

<p>1 Wednesday, 25 February 2015 2 (10.30 am) 3 Submissions by MR ZACAROLI 4 MR JUSTICE DAVID RICHARDS: Mr Zacaroli. 5 MR ZACAROLI: My Lord, issue 4. My Lord, this is, as with 6 issue 2 in fact, a question of construction. This time 7 rule 2.88(9). 8 MR JUSTICE DAVID RICHARDS: Yes. 9 MR ZACAROLI: Just to remind my Lord of the basics, it's 10 2.88(7) that identifies the period during which interest 11 runs and, leaving aside issues about contingent and 12 future debt, which we'll come on to later, it's 13 essentially the date of administration for everything 14 else. 15 MR JUSTICE DAVID RICHARDS: Yes. 16 MR ZACAROLI: 2.88(9)'s purpose is a limited one, limited to 17 identifying the rate which is to be applied under 18 sub-rule 7, the default position is the Judgments Act 19 rate, unless there's a higher rate already in existence. 20 The dispute really comes down to this, that we say 21 the rate applicable to the debt apart from 22 administration is intended to refer to the rate in fact 23 applicable to the debt proved. That necessarily fixes 24 it as the rate applicable by reason of the rights 25 attaching to the debt proved as at the date of</p> <p style="text-align: center;">Page 1</p>	<p>1 Cork Report took a simpler line, that it's the judgment 2 rate alone. 3 MR JUSTICE DAVID RICHARDS: Yes. 4 MR ZACAROLI: The White Paper is worth a revisit because 5 it's then that rule 2.88(9) comes in, or the reason for 6 it comes in. It's bundle 4, tab 1. 7 MR JUSTICE DAVID RICHARDS: Yes. 8 MR ZACAROLI: The relevant paragraph is paragraph 88. We 9 have seen the before. It deals with the case of 10 a surplus and then it refers to the minimum rate 11 equivalent to the judgments rate and then goes on to 12 say: 13 "If, however [the last three lines of 88], a higher 14 contractual rate applies to the debt post-insolvency 15 interest will be chargeable at that rate." 16 Then in 89 there's another reference to the similar 17 thing: 18 "Where the insolvency legislation otherwise provides 19 for a particular rate of interest in ...(reading to the 20 words)... or, if appropriate, a contractual rate." 21 MR JUSTICE DAVID RICHARDS: I see. 22 MR ZACAROLI: Coming back -- I'll come back to contractual 23 rate in a moment. I just note, my Lord, that the 24 reference to judgment rate here in both paragraphs 88 25 and 89 is the rate applicable at the date of the</p> <p style="text-align: center;">Page 3</p>
<p>1 administration. I make that slightly longer description 2 of it to cater for the fact that you may have 3 a contractual right that fluctuates, a rate of interest 4 that varies over time, for example, with LIBOR. So it's 5 not the rate fixed in the contractual case at the date 6 of administration but the rights that the -- the 7 creditor has under its contract at the date of 8 administration, including the right to a fluctuating 9 rate thereafter. 10 So that's what we say the rule says. 11 My learned friends' argument depends on the rule 12 introducing a counter-factual enquiry as to the 13 circumstances in which a judgment could have been or 14 perhaps was obtained or obtainable after the date of 15 administration. 16 MR JUSTICE DAVID RICHARDS: Yes. 17 MR ZACAROLI: Now, in the latter case of a judgment 18 obtained, that is notwithstanding that the 19 counter-factual contradicts the primary assumption of 20 the statutory scheme, which is that all claims are 21 stopped, the moratorium of the stay applies at the date 22 of administration, so in the normal case there will not 23 be judgment obtained thereafter. 24 We needn't go to the Cork Report. My Lord knows 25 there's nothing in it on this topic because the</p> <p style="text-align: center;">Page 2</p>	<p>1 relevant order. I will come back to that. 2 MR JUSTICE DAVID RICHARDS: Hold on. 3 MR ZACAROLI: In the middle of 88, the fifth line: 4 "A minimum rate equivalent to that applicable at the 5 date of the relevant order to judgment debts." 6 The order there obviously is the winding-up order. 7 MR JUSTICE DAVID RICHARDS: Yes, I see. 8 MR ZACAROLI: Now -- 9 MR JUSTICE DAVID RICHARDS: Just to be clear about this, if 10 you have a judgment for £1 million and the judgment rate 11 at the date of the judgment is 8 per cent but before the 12 judgment is satisfied the Judgments Act rate is reduced 13 to, say, 6 per cent, does the judgment from that date 14 carry interest at 6 per cent? 15 MR ZACAROLI: I don't know, my Lord. I just thought of that 16 question as my Lord was saying it. We'll check that. 17 MR JUSTICE DAVID RICHARDS: All right. 18 MR ZACAROLI: But when we come to the rule, we'll see that 19 it undoubtedly ties the rate for the purposes of 20 administration and liquidation and bankruptcy to the 21 date -- to the judgment rates applicable at the date of 22 the relevant winding up. 23 MR JUSTICE DAVID RICHARDS: That is in the rule, is it? 24 MR ZACAROLI: It is. Perhaps we can look at it 25 straightaway. It's one of my points later down the</p> <p style="text-align: center;">Page 4</p>

<p>1 road. 2.88(7) refers back -- sorry, (9) refers you back 2 to (6). It's the rate in (6) which is the rate of 3 interest claimed on the date when the company entered 4 administration. 5 MR JUSTICE DAVID RICHARDS: I see. 6 MR ZACAROLI: The same words appear, just for my Lord's 7 note, section 189(4) in winding up is the date on which 8 the company went into liquidation and in bankruptcy 9 section 328(5) is the same. 10 MR JUSTICE DAVID RICHARDS: Thank you. 11 MR ZACAROLI: Now, the reason that I primarily went to 12 paragraph 88 of the White Paper, however, was for the 13 reference to contractual rates. It's clear that what 14 the draughtsman of the White Paper had in mind was the 15 simple case of a creditor who comes with an existing 16 contractual rate and that was the primary, at least, 17 purpose of the introduction of rule 2.88(9). 18 Now, at this point can I deal with, as my learned 19 friend did, one aspect of the Ruritania problem. 20 MR JUSTICE DAVID RICHARDS: Yes. 21 MR ZACAROLI: I have carefully described our case a moment 22 ago as it's the rate which applies to the debts proved. 23 MR JUSTICE DAVID RICHARDS: Yes. 24 MR ZACAROLI: I don't for the purposes of the argument on 25 issue 4 draw a distinction between the debts proved or</p> <p style="text-align: center;">Page 5</p>	<p>1 a proved debt. You would just have a foreign currency 2 debt. So I don't think there is -- I mean, I think that 3 much is clear. 4 MR ZACAROLI: Yes. As I say, we accept that. 5 MR JUSTICE DAVID RICHARDS: Yes. I mean, I am still -- 6 I have to tell you, it's still a matter which is 7 concerning me. 8 MR ZACAROLI: On the basis that you get an odd interest -- 9 MR JUSTICE DAVID RICHARDS: Yes, I mean, all the more so 10 because here we have the insolvency rules apparently 11 providing across the board that you'll have a foreign 12 currency interest trade applicable to a sterling debt in 13 circumstances where already, by the time these rules 14 were made, the approach of the courts was that the usual 15 order should be an interest rate applicable to the 16 currency in question. Not an absolute rule; the court 17 has a discretion under the statute. But very strongly 18 the authorities indicated that it would normally be 19 right to have the relevant currency interest rate. 20 Now, why should the insolvency rules be put together 21 in a way which is so contrary to the, I should have 22 thought, logical and commercial approach to appropriate 23 interest rates being taken by the courts post-Miliangos? 24 It's a concern. 25 MR ZACAROLI: I understand the concern. We would say that</p> <p style="text-align: center;">Page 7</p>
<p>1 the proved debt, but I can see that would be an 2 important distinction if you have a foreign currency 3 debt because the debt proved is the foreign currency 4 debt, arguably, whereas the proved debt is once it's 5 been converted because you can only prove it by 6 converting it. 7 MR JUSTICE DAVID RICHARDS: Yes. 8 MR ZACAROLI: Now, we don't, however, like my learned 9 friend, take a point that the rule excludes a foreign 10 currency debt or a rate of interest applicable to 11 a foreign currency debt. 12 MR JUSTICE DAVID RICHARDS: Yes. 13 MR ZACAROLI: We accept that that's within the wording of 14 the rule. 15 MR JUSTICE DAVID RICHARDS: Yes. 16 MR ZACAROLI: But that doesn't affect the timing point. 17 MR JUSTICE DAVID RICHARDS: No. I mean, the proof point, 18 I've been considering that as well because I think I've 19 sort of hinted at that, but it did occur to me that, as 20 it were, approaching it as a matter of construction and 21 saying that the debt is a reference to the proved debt, 22 which means a debt in sterling, can't really work, 23 I would have to accept, because it's the rate applicable 24 to the debt, apart from the administration. If you 25 didn't have an administration, you wouldn't have</p> <p style="text-align: center;">Page 6</p>	<p>1 that point -- we still rely on the point that the 2 draughtsman did not positively intend to introduce 3 a future foreign judgment rate for that reason. 4 MR JUSTICE DAVID RICHARDS: Right. 5 MR ZACAROLI: But I think the point here is it is difficult 6 to argue on the construction of this rule that it 7 excludes an existing contractual right to a foreign -- 8 MR JUSTICE DAVID RICHARDS: I follow that. I do follow 9 that. When was 2.88(6) introduced? Sorry to be darting 10 around. Did that come in later than -- well, I don't 11 know. I won't ask you that now because there's quite 12 a sort of history to these rules. 13 My interest -- I am interested to know whether 14 perhaps in the 1986 rules, as they were originally 15 introduced, how did -- was there express provision for 16 conversion of foreign currency debts? I can't remember 17 at the moment. 18 MR ZACAROLI: We'll do some research on that. 19 MR JUSTICE DAVID RICHARDS: Thank you. I am grateful. 20 MR ZACAROLI: I can't answer that now. 21 So -- 22 MR JUSTICE DAVID RICHARDS: Let me say, on a case of this 23 importance, I mean, I don't think it would be 24 appropriate for me simply to say all the parties are 25 agreed that a foreign judgment rate applies and</p> <p style="text-align: center;">Page 8</p>

