officeholder.

72. Indeed, to overturn a result to which a creditor had freely agreed would deny the legitimate expectations of the other party fixed by reference to the objective interpretation of the parties' agreement. That one can so readily identify a perspective from which the application of *ex parte James* would be unfair is proof that the case in question does not call for application of the rule.

73. In this case, the parties have chosen to denominate the claim against LBIE in sterling and, on that basis, LBIE entered into the wide mutual release of all other claims. It is unfair to LBIE, and to its creditors and members who do not hold currency conversion claims waived by the CDDs, to allow such currency conversion claims to be enforced against LBIE notwithstanding the terms of the compromise and release under the CDDs. This unfairness is highlighted by the fact that the non-enforcement of the release would appear to operate 'one-way', i.e. against LBIE and not so as to relax the mutual release so as to permit LBIE now to enforce any claims which it had waived by the CDDs.

74. **Second**, the Senior Creditor Group did not seriously press the case that the entry into the CDDs engaged either principle. The Judge considered they were right not to do so: Judgment at [186]. There would in any event be no basis for doing so. The act of compromising a creditor's claim so as to ensure certainty and finality as between that creditor and the estate is clearly within the proper functions of an administrator and it

is impossible to see how the negotiation of a *mutual* full and final settlement of claims could be regarded as unfair to the creditor, far less could it be regarded as dishonourable, a dirty trick or being contrary to natural justice.

75. **Third**, it follows that to apply the *ex parte James* principle or Paragraph 74 would be to prevent the enforcement of an agreement entered into between the office holder and the creditor, unimpeachable in law or equity, and not suggested to have infringed the principles in *ex parte James* or under Paragraph 74 at the time it was entered into even on the Judge's broader interpretation of those principles.

76. **Fourth**, the later emergence of a particular type of claim which the CDDs, on their true construction, precluded the creditor from asserting, provides no proper basis for the application of either principle. As to this:

(1) The reason why the relevant CDDs preclude a currency conversion claim is because the creditor has agreed to limit its entire claim against LBIE to a sterling sum, and agreed to release any other claim, whether contemplated or not, against LBIE. A currency conversion claim is thus released along with any other uncontemplated claim.

(2) The fact that the release of currency conversion claims was inadvertent, in the sense that currency conversion claims were not contemplated at the time (which is true of at least a large proportion of such CDDs), is as irrelevant as the fact that all and any other claims, not then contemplated, were released.

(3) If it were held to be "unfair" to hold a creditor to the release of a particular uncontemplated claim, upon its later emergence, it must equally be unfair to hold a creditor to the release of any claim which was then uncontemplated but which later emerges. That, however, cannot be right as it would prevent administrators ever entering into any enforceable release of all claims, whether contemplated or not.

(4) That is particularly so when the creditor's agreement to release claims against LBIE was made in consideration of benefits received by it, including the early

resolution of its claim, an earlier distribution, avoiding potentially years of litigation and cost, and a release of any possible claims LBIE might have against it.

77. **Fifth**, to apply either principle in the present case – so as to prevent office-holders from enforcing a compromise agreement freely entered into by a creditor without coercion, mistake, duress or misrepresentation – would be a significant extension of previous case law. It would not be proper to extend the principles, even if the court were minded (contrary to the warning of Slade LJ in *TH Knitwear*) to extend the principles at all, in order to deprive LBIE and its general body of creditors of the benefit of such a contract. To apply the language from the Court of Appeal cases cited above, the enforcement of such a contract – even after it transpires that only some of the estate's creditors are affected by the operation of the release language as it applies to currency conversion claims – can no more be described as dishonourable, a dirty trick or contrary to natural justice, than the entry into the contract in the first place.

78. **Sixth**, the fact that other creditors, who did not enter into a CDD where the Agreed Claim Amount was denominated in sterling, are not precluded from asserting currency conversion claims is irrelevant. The different result as between creditors boils down to the simple fact that creditors who agreed to limit their claim against LBIE to a sterling sum necessarily could not thereafter complain that the sterling sum received by them was worth less in the foreign currency to which they had previously been entitled.

79. Moreover, in circumstances where there was a known and active market in the trading of LBIE debt, to direct the administrators not to enforce CDDs in accordance with their plain and unambiguous terms would itself create unfairness as regards those creditors who purchased other Lehman claims, following the emergence of a surplus, on the basis that they could calculate the likely return from such surplus by reference to the fact that CDDs already entered into with others would be enforced according to their terms.

80. **Seventh**, although the administrators sought to enter into CDDs with as many creditors as possible, each agreement was a bi-lateral arrangement between LBIE and one particular creditor. Although the Waterfall IIB application raises questions that it is hoped apply generically to many creditors, where the question is whether a bi-lateral agreement with each creditor should be enforced, that should be tested by reference to the position of each creditor separately. It can be tested in this way. Imagine first the subsequent emergence of a claim (uncontemplated at the time) which could (but for the release) have been asserted by only one creditor. This fact could not render the enforcement of that release contrary to natural justice, dishonourable or even unfair. The position is no different if the claim that subsequently emerges is one which one other creditor, or a few others, or many others, could have asserted.

Conclusion

81. For the above reasons, neither the principle in *ex parte James*, nor Paragraph 74, provides any reason to prevent the release of un-contemplated claims within each bilateral CDD between a creditor and LBIE from being enforced in accordance with its terms. Those terms form part of a freely entered into bargain, which conferred significant benefits on the creditor as part of the give and take inherent in any agreement.

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