<p>1 therefore, for the purposes of this application, I will 2 assume that to be correct. This is not in that sense 3 ordinary inter partes litigation. There are rights of 4 many people affected here who are not actually 5 represented as such.</p> <p>6 MR ZACAROLI: My Lord, we understand that. It so happens 7 that my clients, it's not in their interests to argue 8 the contrary. We're not arguing the contrary. As 9 my Lord knows, we're here not as representatives.</p> <p>10 MR JUSTICE DAVID RICHARDS: I follow, yes.</p> <p>11 MR ZACAROLI: Therefore, it may well be my Lord isn't to 12 make any declaration or decision on this point. It's 13 left open for, as my learned friend says, someone who is 14 concerned by it.</p> <p>15 MR JUSTICE DAVID RICHARDS: Okay we'll have to see about 16 that, yes.</p> <p>17 MR ZACAROLI: So finishing up my introduction. There is 18 nothing in the Cork Report or the White Paper which 19 supports this counter-factual approach to construing 20 rule 2.88(9).</p> <p>21 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>22 MR ZACAROLI: My Lord, with that introduction, we make seven 23 points on the construction of the rule.</p> <p>24 The first point, which I think my Lord has as my 25 learned friend introduced our case on this basis, that</p> <p style="text-align: center;">Page 9</p>	<p>1 MR ZACAROLI: My Lord, we have referred in our skeleton to 2 the Director General of Fair Trading v First National 3 Bank for one paragraph.</p> <p>4 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>5 MR ZACAROLI: It describes this point. I don't think 6 my Lord needs to turn it up.</p> <p>7 MR JUSTICE DAVID RICHARDS: No, thank you.</p> <p>8 MR ZACAROLI: So that's --</p> <p>9 MR JUSTICE DAVID RICHARDS: Sorry, just to be clear, in 10 2.88(7) the phrase is "on those debts" and that takes us 11 back to --</p> <p>12 MR ZACAROLI: The beginning of (7): 13 "Any surplus remaining after payment of the 14 debt ..."</p> <p>15 MR JUSTICE DAVID RICHARDS: Sorry, yes, of course it does. 16 Yes. Thank you.</p> <p>17 MR ZACAROLI: My Lord the second point is this, and I have 18 already intimated and indeed shown my Lord the words, 19 but the rule requires the Judgments Act rate to be 20 applied to be the date which existed on the date when 21 the company went into administration.</p> <p>22 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>23 MR ZACAROLI: The White Paper that we looked at a moment ago 24 supports that. There's a deliberate choice.</p> <p>25 MR JUSTICE DAVID RICHARDS: Yes.</p> <p style="text-align: center;">Page 11</p>
<p>1 the debt referred to in rule 9 is necessarily 2 a cross-reference to 2.88(7) because (9) is only 3 relevant for determining the rate applicable of 4 interest. So it cross-refers to (7). (7) refers to 5 paying interest on those debts and those debts in the 6 last line of (7) must be referring back to the debts 7 proved in the first line.</p> <p>8 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>9 MR ZACAROLI: A judgment debt, not in existence but which 10 might be obtained in the future, is not the debt which 11 is proved.</p> <p>12 The rights of a creditor as a matter of English law 13 after judgment flow from the judgment. The key point 14 here is not so much whether the debt has in fact merged 15 in the judgment. That's not point really. The point is 16 that they are conceptually regarded as two different 17 things. We say the draughtsman of the rule must be 18 taken to understand English law as it existed at the 19 time of the 86 Act and rules, and that is one aspect of 20 it and, therefore, in referring to the proved debt, he 21 is referring insofar as he was thinking of this point at 22 all to the debt which existed, not some future, 23 different version of the debt once a judgment is 24 obtained.</p> <p>25 MR JUSTICE DAVID RICHARDS: Yes.</p> <p style="text-align: center;">Page 10</p>	<p>1 MR ZACAROLI: This suggests that in determining which is the 2 higher of the two rates you're comparing the rights 3 attaching to the debt as at the date of administration. 4 It reinforces that point. Certainly it is a further 5 indication the draughtsman did not intend to incorporate 6 by this phrase "rate applicable apart from 7 administration" a rate under a future judgment at 8 a future judgments rate in some other country.</p> <p>9 MR JUSTICE DAVID RICHARDS: Or, even, you would say 10 presumably, a future judgment obtained in this country 11 if the Judgments Act rate had changed?</p> <p>12 MR ZACAROLI: Yes, absolutely. Yes I would have thought the 13 draughtsman wasn't envisaging a future judgment in this 14 country, given he's already catered for that by applying 15 the judgments rate at the date of administration.</p> <p>16 MR JUSTICE DAVID RICHARDS: I agree.</p> <p>17 MR ZACAROLI: The third point is that, as my Lord will 18 remember, the Cork recommended judgment rates for all. 19 The White Paper brings in an addition to that. It 20 recommends bringing in one aspect of the contractual 21 rights of creditors, namely the rate to which they were 22 already entitled. That's what the White Paper is 23 recommending. That is essentially, although the wording 24 isn't exactly the same as we've seen, what rule 2.88(9) 25 is doing.</p> <p style="text-align: center;">Page 12</p>

<p>1 So we say it reflects one part, but only one part, 2 of the approach taken in winding up before 1986 by 3 reflecting the rate, but under the pre-1986 law relating 4 to companies it had never been suggested that a creditor 5 who had not obtained a judgment pre-insolvency could in 6 some way obtain interest as if it had one. One 7 authority to reinforce that point, which my Lord has 8 seen just yesterday, but just to take my Lord back to 9 it, is Fine Industrial Commodities, bundle 1B at tab 76. 10 MR JUSTICE DAVID RICHARDS: Yes. 11 MR ZACAROLI: The decision is summarised in the first 12 paragraph of the headnote: 13 "The court has no power, either by statute or under 14 its general jurisdiction in the winding up...(reading 15 to the words)... simple contract to creditors of the 16 company." 17 Just to remind my Lord of the facts. At the top of 18 page 258, certain shareholders request the liquidator to 19 seek directions of the court before paying interest to 20 creditors. There were 83 unsecured creditors. The only 21 creditor who was to the knowledge of the liquidator 22 entitled to prove for interest was the respondent 23 Bennett and Sons who had recovered judgment against the 24 company before liquidation. 25 At the beginning of his judgment, Mr Justice Vaisey,</p> <p style="text-align: center;">Page 13</p>	<p>1 MR JUSTICE DAVID RICHARDS: Yes. It's a sort of statement 2 of policy as to what is appropriate in the distribution 3 of an estate with which the Cork Committee then of 4 course disagreed, but, yes, I -- 5 MR ZACAROLI: I'm not sure it's meant to be policy. It may 6 be put in that way but he is, I think, striving to find 7 a way in which he could do this. And of course he 8 couldn't. He can't find a way of giving them interest. 9 MR JUSTICE DAVID RICHARDS: I see, he's hoping he can give 10 them interest. I was reading that as if he was saying, 11 "I shouldn't". 12 MR ZACAROLI: If you look over the page to the beginning of 13 the main paragraph: 14 "I had rather hoped I should find in the present 15 case I had a discretion and I would be able to award 16 some interest ..." 17 So I think his inclination was to want to try and 18 award interest. 19 MR JUSTICE DAVID RICHARDS: Yes, I see. 20 MR ZACAROLI: Then in that paragraph the critical words 21 are -- 22 MR JUSTICE DAVID RICHARDS: I see. Fair enough. 23 MR ZACAROLI: -- towards the end: 24 "But I cannot discover any case or any section of 25 the Act which...(reading to the words)... as if they</p> <p style="text-align: center;">Page 15</p>
<p>1 at page 260, in the second paragraph, summarises the 2 question: 3 "Are the creditors of the company entitled to 4 interest on their debts?" 5 He deals with the one creditor with a judgment, 6 there's no difficulty about them, the declaration is 7 made; there's an issue about whether it should be an 8 earlier date, but that's not material. No one claimed 9 for the ten days before winding up. 10 MR JUSTICE DAVID RICHARDS: Yes. 11 MR ZACAROLI: Then he deals with the others. My Lord has 12 been taken through this so if I can take you just to 13 page 262, where he first of all is dealing with the 14 point about the company no longer being an insolvent 15 company and therefore the bankruptcy rules don't apply. 16 MR JUSTICE DAVID RICHARDS: Yes. 17 MR ZACAROLI: Then just above the second hole-punch just 18 after the quote "after the winding up of an insolvent 19 company", he says: 20 "But I should have thought that as soon as it is 21 found that there is a surplus...(reading to the 22 words)... ought to come in and prove their debts without 23 any claim to interest." 24 That echoes the words of Lord Justice Giffard in 25 Humber Ironworks which he cites over the page.</p> <p style="text-align: center;">Page 14</p>	<p>1 were judgment creditors." 2 MR JUSTICE DAVID RICHARDS: I see. 3 MR ZACAROLI: So -- 4 MR JUSTICE DAVID RICHARDS: So having said that he's got no 5 statutory power to do it because of the construction of 6 the relevant provision in the Companies Act, he's 7 enquiring whether there's some equitable power and he 8 concludes there isn't. 9 MR ZACAROLI: Yes. So there's no way -- and, therefore, 10 there is no case -- my Lord has had no case cited to him 11 in which a creditor was entitled to interest on the 12 surplus without a pre-existing right to judgment. 13 MR JUSTICE DAVID RICHARDS: Yes. 14 MR ZACAROLI: So even if sub-rule 9 was regarded as bringing 15 in all of the old law relating to companies, which we 16 say it wasn't, it was just bringing the rate, but 17 against me on that point, even if it was bringing 18 everything, the old law never allowed someone without 19 a judgment to interest as if they had had one. 20 MR JUSTICE DAVID RICHARDS: Yes. 21 MR ZACAROLI: A fortiori since it's only bringing the rate, 22 it clearly doesn't do so. 23 That leads to my fourth point which is the point 24 that this is entirely consistent with the general 25 principle that the commencement of insolvency operates</p> <p style="text-align: center;">Page 16</p>

<p>1 as the date for establishing rights of creditors against 2 the estate of the debtor. 3 My learned friend took my Lord to a sentence in our 4 original position paper where I frankly accept we had 5 not put the point as clearly as it could have been and 6 we had referred to "simultaneous ascertainment and 7 distribution". 8 MR JUSTICE DAVID RICHARDS: Yes. 9 MR ZACAROLI: The distribution point wasn't an important 10 part of the argument then. If my Lord looks at our 11 skeleton, we have, not surprisingly, when one thinks 12 about these points for the purposes of producing 13 a skeleton argument, points develop and we have 14 developed and our skeleton is where my Lord will find 15 the argument I'm now reciting set out. 16 MR JUSTICE DAVID RICHARDS: Yes. 17 MR ZACAROLI: But, so that my Lord can see the point that 18 I am making, there are two cases. One is Dynamics, 19 which my Lord knows well but it's worth looking at what 20 Lord Justice Oliver said about the cut-off date of 21 winding up. Bundle 1B, tab 85. In a very well-known 22 section, beginning at page 762, he refers to the long 23 passage from Lord Justice Selwyn in Humber Ironworks, 24 including the phrase "the tree lies where it falls". He 25 then refers to European Assurance Society Arbitration in</p> <p style="text-align: center;">Page 17</p>	<p>1 the passage -- part of the passage we looked at from 2 justice -- Mr Justice Oliver in the Dynamics case. Then 3 29: 4 "The image of collecting and uno flatu distributing 5 the assets of the company on the day of the winding-up 6 order is a vivid one but the courts apply to it give 7 effect to the underlying purpose of fair distribution 8 between creditors pari passu and not as a rigid rule." 9 So its purpose is to enable a pari passu 10 distribution not actually to get rid of the assets on 11 day one. 12 MR JUSTICE DAVID RICHARDS: Yes. 13 MR ZACAROLI: Where this is relevant here is that my learned 14 friends' submissions were based on the fact there ought 15 to be no distinction between interest, statutory 16 interest, and claims of non-provable -- non-provable 17 claims, that tort claim that used to exist. My Lord, 18 those are irrelevant to the analysis, we submit, because 19 those only come into play by definition once all the 20 proved debts and all statutory interest on the proved 21 debts has been paid in full. 22 On the other hand, there is a very important and 23 well-recognised cut-off so far as interest is concerned 24 in two ways. First of all, interest is only provable up 25 to the date of administration.</p> <p style="text-align: center;">Page 19</p>
<p>1 1872, at page 763 letter C. 2 MR JUSTICE DAVID RICHARDS: Yes. 3 MR ZACAROLI: And also British American Continental Bank and 4 he summarises the position at page 764, between D and G. 5 Perhaps my Lord will read between D and G on 764. 6 MR JUSTICE DAVID RICHARDS: Yes. (Pause) 7 Yes. 8 MR ZACAROLI: The reference to ascertainment and 9 distribution is echoed in the first line of the quote 10 there in section 257(1): 11 "As soon as may be after making a winding-up order 12 the court shall cause the assets to be collected and 13 applied and discharged of its liabilities." 14 Of course the application in discharge of 15 liabilities is not the important point. It's not the 16 distribution that's important, it's the ascertainment of 17 liabilities that is the important point. 18 NEW SPEAKER: Yes. 19 MR ZACAROLI: The same point is echoed in the judgment of 20 Lord Hoffmann in Wight v Eckhardt where there is again 21 a reference to immediate distribution in passing but 22 it's not the thrust of what he's saying. That's at 23 bundle 1D, tab 132. 24 MR JUSTICE DAVID RICHARDS: Yes. 25 MR ZACAROLI: It's paragraphs 28 and 29. 28, he refers to</p> <p style="text-align: center;">Page 18</p>	<p>1 MR JUSTICE DAVID RICHARDS: Yes. 2 MR ZACAROLI: Secondly, statutory interest is payable from 3 that date and it's only payable on the proved debts. 4 So we do say that the fact that there is a key date, 5 the date of administration, for the purposes of 6 ascertaining and crystallising claims made to the 7 company is as relevant for the purposes of deciding what 8 rate should be applied to interest as it is for 9 determining what are the claims of creditors to proof. 10 MR JUSTICE DAVID RICHARDS: Yes. 11 MR ZACAROLI: The fact is that commencement of winding up 12 bankruptcy or administration is fixed to a certain date 13 and that can be of critical importance for a number of 14 reasons. By way of example it's most important, for 15 example, as being a cut-off for the proof itself in 16 13.12.1 of the rules. It's a cut-off for execution 17 creditors, creditors seeking to execute against the 18 assets of the company. The date of administration or 19 winding up is important. Section 128, if my Lord wants 20 to take a note. 21 MR JUSTICE DAVID RICHARDS: Thank you. 22 MR ZACAROLI: Of course it's critical for rule 2.88(1) that 23 we've looked at, and it's also of course important for 24 all of the avoidance provisions, although the look-back 25 period doesn't begin with the date of the order, rather</p> <p style="text-align: center;">Page 20</p>

<p>1 the date of the petition, nevertheless it's all based on 2 there being a certain date when creditors' rights and 3 the debtors' rights are fundamentally affected. 4 Put another way, the commencement of insolvency 5 creates a line in the sand which means that different 6 conclusions do apply depending on whether an event 7 happened before or after that line in the sand. It's -- 8 my Lord may have heard arguments to the effect that, 9 well, this can't be right because if this had happened 10 two days later, the result would have been different in 11 an insolvency context and such arguments are invariably 12 rejected because insolvency does work on the basis of 13 strict dates, and this is one example. 14 It's at this point that my learned friends' 15 submissions on issues 4 and 2 collide in some way or 16 coincide because of the arguments that you salami-slice 17 the approach to this question, judgment before, judgment 18 afterwards, proceedings before, et cetera. It's 19 a thesis which pervades their case on issues 2 and 4. 20 So what I say here has some relevance to issue 2, 21 as I mentioned yesterday. 22 MR JUSTICE DAVID RICHARDS: Right. 23 MR ZACAROLI: To summarise our points on this, the fact that 24 a judgment has not been obtained at the commencement of 25 insolvency has always been seen as a critical</p> <p style="text-align: center;">Page 21</p>	<p>1 its irrelevance, therefore, to our case. 2 MR JUSTICE DAVID RICHARDS: Yes, I see. 3 MR ZACAROLI: So although it's right that the same rationale 4 that was applied in the deceased estate's case, namely, 5 well, the creditors are stopped from pursuing the 6 deceased and therefore we'll give a judgment in their 7 favour, and that same rationale underlies the reason why 8 the Judgments Act rate is given for creditors generally 9 in administration or liquidation. That's the same 10 rationale, but the legal response to it is very 11 different: in the one case a judgment is made which 12 affects the rights of creditors, it's a judgment for 13 them; in a winding-up bankruptcy it's not. 14 MR JUSTICE DAVID RICHARDS: Yes. 15 MR ZACAROLI: Now, this problem cannot be overcome, we 16 submit, with use of the hindsight principle which, 17 again, is relied upon both in the context of 4 and 2 -- 18 issues 4 and 2. The hindsight principle is purely about 19 using later events to establish a certain value for 20 a claim that was previously of uncertain value, and 21 my Lord stated that very clearly in the MF Global 22 judgment in 1E, tab 161 at paragraph 48. 23 MR JUSTICE DAVID RICHARDS: Yes. 24 MR ZACAROLI: It can't be used to create rights which did 25 not exist at the time. So it can't be used -- you can't</p> <p style="text-align: center;">Page 23</p>
<p>1 distinction, as we've just seen from Fine Industrial. 2 It's never been the case that creditors are treated as 3 if they had a judgment at the date when they did not 4 have a judgment. We had Whittingstall v Grover cited 5 once again in this context. I don't want to go back 6 over all my submissions on that. 7 MR JUSTICE DAVID RICHARDS: No. 8 MR ZACAROLI: Could I just flag up to my Lord that in our 9 reply skeleton we deal with the distinction between 10 a decree in a testamentary case and a winding-up order. 11 MR JUSTICE DAVID RICHARDS: Yes. 12 MR ZACAROLI: At paragraphs 48 to 59 of our reply skeleton 13 where we cite the relevant passages from 14 Mr Justice Chitty in Whittingstall v Grover, we set out 15 the relevant rules, both then and now, relating to 16 testamentary estates and, in particular, we refer to the 17 passage in the Herefordshire Banking case which I didn't 18 give my Lord the reference yesterday. It's 1A, tab 24, 19 where Lord Rommily points out the crucial distinction 20 between a decree in a deceased person's estate case, 21 which does constitute a judgment against creditors, and 22 a winding-up order, which does not. 23 MR JUSTICE DAVID RICHARDS: Right. 24 MR ZACAROLI: That is a very important background to 25 understand the relevance of Whittingstall v Grover and</p> <p style="text-align: center;">Page 22</p>	<p>1 use hindsight to say that the subsequently obtained 2 judgment is the proved debt. It isn't. The proved debt 3 was the underlying right before they obtained the 4 judgment. 5 MR JUSTICE DAVID RICHARDS: Yes. 6 MR ZACAROLI: To take the example of the personal injury 7 claim, which came up in argument yesterday, 8 a subsequently obtained judgment, which would be 9 relevant for the purposes of a claim against insurers, 10 for example, does not alter the fact that at the date of 11 administration the debt, the claim was the underlying 12 debt, the provable debt so the claim for damages for 13 personal injury was then the claim. With hindsight the 14 judgment merely quantifies that claim at a certain 15 amount. 16 MR JUSTICE DAVID RICHARDS: Yes. 17 MR ZACAROLI: Now, the very close connection here with 18 issue 2 is that you can't use hindsight to rewrite 19 history, and under issue 2 that's relevant because you 20 can't use hindsight to rewrite history by saying that 21 interest which did not become accrued and due until the 22 surplus arose had in fact accrued due earlier. That's 23 a part, I think, of my learned friend's argument on 24 issue 2 you can't use hindsight for that purpose. That 25 would be re-writing history.</p> <p style="text-align: center;">Page 24</p>

<p>1 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>2 MR ZACAROLI: Now, the personal injury claimant, my learned</p> <p>3 friend Mr Dicker, I think, mischaracterised our case on</p> <p>4 the relevance of merger at this point because he said</p> <p>5 that the personal injury claimant would have been</p> <p>6 entitled to interest on the underlying claim but</p> <p>7 a judgment obtained after administration would cause</p> <p>8 merger and therefore the original claim disappears, and</p> <p>9 you can't get interest on the judgment because we say</p> <p>10 it's too late. He said that would be nonsense. Well,</p> <p>11 of course, it is nonsense. That is not the conclusion</p> <p>12 we suggest. We suggest that the fallacy in that</p> <p>13 argument is that in thinking that what happens after the</p> <p>14 date of administration is relevant to the question of</p> <p>15 interest under 2.88(9) at all, the debt proved was the</p> <p>16 personal injury claim. It would carry in fact no right</p> <p>17 to interest as a mere claim for damages, but it was</p> <p>18 entitled to interest upon the administration order in</p> <p>19 the event of a surplus through the operation of</p> <p>20 rule 2.88(7) at the Judgments Act rate.</p> <p>21 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>22 MR ZACAROLI: Assume the claim was pursued thereafter,</p> <p>23 whether or not the claim merges in the judgment is</p> <p>24 irrelevant and certainly does not remove the right to</p> <p>25 interest which is established by the fact that the debt</p> <p style="text-align: center;">Page 25</p>	<p>1 Parliament's intention was actually all we're doing here</p> <p>2 is identifying the rights under whatever judgment you</p> <p>3 could have got, what's the reason for imposing a lower</p> <p>4 rate in a foreign jurisdiction?</p> <p>5 MR JUSTICE DAVID RICHARDS: Sorry, I'm not -- I mean,</p> <p>6 because the policy is it's only if it's a higher rate</p> <p>7 that you --</p> <p>8 MR ZACAROLI: Yes --</p> <p>9 MR JUSTICE DAVID RICHARDS: The 8 per cent -- the</p> <p>10 Judgments Act rate is a floor, isn't it?</p> <p>11 MR ZACAROLI: Exactly. That's because the policy is the</p> <p>12 Judgments Act rate operates fairly as a floor to all;</p> <p>13 not because that's the rate which creditors could have</p> <p>14 got generally -- not all creditors could have got.</p> <p>15 MR JUSTICE DAVID RICHARDS: I see.</p> <p>16 MR ZACAROLI: That's the point.</p> <p>17 The sixth point goes back to the mismatch between</p> <p>18 currencies. Given that the Judgments Act rate is</p> <p>19 specifically applicable to a sterling debt, given that</p> <p>20 the proof is payable in sterling, and that a foreign</p> <p>21 Judgments Act rate is likely to be linked to its own</p> <p>22 currency, we say it's highly unlikely the draughtsman</p> <p>23 positively intended to include generally rates under</p> <p>24 foreign judgments that would be obtained in the future.</p> <p>25 Now, we accept, as I said in opening, that as</p> <p style="text-align: center;">Page 27</p>
<p>1 proved carried a right to interest at the Judgments Act</p> <p>2 rate. And it's the same if the debt did carry a right</p> <p>3 to interest greater than 8 per cent. That would then be</p> <p>4 the debt proved and therefore the rate of interest</p> <p>5 applicable to the debt proved.</p> <p>6 Our fifth point, and related to that, the "as if"</p> <p>7 point, but a slightly broader point: in my learned</p> <p>8 friends' skeletons it's suggested that the fact that the</p> <p>9 Judgments Act rate is chosen is because Parliament</p> <p>10 intended creditors to get the benefit of any</p> <p>11 Judgments Act rate that they would have been entitled</p> <p>12 to. We say that's a non sequitur. The reason the</p> <p>13 Judgments Act rate was chosen as the default rate was</p> <p>14 because it was thought that that's as a minimum what</p> <p>15 creditors would be entitled to, since they're all shut</p> <p>16 out from claiming a judgment. It's a rationale for</p> <p>17 choosing the rate; it doesn't mean that Parliament went</p> <p>18 the extra step and intended that if a creditor had</p> <p>19 a right to some different judgment it should be that</p> <p>20 rate which applies.</p> <p>21 In a sense, the fallacy of that argument can be</p> <p>22 shown by the fact that there's no suggestion from my</p> <p>23 learned friends' side that if a judgment rate from</p> <p>24 another jurisdiction would produce a lower rate of</p> <p>25 interest, it should be that rate which applies. If</p> <p style="text-align: center;">Page 26</p>	<p>1 a matter of the drafting of the rule we can't exclude --</p> <p>2 we don't think we can exclude a foreign contractual</p> <p>3 rate, nor do we think that you could exclude a rate</p> <p>4 under a judgment obtained rule.</p> <p>5 MR JUSTICE DAVID RICHARDS: Quite.</p> <p>6 MR ZACAROLI: Because those are the rates that actually</p> <p>7 apply to your debt at the time.</p> <p>8 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>9 MR ZACAROLI: But those, in a sense, we say, are just</p> <p>10 consequences of the way it's been drafted.</p> <p>11 My learned friends' case, the counter-factual</p> <p>12 necessary in their case requires a positive intention on</p> <p>13 the part of the draughtsman to include a subsequently</p> <p>14 obtained judgment because it's only that which is</p> <p>15 relevant to introduce a rate which wouldn't have been</p> <p>16 applicable to the debt at the date of administration.</p> <p>17 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>18 MR ZACAROLI: The foreign judgment is the only case that</p> <p>19 only parties thought of that's relevant to this.</p> <p>20 Now, the draughtsman clearly wouldn't have been</p> <p>21 thinking of a subsequently obtained English judgment</p> <p>22 because the Act has already dealt with that.</p> <p>23 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>24 MR ZACAROLI: So the counter-factual which is necessary for</p> <p>25 the other side's argument depends on the draughtsman</p> <p style="text-align: center;">Page 28</p>

<p>1 positively intending a future foreign judgment rate to 2 have been included. We suggest that's a highly unlikely 3 intention to impute to the draughtsman. 4 MR JUSTICE DAVID RICHARDS: Yes. 5 MR ZACAROLI: The seventh point is the impracticalities 6 point, that the complexities to which the 7 counter-factual give rise which are simply not catered 8 for in the rule -- 9 MR JUSTICE DAVID RICHARDS: Sorry to bang on about this, but 10 you say that the draughtsman clearly wouldn't have been 11 thinking of a subsequently obtained English judgment. 12 MR ZACAROLI: Yes. 13 MR JUSTICE DAVID RICHARDS: Because the Act has already 14 dealt with that, but has it? When you say the Act has 15 dealt with it, do you mean -- 16 MR ZACAROLI: Act and the rules. Act in relation to 17 liquidation -- 18 MR JUSTICE DAVID RICHARDS: The judgment, but there is the 19 point that you could have a subsequent judgment and 20 interest -- judgment rate interest might be different at 21 that point. 22 MR ZACAROLI: I accept that. That's an example that's not 23 catered for, but it's catered for in this sense, that in 24 relation to English claims, the draughtsman had thought 25 sufficient to fix the judgments rate at the date of</p> <p style="text-align: center;">Page 29</p>	<p>1 difficulties which the counter-factual case gives rise 2 to which are simply not catered for in the rule and 3 therefore suggest that rule never intended them. That's 4 the key point here. 5 MR JUSTICE DAVID RICHARDS: Yes, yes. 6 MR ZACAROLI: Just to summarise the key points, and these 7 are in paragraph 133 of our initial skeleton. 8 MR JUSTICE DAVID RICHARDS: Hmm, hmm. 9 MR ZACAROLI: The first point is whether what's necessary 10 for the creditors to establish is that it could have 11 obtained a judgment, it would have obtained a judgment 12 or it did obtain a judgment. 13 MR JUSTICE DAVID RICHARDS: Yes. 14 MR ZACAROLI: The rule is silent as to which of those 15 matters. 16 The debate between "would" and "could" could be very 17 important where the creditor has a choice of 18 jurisdictions in which to sue, which is not an uncommon 19 situation. 20 MR JUSTICE DAVID RICHARDS: Yes. I am just opening up your 21 skeleton and looking at 133. 22 MR ZACAROLI: 133. 23 MR JUSTICE DAVID RICHARDS: Yes, thank you. 24 MR ZACAROLI: The point I'm on now is really at 25 paragraph 133.3 -- well, 2 and 3 because you need to</p> <p style="text-align: center;">Page 31</p>
<p>1 administration. 2 MR JUSTICE DAVID RICHARDS: Quite. So that would be odd if 3 you had a subsequent judgment in England for which 4 permission, if it was a compulsory liquidation, leave 5 had been given to proceed which carried interest at 6 a higher rate than the rate applicable at the date of 7 administration. 8 MR ZACAROLI: My Lord says "odd". It's not odd in this 9 sense, that rules provide you with your interest for the 10 post-administration period at a rate that applies to 11 everybody equally. 12 MR JUSTICE DAVID RICHARDS: I mean, I think it was a point 13 in your favour. If you have -- if the judgment rate is 14 8 per cent at the date of administration, you then have, 15 as I have mentioned earlier, a personal injuries claim, 16 for which leave is given to commence proceedings, which 17 result in a judgment, by which time the Judgments Act 18 rate is 10 per cent. Now, it would be odd, I think, if 19 the draughtsman had intended in those circumstances that 20 that judgment creditor should get interest at 21 10 per cent from the date of his judgment. 22 MR ZACAROLI: I agree entirely with that, yes. 23 MR JUSTICE DAVID RICHARDS: Odd. Of course that may be the 24 effect. 25 MR ZACAROLI: So our seventh point was the complexities and</p> <p style="text-align: center;">Page 30</p>	<p>1 determine which jurisdiction is it that one picks, where 2 there's a choice. Is it just that the creditor can 3 choose the highest that it could possibly sue in? 4 Because that, in a sense, is a right it had to pursue 5 litigation in other jurisdictions. On what standard -- 6 if it's not "could" but "would", what is envisaged, 7 a sort of theoretical, hypothetical investigation as to 8 what people would have done, had there been no 9 administration, but it's a nonsensical and very complex 10 enquiry amongst many creditors, completely contradicting 11 the idea of simplicity and certainty of that interest? 12 MR JUSTICE DAVID RICHARDS: Yes. 13 MR ZACAROLI: The other point is this, just to highlight 14 this part: that is since the counter-factual is what 15 would, could or did happen after the date of 16 administration, logically the counter-factual should 17 only allow interest from the date that whatever it was 18 that was going to happen would have happened. 19 MR JUSTICE DAVID RICHARDS: Yes. 20 MR ZACAROLI: We don't -- in a sense we agree with my 21 learned friends on this point. That's not what 22 rule 2.88(9) is about. It's about identifying the rate 23 which is then to be inserted for the periods referred to 24 in sub-rule 7. 25 MR JUSTICE DAVID RICHARDS: Yes. So is it Mr Dicker's</p> <p style="text-align: center;">Page 32</p>



<p>1 submission that if a foreign judgment is obtained, so 2 not his more refined case, but there is a judgment 3 obtained after a years -- a year after the commencement 4 of administration, the interest payable under that 5 judgment, say 9 per cent, is payable from the start of 6 the administration? 7 MR ZACAROLI: Yes, that's as I understand their case. As 8 I say, we would agree, if we lose everything up to that 9 point, that's the logical answer because 2.88(9) is not 10 about identifying periods, it's about identifying the 11 rate to be inserted. 12 MR JUSTICE DAVID RICHARDS: Quite. 13 MR ZACAROLI: But that strongly suggests the counter-factual 14 is not right. 15 MR JUSTICE DAVID RICHARDS: Yes, I'm with you. 16 MR ZACAROLI: My Lord, that just leaves the following, which 17 is to deal with York's argument in their skeleton which 18 Mr Dicker referred to but Mr Smith didn't develop, but 19 I will still deal with it, and that is that a creditor 20 has a contingent right to a judgment at the date of 21 administration. 22 MR JUSTICE DAVID RICHARDS: Yes. 23 MR ZACAROLI: We very much doubt this is a real issue in 24 this case. 25 MR JUSTICE DAVID RICHARDS: I mean, contingencies are</p> <p style="text-align: center;">Page 33</p>	<p>1 been loads of people who started proceedings beforehand, 2 and there will not be a contingent judgment debt unless 3 you have started proceedings because you're outside the 4 regime altogether -- the litigation regime. 5 MR JUSTICE DAVID RICHARDS: Yes. 6 MR ZACAROLI: If my Lord wants a reference, it's 7 paragraph 169 of Lord Sumption in Nortel. That's 1E, 8 tab 169 at paragraph 136. Lord Sumption is dealing 9 there with the costs awards, and there's a contingency 10 because you've begun litigation. 11 MR JUSTICE DAVID RICHARDS: Right. 12 MR ZACAROLI: So we don't think this is a real issue in this 13 administration. 14 MR JUSTICE DAVID RICHARDS: I follow. 15 MR ZACAROLI: But just to deal with it as a sort of 16 theoretical point. So the position is that you have 17 someone, let's say with a claim for £100 -- let's make 18 it dollars so it fits in with issue 4 -- \$100, and the 19 creditor says, well, I've started proceedings to sue for 20 that because the debtor is refusing to pay me. And at 21 the date of administration, therefore, I have 22 a contingent right to a judgment in the same way that 23 I have a contingent right to a costs order, I have 24 a contingent right to a liability order. The problem 25 here, however, is that there are undoubtedly two</p> <p style="text-align: center;">Page 35</p>
<p>1 relevant for the purposes of proof. 2 MR ZACAROLI: Yes. 3 MR JUSTICE DAVID RICHARDS: The hindsight principle is 4 relevant for the purposes of putting a value on 5 contingent claims. 6 MR ZACAROLI: Yes. 7 MR JUSTICE DAVID RICHARDS: Of course you can't prove for 8 post-administration interest, so questions of proof are 9 irrelevant. 10 MR ZACAROLI: Irrelevant to interest, yes. But he -- 11 MR JUSTICE DAVID RICHARDS: Exactly. So the question arises 12 what is the relevance of asking -- of entering into the 13 question of: do I have a contingent claim to interest on 14 the judgment or to a judgment and therefore to interest 15 on it? 16 MR ZACAROLI: I don't think the way it's put. 17 MR JUSTICE DAVID RICHARDS: No. 18 MR ZACAROLI: I think it's put on the basis there's 19 a contingent right to the judgment debt, not to the 20 interest on it, to the judgment debt. So if one asks -- 21 MR JUSTICE DAVID RICHARDS: I see. It's a contingent right 22 to the judgment debt. I'm with you, okay. 23 MR ZACAROLI: So, as I say, I think this is unlikely to be 24 a real issue in this administration at all. Given the 25 speed with which Lehman's collapsed, there will not have</p> <p style="text-align: center;">Page 34</p>	<p>1 co-existing rights because the underlying claim, the 2 contract debt, is extant. It exists. 3 MR JUSTICE DAVID RICHARDS: Yes. 4 MR ZACAROLI: The creditor could never prove both. The idea 5 in the real world of the creditor proving their 6 contingent right to a judgment which is now stayed, 7 where the proceeding are stayed, and therefore subject 8 to the real possibility, and one might say probability, 9 of it never happening would be absurd when they have 10 a perfectly good right to prove for their existing debt. 11 So where there's co-existing rights in that way we 12 say it would be absurd for the creditors to seek to 13 prove the underlying -- the judgments debt as opposed to 14 their existing contract debt. 15 MR JUSTICE DAVID RICHARDS: Yes. 16 MR ZACAROLI: Moreover, it would be absurd or very doubtful 17 an administrator would accept that proof because he 18 would say, "Well, you can't get a judgment now". And 19 there's no way you'll get the stay lifted just for the 20 purposes of getting a leg up to claim interest which the 21 rules otherwise don't give you. So mirroring, I think, 22 my Lord's comments yesterday, we would say that in those 23 circumstances it would be highly unlikely a creditor 24 would get leave, other than the case where it gets leave 25 for a different purpose --</p> <p style="text-align: center;">Page 36</p>

<p>1 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>2 MR ZACAROLI: -- to claim against insurers, for example.</p> <p>3 Now, there are two ways of dealing with that very</p> <p>4 small category of cases. The first is to say what we're</p> <p>5 really talking about here -- no, the first is to say</p> <p>6 that the court could, on that claim being obtained,</p> <p>7 impose conditions -- on the judgment being obtained</p> <p>8 impose conditions for lifting the stay, one of which is</p> <p>9 that you won't claim any interest on the judgment; that</p> <p>10 a perfectly tenable thing for the court to do. But we</p> <p>11 say the second way is probably the cleaner one, which is</p> <p>12 to say this is really a question of construction of the</p> <p>13 rule again; that's what this must come back to. And the</p> <p>14 question is: did the draughtsman of 2.88(9) intend that</p> <p>15 the rate applicable to the proved debt would include</p> <p>16 a rate applicable to a creditor's proof of a future</p> <p>17 contingent judgment debt when the creditor already has</p> <p>18 an existing non-contingent debt at of the day</p> <p>19 administration? We say really for all the reasons we've</p> <p>20 been through so far, the draughtsman didn't have that</p> <p>21 intention in mind when he drafted rule.</p> <p>22 MR JUSTICE DAVID RICHARDS: Yes. Just to pick up the point</p> <p>23 about the costs awards, so assume the proceedings have</p> <p>24 been commenced before the commencement of the</p> <p>25 administration, so at that time the claimant has</p> <p style="text-align: center;">Page 37</p>	<p>1 anyway, but if it were a higher judgments rate because</p> <p>2 the judgments rate has changed in the interim period,</p> <p>3 then that again supports the view that it should be the</p> <p>4 judgments rate at administration which applies.</p> <p>5 MR JUSTICE DAVID RICHARDS: With a costs order I think the</p> <p>6 court can order the interest to run from the date the</p> <p>7 costs were incurred.</p> <p>8 MR ZACAROLI: Yes, it can.</p> <p>9 MR JUSTICE DAVID RICHARDS: Which might pre-date the</p> <p>10 commencement of the administration, but you would say,</p> <p>11 well, it's still -- you look at the rate applicable at</p> <p>12 date of administration which is 8 per cent.</p> <p>13 MR ZACAROLI: Yes. In fact that -- it may be a non-point</p> <p>14 for another reason. I suppose if the proceedings are</p> <p>15 continuing, costs will be an expense.</p> <p>16 MR JUSTICE DAVID RICHARDS: Well, we're thinking of the</p> <p>17 claimants' costs. I see.</p> <p>18 MR ZACAROLI: If the administrator defends the proceedings,</p> <p>19 then the costs will become an expense by definition.</p> <p>20 MR JUSTICE DAVID RICHARDS: But he might not, I suppose.</p> <p>21 MR ZACAROLI: But we're going to be talking mostly about</p> <p>22 past costs and past interest.</p> <p>23 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>24 MR ZACAROLI: So the interest we're talking about is in fact</p> <p>25 a provable debt because it relates to a prior --</p> <p style="text-align: center;">Page 39</p>
<p>1 a contingent claim for interest, so has a -- for</p> <p>2 costs -- so has a provable claim for the costs still to</p> <p>3 be awarded, and those costs will carry interest, dating</p> <p>4 back, I think, to when the costs were incurred. What's</p> <p>5 the analysis there?</p> <p>6 MR ZACAROLI: Well, it's unlikely to be an issue other than</p> <p>7 in relation to proceedings -- well, in England</p> <p>8 certainly. In the US, where most of this issue is</p> <p>9 directed, generally there aren't costs orders.</p> <p>10 MR JUSTICE DAVID RICHARDS: No, I follow.</p> <p>11 MR ZACAROLI: But in England we would say the cleanest</p> <p>12 answer again is to say that the contingent right to</p> <p>13 costs is an existing claim at the date -- there is no</p> <p>14 parallel other claim there of course. It's just the</p> <p>15 contingent claim.</p> <p>16 MR JUSTICE DAVID RICHARDS: Correct. Exactly.</p> <p>17 MR ZACAROLI: But that exists at the date of administration.</p> <p>18 There is currently no interest attaching to that right.</p> <p>19 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>20 MR ZACAROLI: So the judgments rate applies in default.</p> <p>21 MR JUSTICE DAVID RICHARDS: That's your answer there, yes.</p> <p>22 MR ZACAROLI: Yes.</p> <p>23 MR JUSTICE DAVID RICHARDS: I follow.</p> <p>24 MR ZACAROLI: It's probably relevant because once the costs</p> <p>25 order is obtained in England the judgment rates attached</p> <p style="text-align: center;">Page 38</p>	<p>1 MR JUSTICE DAVID RICHARDS: Well, no, because you've not got</p> <p>2 an order for costs in your favour so it's still</p> <p>3 a contingent -- well, it is provable, but post-Nortel.</p> <p>4 MR ZACAROLI: -- but provable. And therefore what is</p> <p>5 stopped by rule 2.88(1) is interest relating to the</p> <p>6 period after administration.</p> <p>7 MR JUSTICE DAVID RICHARDS: I see, yes. The question then</p> <p>8 is what the rate would be post-administration and your</p> <p>9 answer would be 8 per cent on the --</p> <p>10 MR ZACAROLI: If there were -- but this is -- in most cases</p> <p>11 we would be talking only about costs already incurred</p> <p>12 and therefore interest up to the date of administration.</p> <p>13 MR JUSTICE DAVID RICHARDS: Yes, okay.</p> <p>14 MR ZACAROLI: I suppose there will be a period after this as</p> <p>15 well, by definition, and in that period it's the</p> <p>16 8 per cent.</p> <p>17 My Lord, those, unless I can assist further --</p> <p>18 MR JUSTICE DAVID RICHARDS: Sorry, to pursue another</p> <p>19 example. You have a section 994 petition which has been</p> <p>20 issued with the company that goes into administration as</p> <p>21 the respondent.</p> <p>22 MR ZACAROLI: Yes.</p> <p>23 MR JUSTICE DAVID RICHARDS: The order sought is a monetary</p> <p>24 order. That too, I think, would fall within the Nortel</p> <p>25 analysis. You have commenced the proceedings. There is</p> <p style="text-align: center;">Page 40</p>

<p>1 no liability, as such, until the court exercises its 2 discretion to make the order on the 994 petition, but 3 there are ongoing proceedings and leave is given to 4 continue them. The court exercises its discretion, 5 orders the company to pay £1 million, which -- that 6 million pounds becomes a provable debt -- well, there's 7 a provable debt anyway but that will ascertain the 8 amount of the claim. 9 MR ZACAROLI: Yes. 10 MR JUSTICE DAVID RICHARDS: The judgment -- well, would 11 I suppose carry judgment, you know, absent an 12 administration would carry Judgments Act rate after the 13 date of the order. There, again, you would say, well, 14 no, it's 8 per cent from the date of the administration? 15 MR ZACAROLI: Yes. 16 MR JUSTICE DAVID RICHARDS: I see. 17 MR ZACAROLI: My Lord, those are our submissions. 18 MR JUSTICE DAVID RICHARDS: Good. Thank you, Mr Zacaroli. 19 Submissions by MR TROWER 20 MR TROWER: My Lord, I have no submissions on substance to 21 make but I meant to say this to your Lordship. The 22 Ruritanian piso issue has arisen on a couple of 23 occasions in respect of issue 4. 24 Can I just show your Lordship a letter which 25 Linklaters sent to the parties and is in volume 5,</p> <p style="text-align: center;">Page 41</p>	<p>1 MR JUSTICE DAVID RICHARDS: Yes, of course. 2 MR TROWER: Pages 56 and 57. (Pause) 3 MR JUSTICE DAVID RICHARDS: So it's answer 1 that seems to 4 be -- 5 MR TROWER: They have come to answer 1. 6 MR JUSTICE DAVID RICHARDS: The proved debt and so -- but 7 what you're raising Mr Trower, is, well, maybe this 8 isn't an issue -- a real issue in this case. 9 MR TROWER: It may not be real issue in this case, although 10 I quite understand why it is that one may need to -- 11 MR JUSTICE DAVID RICHARDS: Issue 4 pre-supposes it is 12 a real issue, doesn't it? 13 MR TROWER: Well, I know. 14 MR JUSTICE DAVID RICHARDS: But perhaps only -- but perhaps 15 because of Mr Dicker's argument, that one takes into 16 account judgments -- that you should apply the rate that 17 would obtain on judgments which could have been entered. 18 MR TROWER: That could have been obtained. 19 MR JUSTICE DAVID RICHARDS: I think that it's said that 20 under New York law the judgment rate is 9 per cent. 21 MR TROWER: It's 9 per cent. 22 MR JUSTICE DAVID RICHARDS: So is that where the relevant 23 bit comes in? 24 MR TROWER: That may be where the wrinkle comes in, but your 25 Lordship's very specific point about the extreme example</p> <p style="text-align: center;">Page 43</p>
<p>1 tab 1, page 56 to page 57. This letter was sent 2 immediately after your Lordship raised the point and 3 what we have done in it is identified three possible 4 possibilities in relation to Ruritanian pisos, if I can 5 put it that way. 6 MR JUSTICE DAVID RICHARDS: Yes. 7 MR TROWER: What we are checking as well at the moment, but 8 we don't have a final answer on it, is whether this 9 actually has any relevance for this administration at 10 all. 11 MR JUSTICE DAVID RICHARDS: All right. 12 MR TROWER: The prospects are that it doesn't because what 13 we do know is the vast majority of claims are euros, 14 dollars and Swiss francs, where the issue wouldn't arise 15 in any practical sense. It might arise right on the 16 margins and it may well be -- we quite understand why 17 your Lordship has asked the question for the purposes of 18 testing the argument, but in practical terms it may not 19 be a question which your Lordship has to address for the 20 purposes of giving directions to the administrators on 21 this particular issue, but can I come back to you with 22 a final position on that. 23 What we have done is if your Lordship would just 24 read the letter. The parties have actually ended up 25 I think with answer 1.</p> <p style="text-align: center;">Page 42</p>	<p>1 on Ruritanian pisos doesn't arise. 2 MR JUSTICE DAVID RICHARDS: Probably because of the point 3 you make about the different interest rates. I see. 4 MR TROWER: My Lord, I don't want and don't think it's 5 probably appropriate for me to develop anything at the 6 moment, but I wanted your Lordship to know that as to 7 what we have said. 8 MR JUSTICE DAVID RICHARDS: Thank you. 9 MR TROWER: I know Mr Dicker said he wants to come back to 10 this point on issue 28 and that's fine from our point of 11 view. But we just wanted your Lordship to see that. 12 MR JUSTICE DAVID RICHARDS: I'm grateful for that, 13 Mr Trower. Thank you. 14 MR TROWER: My Lord, subject to that, I am not instructed to 15 make any submissions on this issue. 16 MR JUSTICE DAVID RICHARDS: Very well. 17 Mr Dicker? 18 Reply submissions by MR DICKER 19 MR DICKER: My Lord, briefly by way of reply. There is, 20 I think, a fundamental difference between Wentworth and 21 the Senior Creditor Group about what is involved when 22 you distribute the surplus. Ignoring for the moment the 23 specific issue in relation to interest, just dealing 24 generally with the concept of distribution of the 25 surplus, my learned friend's position, as I understand</p> <p style="text-align: center;">Page 44</p>

<p>1 it, is that it's done by reference to the rights in fact 2 applicable to the proved debt as at the date of 3 administration. He certainly says that's the position 4 in relation to interest. We say that's not right. It's 5 done by reference generally at least by rights as at the 6 date of distribution of the surplus. 7 We say that's always been the position. If one goes 8 back all the way to Bromley v Goodere and the analysis 9 of the position, there's no point prior to discharge in 10 distributing the surplus to the bankrupt if creditors 11 can probably sue the bankrupt for non-provable claims 12 which they have against him for whatever reason they're 13 non-provable. Lord Hardwicke said, "And discharge 14 doesn't affect that". 15 We say that's still the general position. One sees 16 that from your Lordship's own judgment in TNM. 17 What my learned friend says is you start 18 effectively -- you start and stop with Dynamics and the 19 principle of notional distribution, collection and 20 distribution on day one and effectively that is then 21 determinative. That's why everything, all rights are 22 ascertained and fixed as at the date of administration. 23 Now, we say that principle applies in the context of 24 the process of collective enforcement for the purposes 25 of payment of proved debts. It's not how the court</p> <p style="text-align: center;">Page 45</p>	<p>1 policy, including most obviously members last. 2 Otherwise one has a situation in which, by the time the 3 surplus is distributed, creditors are on any basis 4 entitled to whatever right may be -- it doesn't 5 matter -- against the company, those rights are 6 effectively, on Wentworth's submission, extinguished and 7 the surplus distributed to the members. 8 Now, my learned friend's submission then in this 9 respect has an echo of his submission in relation to 10 section 69 of the 1883 Act. Your Lordship may remember 11 that referring to payment in full with interest. 12 MR JUSTICE DAVID RICHARDS: Yes. 13 MR DICKER: In accordance with this Act. 14 MR JUSTICE DAVID RICHARDS: Yes. 15 MR DICKER: My Lord, your Lordship knows that our submission 16 is that payment in full has always meant payment in 17 full, not merely of proved debts but of all debts. My 18 learned friend's submission effectively that in 1883 the 19 meaning of that phrase changed so that it no longer 20 meant payment in full of all debts, it meant payment in 21 full of proved debts plus interest. That's how he gets 22 his construction argument on 1883 going, but, my Lord, 23 that argument, we say, is wrong in relation to 1883 and 24 has never been an argument that has been applied 25 anywhere else. It's not or is not applicable beforehand</p> <p style="text-align: center;">Page 47</p>
<p>1 approaches matters when the company turns out to be 2 solvent. The clearest indication of that, can I just 3 show your Lordship reflected in the judgment in find 4 industrial, which your Lordship has at bundle 1B, 5 tab 76. 6 MR JUSTICE DAVID RICHARDS: Yes. 7 MR DICKER: My Lord, it's Mr Justice Vaisey's judgment, as 8 your Lordship knows, cited with approval by 9 Vice Chancellor Pennycuik in Rolls-Royce. The passage 10 I want to show your Lordship, often referred to, is at 11 page 262 from Mr Justice Vaisey's judgment. It's two 12 short passages. The first in the first full paragraph, 13 about eight lines -- six lines down, he starts by 14 saying: 15 "Although for some purposes during the winding-up 16 proceedings ..." 17 Does your Lordship have that? 18 MR JUSTICE DAVID RICHARDS: Yes, thank you. 19 MR DICKER: "Although for some purposes during the 20 winding-up proceedings this company must have been 21 deemed ...(reading to the words)... but to be winding up 22 a company which is solvent." 23 We say that this approach, effectively looking at 24 the rights as at the date of distribution of the 25 surplus, is entirely in accordance with principle and</p> <p style="text-align: center;">Page 46</p>	<p>1 and it's not applicable in relation to the 1986 Act. 2 So we say the starting point, before you get to 3 interest, the feature of the statutory scheme which one 4 has to bear in mind is the idea that you're distributing 5 the surplus by reference to rights which exist at the 6 date of distribution of the surplus. Once you have 7 dealt with all of those, the shareholders only get the 8 residue. 9 So that's -- 10 MR JUSTICE DAVID RICHARDS: I mean, one way of looking at it 11 though is to say that statutory interest doesn't fall 12 within that area of non-provable claims but actually the 13 surplus you're talking about is not truly a surplus. 14 It's simply a surplus over proved debts and then you 15 apply what you then have in paying statutory interest on 16 proved debts. We haven't yet got to the position of 17 non-provable claims. 18 MR DICKER: No, my Lord, that's absolutely right and that's 19 why I said one has to start, as it were, with the way in 20 which the scheme works in general. We say if one then 21 focuses in on, as your Lordship has just done, in 22 relation to interest, what is the position in relation 23 to that? Does it reflect this general approach or does 24 it provide for something different? 25 MR JUSTICE DAVID RICHARDS: Yes.</p> <p style="text-align: center;">Page 48</p>

<p>1 MR DICKER: Now, so far as the wording of the rule is 2 concerned, we made the submission that the rule simply 3 refers to the rate applicable to the debt, apart from 4 the administration. There's nothing in the terms of the 5 rules which say you have to look at the rate as at the 6 date of administration. 7 MR JUSTICE DAVID RICHARDS: Right. 8 MR DICKER: Or anything of that sort. It's essentially just 9 saying what was the rate applicable to the debt, apart 10 from the administration? If you leave the 11 administration aside, treat the company as if it was, is 12 and always was solvent, what's the rate applicable? 13 What is the relevance, we ask, of the date of 14 administration in that context, echoing a point 15 your Lordship made yesterday? The hypothetical which 16 the rule envisages, at least envisages ignoring the 17 administration because it's the rate applicable, apart 18 from the administration. 19 Now, to take -- ignore for the moment foreign 20 judgments. Take a simpler case. Consider the following 21 example: a creditor has a claim against a company and 22 doesn't carry interest as a matter of contract. The day 23 after administration the legislature passes an Act, 24 let's call it the Late Payment of Commercial Debts Act, 25 which says every creditor with an unpaid debt, which is</p> <p style="text-align: center;">Page 49</p>	<p>1 MR DICKER: The answer is not necessarily because it depends 2 on the construction of the rules. 3 MR JUSTICE DAVID RICHARDS: Yes. 4 MR DICKER: My point, as I say, is one has to construe the 5 rules in context and one of the overarching features of 6 the statutory scheme is this idea of members last, 7 therefore distribution of the surplus by reference to 8 rights as at that date, that you would expect to 9 encompass the example I've just given, the statute 10 giving creditors a right -- 11 MR JUSTICE DAVID RICHARDS: But not necessarily -- I mean 12 what -- the point I'm focusing on is we're looking here 13 at 2.88 and what that intended to confer, not what 14 should be taken care of before the final surplus is 15 distributed to shareholders. 16 MR DICKER: My Lord is absolutely right, but our submission 17 is when one comes to 2.88(9) is there anything in the 18 wording of that rule which requires your Lordship to 19 produce a result different from the result you would 20 expect to apply; in other words, the result which would 21 ensure creditors are satisfied in full before any 22 distribution is made to shareholders. 23 Now, if -- 24 MR JUSTICE DAVID RICHARDS: I see the way you've put it. 25 MR DICKER: So one starts, as it were, with the general</p> <p style="text-align: center;">Page 51</p>
<p>1 unpaid for longer than 30 days, has a right to interest 2 on that date -- on that debt as at the following rate. 3 MR JUSTICE DAVID RICHARDS: Yes. 4 MR DICKER: Now, if one just looks at the wording of 5 2.88(9), the rate applicable to the debt, apart from the 6 administration, why wouldn't it include that statutory 7 right? 8 MR JUSTICE DAVID RICHARDS: We assume that that's not 9 a retrospective piece of legislation, but it operates 10 from the date it comes into force which is the day after 11 administration. 12 MR DICKER: Correct. Why shouldn't creditors be entitled to 13 the benefit of that right, given to them by statute, 14 merely because they had previously gone into 15 administration in circumstances where it turns out the 16 company is solvent and one should treat the company, at 17 least ignoring interest, one should treat the company as 18 if it was, is and was always solvent? 19 MR JUSTICE DAVID RICHARDS: Is that quite right then, 20 Mr Dicker? Are we treating the company as if it was and 21 always is solvent when we're talking about paying 22 statutory interest? 23 MR DICKER: My Lord -- 24 MR JUSTICE DAVID RICHARDS: Because that's what we're 25 focusing on at the moment.</p> <p style="text-align: center;">Page 50</p>	<p>1 insolvency scheme, the underlying features, as 2 Lord Walker and Lord Neuberger referred to it, and 3 you -- as with every part of this Act, you have to -- in 4 our submission, you have to construe the rules bearing 5 those features in mind. The question then is: is there 6 anything in 2.88(9) that prevent you from doing that? 7 We say "no". There might have been if the rule had said 8 it's the rate applicable to the debt as at the date of 9 administration, but it doesn't say that. It just speaks 10 generally about the rate applicable, apart from the 11 administration. 12 MR JUSTICE DAVID RICHARDS: Yes. 13 MR DICKER: My Lord, there's a further point and a different 14 way of attacking my learned friend's submissions. My 15 learned friend's starting point, as I understand it, is 16 you have to look at the rights attached as at the date 17 of administration. So let's just assume he's right 18 about that for the moment. We say he's not, but let's 19 assume that he's right about that. Where does one then 20 go? Take an example of a contract. You have 21 a provision in a contract entitling you to interest 22 conditional on, let's just say, commencing arbitration 23 proceedings and the exercise of a discretion by the 24 arbitrator in the event he finds in your favour that you 25 should receive interest. My learned friend would accept</p> <p style="text-align: center;">Page 52</p>

<p>1 that those rights were sufficiently attached by the date 2 of administration. 3 MR JUSTICE DAVID RICHARDS: That's right. I accept that. 4 Think about it. Carry on, Mr Dicker. 5 MR DICKER: Now, one then says in exactly the same way as we 6 argued it in Nortel, what is the difference between that 7 and a right pursuant to statute effectively in identical 8 terms? So the statute says you imagine a contractual 9 provision that says in the event you commence 10 proceedings and the Tribunal decides as a matter of 11 discretion that you should be entitled to interest, you 12 will receive interest. Imagine that text cut and pasted 13 into a statute applicable effectively to anyone. The 14 source of the right can't matter, so why isn't the 15 creditor entitled to say, using my learned friend's 16 approach, I have a sufficient right, as at the date of 17 administration; there is this statutory provision which 18 says in certain circumstances I'm entitled to interest. 19 In the contractual case you don't have to go on and get 20 your arbitration award, et cetera, that's all taken care 21 of during the scheme. Why is it any different in 22 relation to the statutory provision? 23 That logically takes one, in our submission, to the 24 salami-slicing exercise. Imagine a creditor who had 25 actually commenced proceedings beforehand, doesn't get</p> <p style="text-align: center;">Page 53</p>	<p>1 a fund available for statutory interest but not 2 a sufficient fund to pay all the statutory interest. 3 MR DICKER: Yes. At that point one goes back and says, 4 "Okay, this is one situation which plainly has to be 5 grappled with, it's a situation where there is a surplus 6 for shareholders", and we say it's dealt with in this 7 way. It doesn't matter whether you get your right only 8 afterwards. It certainly doesn't matter if you had an 9 attached right in the way my learned friend described it 10 beforehand. That's then effectively embodied in the 11 language of 2.88(9). There's no reference to the date 12 of administration being the cut-off date. 13 MR JUSTICE DAVID RICHARDS: Yes. 14 MR DICKER: Having got that, your Lordship is absolutely 15 right, there is an intervening category, but the effect 16 of that construction of the rules is simply that in that 17 intermediate category the creditor is entitled to 18 interest in accordance with the judgment he only 19 obtained afterwards, even in that situation, because 20 that's what the rules provide. 21 Now, my learned friend had a series of submissions 22 on the relevance of the previous law. Your Lordship 23 might simply note the, if I may say so, different 24 approach to the relevance of the previous law in 25 relation to this issue so far as Wentworth is concerned</p> <p style="text-align: center;">Page 55</p>
<p>1 judgment until afterwards. My learned friend, as 2 I understand it, assuming that my logic so far is 3 correct, should accept that that creditor has 4 a sufficiently attached right to interest pursuant to 5 his judgment because he commenced proceedings 6 beforehand. Now, why should the draughtsman have 7 intended to benefit only those who commenced proceedings 8 beforehand? The statute gives you a right, we're 9 assuming, to interest. We're dealing with a solvent 10 company. Whether you commence proceedings before or 11 after the administration date is effectively an 12 irrelevancy in this situation. 13 MR JUSTICE DAVID RICHARDS: We're not necessarily dealing 14 with a solvent company because the company may have 15 insufficient assets to paid full amount of statutory 16 interest. 17 MR DICKER: Well, we're -- 18 MR JUSTICE DAVID RICHARDS: So I think it's important to 19 bear that in mind. 20 MR DICKER: That's true. I think, as we understand it -- 21 well, my Lord, I can't go any further. 22 MR JUSTICE DAVID RICHARDS: Obviously we have to approach 23 these issues, at it were, on the basis that it would be 24 possible. It may not be the case with Lehmans but 25 possibly in the cases of other companies that there is</p> <p style="text-align: center;">Page 54</p>	<p>1 compared to question 2. Plainly the law's previous 2 position is relevant. We say it supports our case here 3 because one goes back, as I say, to the fundamental 4 principles and the features of the scheme. 5 The final point I had by way of reply, was this, 6 just one specific question I think from your Lordship 7 which my learned friend answered. What date does the 8 date of interest run from? Now, we say logically if the 9 effect of the rules was only to provide that a creditor 10 with an actual judgment was entitled to rely on that 11 judgment as the rate applicable, then logically that 12 rate would only apply from the date he in fact obtained 13 the judgment. 14 As your Lordship knows, that intermediate 15 possibility isn't one for which either side advocates. 16 Wentworth say you never get there because there's 17 a cut-off date at the date of administration. We say 18 you go far past that because the wording of the rules is 19 such it doesn't matter whether you get a judgment at 20 all. It's on that second -- if we're right on our 21 primary position, and it doesn't matter whether you get 22 a judgment at all, we say the logic therefore must be 23 that in that situation the rate runs from the date of 24 administration. The logic for that would be the 25 moratorium has in practice prevented you from obtaining</p> <p style="text-align: center;">Page 56</p>

<p>1 a judgment. You should be treated as if you had 2 obtained a judgment on the date of administration. 3 MR JUSTICE DAVID RICHARDS: Is that the real issue on issue 4 4, question 4, the point you've outlined? You say it's 5 not -- I just want to understand whether in this case 6 the question -- you have a sort of three possible 7 positions. Mr Zacaroli's position, your position and 8 the one in the middle. 9 MR DICKER: Yes. 10 MR JUSTICE DAVID RICHARDS: But I think what you're telling 11 me, that really no one is contending for the one in the 12 middle, by which I mean where a judgment is in fact 13 obtained after administration, such judgment carrying 14 a higher interest rate. 15 MR DICKER: My Lord, as I submitted in opening, it's not our 16 primary case. We do submit that, however, if a judgment 17 is obtained a creditor would be entitled -- 18 MR JUSTICE DAVID RICHARDS: Yes. I mean, that's a necessary 19 stepping stone in your principal submission, it seems to 20 me. 21 MR DICKER: It's not -- I'm not sure it's a necessary 22 stepping stone because, as I say, if one comes at it 23 from what I call the overarching principle, but it's 24 certainly part of that submission. 25 My Lord, the --</p> <p style="text-align: center;">Page 57</p>	<p>1 The second -- 2 MR JUSTICE DAVID RICHARDS: Which rights are you referring 3 to there? 4 MR DICKER: The right to interest, in this case pursuant to 5 a judgment. 6 MR JUSTICE DAVID RICHARDS: An actual judgment? 7 MR DICKER: Yes. 8 MR JUSTICE DAVID RICHARDS: I follow. 9 MR DICKER: The second argument, which is a different 10 argument, is effectively to adopt my learned friend's 11 approach. Assume he's right and what one is looking for 12 is rights attached prior to the date of administration, 13 effectively applying the Nortel line, applying the 14 argument that why should it matter whether or not the 15 right exists in a contract or is simply given to you as 16 a matter of statute, if that's sufficient that is 17 another way of establishing an actual right prior to 18 distribution. 19 Those two arguments only apply -- the first argument 20 requires an actual judgment prior to distribution. 21 MR JUSTICE DAVID RICHARDS: Right. 22 MR DICKER: The second argument requires some notion of 23 attached rights prior to the date of administration, but 24 doesn't require an actual judgment. 25 MR JUSTICE DAVID RICHARDS: The attached right being the</p> <p style="text-align: center;">Page 59</p>
<p>1 MR JUSTICE DAVID RICHARDS: Your overarching approach is to 2 sort of use Nortel to say, well, there is -- I don't 3 quite know how you get to it without using the 4 intermediate position as a stepping stone. 5 MR DICKER: My Lord, essentially we have two arguments. 6 My first one was that you look at rights as at the 7 date of distribution. That's how -- and that general 8 approach is reflected in rule 2.88(9). That's the first 9 point. So it doesn't matter whether or not you can 10 apply a Nortel analysis at all. It's a little like the 11 TNM situation. You acquire a right -- 12 MR JUSTICE DAVID RICHARDS: I don't want to sound stupid 13 here, but if at date of distribution you do not have 14 a foreign judgment giving you a higher rate of interest, 15 what's the basis for saying -- 16 MR DICKER: No, your Lordship is right, if that's where the 17 point goes, absolutely. 18 MR JUSTICE DAVID RICHARDS: I'm trying to understand how -- 19 MR DICKER: Well, my Lord, two different arguments. One is 20 you look at rights as at the date of distribution. 21 MR JUSTICE DAVID RICHARDS: All right. 22 MR DICKER: TNM, an example, we say nothing in the rules 23 relating to interest inconsistent with that. That's 24 focusing simply on whether the rights have accrued by 25 the date of distribution. That's the first argument.</p> <p style="text-align: center;">Page 58</p>	<p>1 fact that you have submitted to the jurisdiction of the 2 New York courts and you could have commenced proceedings 3 there and obtained a judgment? 4 MR DICKER: Yes. Looked at from the other way round, there 5 is a New York statute which as a matter of New York law 6 gives you a right to interest conditional on commencing 7 proceedings and obtaining a judgment, just as -- 8 MR JUSTICE DAVID RICHARDS: I am still having difficulty 9 with this. If there isn't actually a judgment. I mean, 10 Nortel doesn't help you. 11 MR DICKER: Well, my Lord, with respect, Nortel in our 12 submission does. Because one of the points in Nortel is 13 go back to the distinction between contractual and 14 statutory rights. You have -- it's very easy in the 15 case of a contract -- 16 MR JUSTICE DAVID RICHARDS: Sorry, let me interrupt you. 17 Why I said that was in Nortel there was a contribution 18 notice; there was no suggestion the pension regulator or 19 whoever could prove for the amount of a contribution 20 notice if there hadn't been fact been one. 21 MR DICKER: No, and one has to identify what it is that is 22 necessary to trigger the attached rights for these 23 purposes and it may be one says the commencement of the 24 proceedings. 25 MR JUSTICE DAVID RICHARDS: Your argument doesn't depend on</p> <p style="text-align: center;">Page 60</p>

<p>1 the commencement of proceedings. Your argument depends 2 on an entitlement to commence proceedings, whether or 3 not it's exercised. 4 MR DICKER: That's right, but one gets to that, as I say, 5 that's why I used the expression of salami-slicing and 6 what did the legislature contend. On my learned 7 friend's approach -- there may be an argument about 8 quite how much you have to do in New York before you get 9 this -- before as a matter of New York law you're 10 regarded as having a right to interest, albeit 11 conditional. Let's just take the analogy with the costs 12 cases. 13 Assume that what you need to do is effectively have 14 commenced proceedings in New York. So you don't 15 actually have a judgment at all at this stage. You 16 simply have commenced proceedings. 17 MR JUSTICE DAVID RICHARDS: No. 18 MR DICKER: On my learned friend's logic, as we say, that 19 should be sufficient. That's where the argument arises. 20 Why in the context of a surplus should it matter whether 21 you commence proceedings beforehand if you haven't yet 22 obtained a judgment and only did so afterwards as 23 against obtaining -- commencing proceedings after and 24 getting a judgment after? In other words, what is the 25 centrality of the date of administration?</p> <p style="text-align: center;">Page 61</p>	<p>1 be distributed to shareholders, to members, you, the 2 creditor, have not got a New York judgment entitling you 3 to a higher rate of interest, you wouldn't be able to 4 stop that distribution. 5 MR DICKER: No, and that's absolutely right. So one then 6 needs the final part of the argument, which is if one 7 accepts that a creditor who obtains a judgment 8 post-administration would be entitled to interest at 9 that judgment rate before the surplus is distributed, 10 one then asks, okay, assuming the draughtsman recognised 11 that possibility, how did he intend that it should be 12 dealt with? Did he intend that only creditors who in 13 fact obtained a judgment before distribution should be 14 entitled to interest or did he think to himself, "That 15 doesn't make any sense at all, all I will be doing is 16 encouraging creditors to commence proceedings and to 17 obtain judgment. I run the risk that some only may 18 manage to get judgment, for whatever reason, so I run 19 the risk of creditors being treated unequally. Wouldn't 20 it be much more sensible simply to have a rule which 21 operated equally for all creditors, whether or not they 22 had in fact commenced a judgment?" At that point the 23 draughtsman says to himself, "I think that's the 24 sensible solution" and he therefore drafted rule, 25 2.88(9), in a way that would enable that to occur by</p> <p style="text-align: center;">Page 63</p>
<p>1 MR JUSTICE DAVID RICHARDS: Hold on. In both of those 2 examples you're postulating that there are actual 3 proceedings. 4 MR DICKER: That's the next stage in the argument, yes. 5 MR JUSTICE DAVID RICHARDS: Well, what you just gave me 6 there you postulated proceedings commenced either before 7 or after the commencement of the administration. As 8 I understand it, your principal submission here is it 9 doesn't matter whether in fact there are any proceedings 10 or not. 11 MR DICKER: Correct. That's because for the simple reason 12 that if one gets to a stage of finding that a creditor 13 in one of these intermediate situations is plainly 14 entitled to interest at his judgment rate, one then has 15 to ask, in our submission, how the legislature intended 16 to deal with that possibility when drafting 2.88(9). 17 MR JUSTICE DAVID RICHARDS: Pause there. I understand the 18 argument, but it's an argument that turns exclusively on 19 the drafting of 2.88. It's not an argument that in any 20 sense depends on how you distribute a surplus before you 21 hand it back to shareholders. 22 MR DICKER: My Lord, it ultimately depends on the 23 construction of 2.88(9). 24 MR JUSTICE DAVID RICHARDS: Just to repeat my point to you 25 if you had -- at the point at which the fund is about to</p> <p style="text-align: center;">Page 62</p>	<p>1 effectively asking for a counter-factual question to be 2 answered. 3 MR JUSTICE DAVID RICHARDS: To some extent that is exactly 4 what rule 2.88 does because it imposes 8 per cent -- 5 sorry, it imposes Judgments Act rate. 6 MR DICKER: My Lord, absolutely, and that's what we say -- 7 in a sense that is a mirror of what we say the 8 draughtsman achieved in relation to foreign judgments. 9 So he's asking -- 10 MR JUSTICE DAVID RICHARDS: Okay. I understand. So just 11 coming back to my question. Nobody -- it's right, is 12 it -- I'm not quite clear, Mr Dicker. Are you arguing 13 in the alternative for the intermediate position? 14 Supposing you're wrong on your main submission -- just 15 supposing, that's all -- are you -- because I need to 16 know what is arising for decision, are you submitting 17 that the intermediate position is nonetheless correct or 18 is it simply not really an issue that arises in Lehman's, 19 so no one is really bothered? 20 MR DICKER: The intermediate situation, as I understand it, 21 does presently arise in at least one case. Mr Lomas's 22 eleventh statement, paragraph 26, refers to 23 a post-administration judgment by a creditor in Milan. 24 That's only example that -- 25 MR JUSTICE DAVID RICHARDS: Would that give him a rate of</p> <p style="text-align: center;">Page 64</p>



<p>1 interest which is higher than 8 per cent?</p> <p>2 MR DICKER: My Lord, that's --</p> <p>3 MR JUSTICE DAVID RICHARDS: It would only be then that it</p> <p>4 mattered.</p> <p>5 MR DICKER: That's obviously of no benefit, certainly so far</p> <p>6 as my clients were concerned, because I'm assuming they</p> <p>7 weren't the creditor in Milan.</p> <p>8 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>9 MR DICKER: My Lord, judgments obtained to date --</p> <p>10 MR JUSTICE DAVID RICHARDS: That's right, yes. Judgments</p> <p>11 obtained to date, yes.</p> <p>12 MR DICKER: Because if your Lordship were to hold</p> <p>13 effectively it would be good enough if you had</p> <p>14 a judgment --</p> <p>15 MR JUSTICE DAVID RICHARDS: I can see what going to happen</p> <p>16 in New York, but, I mean, that might be a very good</p> <p>17 reason for not deciding it, if it doesn't actually arise</p> <p>18 for decision today, or maybe it would be a very good</p> <p>19 reason for deciding it; I don't know. I'm just a little</p> <p>20 unclear about this, that's all. I just -- it may be</p> <p>21 that it will fall to Mr Trower to define what it is</p> <p>22 I have to decide on issue 4. I think you and I have</p> <p>23 probably taken it as far as we can.</p> <p>24 MR DICKER: My Lord, just to stress that last point. We do,</p> <p>25 therefore, contend in the alternative for the</p> <p style="text-align: center;">Page 65</p>	<p>1 debts. Question 8 with future debts. It's easiest to</p> <p>2 deal with those first and then deal with question 6.</p> <p>3 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>4 MR DICKER: As your Lordship knows, the issue is in whether</p> <p>5 in relation to such debts interest is calculated from</p> <p>6 the date of administration or the date that the</p> <p>7 contingent debts ceased to be subject to a contingency</p> <p>8 and future debt became due and payable, or some other</p> <p>9 date.</p> <p>10 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>11 MR DICKER: My Lord, this is ultimately a question of</p> <p>12 construction of rule 2.88(7), in particular the phrase</p> <p>13 or the requirement that "surplus be applied in paying</p> <p>14 interest on those debts in respect of the periods during</p> <p>15 which they have been outstanding since the relevant</p> <p>16 date".</p> <p>17 My Lord, in what may be called an easy case, the</p> <p>18 answer is obvious. If the debt was due and payable as</p> <p>19 at the date of administration, then of course interest</p> <p>20 is payable from that date. The question is how those</p> <p>21 rules were intended to apply to contingent and future</p> <p>22 claims.</p> <p>23 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>24 MR DICKER: We say one can't answer that question without</p> <p>25 first having regard to the nature of the statutory</p> <p style="text-align: center;">Page 67</p>
<p>1 intermediate case and the consequence of that may be</p> <p>2 unsatisfactory.</p> <p>3 MR JUSTICE DAVID RICHARDS: I follow.</p> <p>4 MR DICKER: Ultimately for everyone.</p> <p>5 MR JUSTICE DAVID RICHARDS: I follow, yes. All right. This</p> <p>6 might be -- Mr Dicker, does that actually complete your</p> <p>7 reply submissions?</p> <p>8 MR DICKER: Yes.</p> <p>9 MR JUSTICE DAVID RICHARDS: I interrupted you --</p> <p>10 MR DICKER: No, I should have said it does before sitting</p> <p>11 down.</p> <p>12 MR JUSTICE DAVID RICHARDS: No, don't worry. I'll take the</p> <p>13 five-minute break now.</p> <p>14 (11.35 am)</p> <p>15 (Short break)</p> <p>16 (11.42 am)</p> <p>17 Submissions by MR DICKER</p> <p>18 MR JUSTICE DAVID RICHARDS: Mr Dicker.</p> <p>19 MR DICKER: My Lord, questions 6 to 8.</p> <p>20 MR JUSTICE DAVID RICHARDS: Yes. Mr Smith, I took it there</p> <p>21 was nothing you wanted to say?</p> <p>22 MR SMITH: Nothing in reply, my Lord.</p> <p>23 MR DICKER: My Lord, questions 6 to 8 are concerned with the</p> <p>24 date from which interest under rule 2.88(8) and (9) is</p> <p>25 calculated. Question 7 is concerned with contingent</p> <p style="text-align: center;">Page 66</p>	<p>1 scheme and also the effect of the statutory scheme on</p> <p>2 those claims.</p> <p>3 Now, the Senior Creditor Group and York submit that</p> <p>4 in both cases interest is calculated from the date of</p> <p>5 administration. That, they say, is the effect of</p> <p>6 2.88(7), particularly when that provision is construed</p> <p>7 in the light of the statutory regime and two aspects of</p> <p>8 that regime, firstly, that the liquidation and</p> <p>9 distribution of the assets are treated as notionally</p> <p>10 taking place on the commencement date and, secondly,</p> <p>11 that provable debts are ascertained and valued as at</p> <p>12 that date.</p> <p>13 In other words, we're not simply dealing with</p> <p>14 contingent or future debts in the same state in which</p> <p>15 they existed outside of insolvency. Something has</p> <p>16 happened to those debts, we say, as a result of the</p> <p>17 insolvency process. One need to answer the question</p> <p>18 having regard to what has happened.</p> <p>19 Now, Wentworth agrees with us in relation to future</p> <p>20 debts. Wentworth effectively says, well, given that</p> <p>21 rule 2.105 requires future debts to be discounted for</p> <p>22 the purposes of dividend to the date of administration</p> <p>23 to achieve a present value, it obviously follows that</p> <p>24 interest is then due from the date of administration.</p> <p>25 MR JUSTICE DAVID RICHARDS: Yes.</p> <p style="text-align: center;">Page 68</p>

<p>1 MR DICKER: Their position is it doesn't make sense to 2 discount something for present value and then refuse to 3 pay interest on it. 4 Wentworth disagree in relation to contingent claims 5 They say that the position in relation to contingent 6 claims is different. Interest only accrues on those 7 claims from the date that the contingency accrues. 8 The administrators' position is that they disagree 9 with us, both in relation to contingent and also in 10 relation to future debts. 11 MR JUSTICE DAVID RICHARDS: Right. 12 MR DICKER: So before turning to the construction of 13 2.88(7), I need to deal with the two aspects of the 14 statutory regime. The first concerns the notional 15 liquidation and distribution and the way that courts 16 analyse that. As your Lordship knows, the process of 17 collecting and distributing the assets of the company 18 treated as taking place on the commencement date, and 19 the debts which rank for proof are ascertained as at 20 that date. So the basic idea is that assets are 21 collected, claims are ascertained and distributions are 22 made as at the commencement date. 23 Put another way, the commencement date is the date 24 upon which creditors' claims are notionally enforced 25 through the collective process against the company's</p> <p style="text-align: center;">Page 69</p>	<p>1 between letter G and H. Just between letter G and H, 2 the sentence beginning: 3 "What the court is seeking to do in a winding up is 4 to ascertain the liabilities of the company at 5 a particular date and to distribute the available assets 6 as at that date pro rata according to the amounts of 7 those liabilities. In practice the process cannot be 8 immediate but notionally I think it is, and as it seems 9 to me it has to be treated as if it were, although 10 subsequent events can be taken into account in 11 quantifying what the liabilities were at the relevant 12 date. In the context of a liquidation therefore the 13 relevant date for the ascertainment of the amount of the 14 liability is the notional date of discharge of that 15 liability." 16 So one has at least this -- 17 MR JUSTICE DAVID RICHARDS: I see, yes. 18 MR DICKER: One has at least this image of a notional 19 collective enforcement, assets realised and applied in 20 discharge of debts -- one might add outstanding -- as at 21 that date. They are effectively at least notionally 22 treated as outstanding at that date and the assets 23 applied in discharge of them. 24 Now, that's simply the notional collection and 25 distribution, but we say that is then reflected in the</p> <p style="text-align: center;">Page 71</p>
<p>1 assets and the date on which their entitlement to 2 a share in those assets arises. 3 That, we say, necessarily involves at least 4 a notional acceleration of contingent and future claims. 5 They are at least notionally treated as outstanding from 6 that date. 7 My Lord, your Lordship is no doubt very familiar 8 with the various statements to this effect. Can I just 9 show your Lordship or remind your Lordship of one, 10 namely that in re Dynamics Corporation which 11 your Lordship has at bundle 1B, tab 85. 12 MR JUSTICE DAVID RICHARDS: Yes. 13 MR DICKER: The two passages are 761, just above letter D 14 where Mr Justice Oliver says, the second sentence: 15 "It is, of course, necessary in a liquidation, if 16 a proportionate distribution among creditors of the 17 available assets is to be achieved, that the claims of 18 all creditors be reduced at some stage to a common unit 19 of account. The point of time at which that should be 20 done had been concluded by a series of cases which 21 established that the conversion must be made at the date 22 when payment became due so that the sterling amount of 23 any claim was ascertainable either before or at the 24 latest upon the commencement of the winding up." 25 Then the well-known passage at 774, starting just</p> <p style="text-align: center;">Page 70</p>	<p>1 way in which the statutory scheme deals with contingent 2 and future debts. Starting, if I may, with contingent 3 debts. My Lord, as your Lordship knows, proof of debt 4 is required to state the value of the claim as at the 5 date on which the company entered administration. For 6 the purposes of administration, your Lordship will see 7 that reflected in rule 2.73 -- I am sorry, 8 2.72(3)(b)(ii): 9 "Proof must state the following matters: the total 10 amount of the creditors' claim as at the date on which 11 the company entered administration." 12 MR JUSTICE DAVID RICHARDS: Yes. 13 MR DICKER: That merely, as it were, codifies effectively 14 the cut-off date. 15 Now, for contingent claims that is achieved, again, 16 as your Lordship knows, by rule 2.81: 17 "The administrator shall estimate the value of any 18 debt which by reason of its being subject to any 19 contingency or for any other reason does not bear 20 a certain value and he may revise any estimate 21 previously made ..." 22 Sub-rule 2: 23 "Where the value of a debt is estimated under this 24 rule, the amount provable in the administration in the 25 a case of that date is that of the estimate at the time</p> <p style="text-align: center;">Page 72</p>

<p>1 being."</p> <p>2 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>3 MR DICKER: We say the process of estimation requires an</p> <p>4 administrator to place a present value as at the date of</p> <p>5 administration on uncertain future claims. That's</p> <p>6 necessary to enable the company's assets to be</p> <p>7 distributed pari passu amongst its creditors.</p> <p>8 Now, a contingent claim is a claim which may or may</p> <p>9 not become due and payable in the future depending on</p> <p>10 whether or not one or more contingencies occur.</p> <p>11 Therefore, as a matter of principal, when you're</p> <p>12 estimating its value, there are essentially two parts --</p> <p>13 estimating its present value, there are essentially two</p> <p>14 parts one has to take into account. Firstly, the</p> <p>15 likelihood of the contingency occurring and the fact</p> <p>16 that, if it does occur, debt will only be payable in the</p> <p>17 future.</p> <p>18 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>19 MR DICKER: You need to do that to make a just estimate of</p> <p>20 the value of the claim so as to ensure the assets are</p> <p>21 distributed pari passu.</p> <p>22 We say, if that's right, then, as Wentworth accept</p> <p>23 in relation to future claims, the process of present --</p> <p>24 of estimating the present value of a contingent debt</p> <p>25 necessarily involves treating it as outstanding. It</p> <p style="text-align: center;">Page 73</p>	<p>1 ...(reading to the words)... the holder of the claims,</p> <p>2 will be entitled to rank among the rest of the</p> <p>3 creditors."</p> <p>4 So basic stuff. Present value, both for contingent</p> <p>5 and for future claims.</p> <p>6 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>7 MR DICKER: He concludes, page 71, column 1, ten lines from</p> <p>8 the end of the first paragraph, in the middle column:</p> <p>9 "I have no hesitation therefore from adhering to the</p> <p>10 rule laid down by the statute and followed by</p> <p>11 Lord Cairns and I declare that every policy and every</p> <p>12 annuity shall be admissible to proof in this</p> <p>13 administration according to the value of the policy and</p> <p>14 the annuity as at the date of the order to wind up."</p> <p>15 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>16 MR DICKER: My Lord, fairly basic stuff, we would say,</p> <p>17 reflected, although more briefly, in a number of more</p> <p>18 recent cases. Can I just give your Lordship three</p> <p>19 examples. The first is Danka Business Systems at first</p> <p>20 instance, which is 1B, tab 158. It's tab 158 and the</p> <p>21 relevant paragraph is paragraph 40.</p> <p>22 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>23 MR DICKER: It starts:</p> <p>24 "In summary therefore the position is as</p> <p>25 follows: the members of a company are entitled to place</p> <p style="text-align: center;">Page 75</p>
<p>1 doesn't make sense to give a debt a present value, save</p> <p>2 on the basis that you are going to treat it as if it was</p> <p>3 being paid on that date, payable on that date and</p> <p>4 therefore should accrue interest from that date.</p> <p>5 Now, in our submission this is precisely what the</p> <p>6 authorities provide. Can I show your Lordship, firstly,</p> <p>7 European Assurance Society Arbitration. It's bundle 1A,</p> <p>8 tab 36. My Lord, the case concerned valuations of</p> <p>9 policies or annuities. The judgment is given by</p> <p>10 Lord Westbury. Your Lordship will see it starts at</p> <p>11 page 70, at the bottom of column 1.</p> <p>12 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>13 MR DICKER: He says:</p> <p>14 "In this case I have to decide two points, one as to</p> <p>15 the time and the valuation ...(reading to the words)...</p> <p>16 wherein some indefinite enactments may probably be</p> <p>17 attributed to the existence of that doubt."</p> <p>18 Then he effectively says, well, of course you value</p> <p>19 it as at the date of commencement of the liquidation.</p> <p>20 He goes on:</p> <p>21 "If you examine the subject I think it will be</p> <p>22 admitted at once ...(reading to the words)... these are</p> <p>23 claims to arise as is the case of annuities from time to</p> <p>24 time in future [so some of them are future]. In the</p> <p>25 case of policies they are contingent claims arising</p> <p style="text-align: center;">Page 74</p>	<p>1 their ...(reading to the words)... with an uncertain</p> <p>2 value rules 4.86 applies."</p> <p>3 Then dropping to the last six lines of that</p> <p>4 paragraph to the sentence that's relevant, it says:</p> <p>5 "The statutory scheme has been designed to place</p> <p>6 a present value on uncertain future claims in order to</p> <p>7 enable the liquidation process to be brought to a speedy</p> <p>8 conclusion."</p> <p>9 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>10 MR DICKER: So, again, we say fairly basic stuff.</p> <p>11 Contingent claims which may or may not fall due in the</p> <p>12 future, when you presently value them you need to take</p> <p>13 into account both the likelihood of the contingency, and</p> <p>14 the fact, if it does occur, it will only be payable in</p> <p>15 the future.</p> <p>16 My Lord, two other references. First, from</p> <p>17 your Lordship's judgment in MF Global. The same bundle,</p> <p>18 tab 161.</p> <p>19 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>20 MR DICKER: The relevant paragraph is paragraph 54 on</p> <p>21 page 1044.</p> <p>22 MR JUSTICE DAVID RICHARDS: 54?</p> <p>23 MR DICKER: 54.</p> <p>24 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>25 MR DICKER: It reads:</p> <p style="text-align: center;">Page 76</p>

<p>1 "It is relevant to emphasise a feature of the 2 hindsight principle which is of particular significance 3 to the present case ...(reading to the words)... which 4 is unascertained at the relevant future date." 5 Then your Lordship says this: 6 "It is essentially a process of putting a present 7 value on possible future events or outcomes." 8 The third and final reference on this point in the 9 authorities is to your Lordship's judgment and 10 Waterfall 1, tab 167. 11 MR JUSTICE DAVID RICHARDS: Yes. 12 MR DICKER: It's paragraph 77, just above letter E, where 13 your Lordship says, just above the letter E: 14 "In order to bring administrations and liquidations 15 to a conclusion as quickly as practical ... future debts 16 are discounted ... the creditor receives the full 17 present value of the debt calculated provided by the 18 insolvency rules." 19 MR JUSTICE DAVID RICHARDS: Yes. 20 MR DICKER: My Lord, there's also a discussion in 21 Professor Goode's book, Principles of Corporate 22 Insolvency Law, which your Lordship has in bundle 2, 23 tab 6. 24 MR JUSTICE DAVID RICHARDS: Yes. 25 MR DICKER: The relevant paragraph is 4-39 --</p> <p style="text-align: center;">Page 77</p>	<p>1 accrue, whilst a liability with a 50 per cent chance of 2 accrual would be disregarded altogether." 3 Ignoring, as it were, the point he's discussing, 4 which is how you deal with whether -- the 80 per cent 5 versus the 50 per cent chance, there's the reference to 6 discounting to take account of its futurity. He says 7 that in line 4 and he repeats that in line 5. 8 MR JUSTICE DAVID RICHARDS: Yes. 9 MR DICKER: He discusses -- he then goes on, perhaps 10 I should read it: 11 "An alternative approach is to value the contingent 12 liability ...(reading to the words)... and is capable of 13 valuation and disregarded altogether in other cases." 14 My Lord, the point is embedded in a discussion of 15 a different point, but the one common theme here is 16 whatever approach one takes for contingent claims, you 17 discount them for futurity. The point Professor Goode 18 is then discussing, okay, ignore the discount for 19 futurity which he repeatedly says you have to make, how 20 do you estimate the likelihood of the contingency 21 happening? The point he's discussing here is whether, 22 if the contingency is just over 50 per cent, you admit 23 it in full, or if it's 80 per cent you admit it for 24 80 per cent. That's obviously not the point with which 25 your Lordship is concerned.</p> <p style="text-align: center;">Page 79</p>
<p>1 MR JUSTICE DAVID RICHARDS: Sorry, volume 2? 2 MR DICKER: Volume 2, tab 6. 3 MR JUSTICE DAVID RICHARDS: Thank you. It's 4- ...? 4 MR DICKER: 4-39. 5 MR JUSTICE DAVID RICHARDS: Yes. 6 MR DICKER: "Estimation of liabilities." 7 MR JUSTICE DAVID RICHARDS: Yes. 8 MR DICKER: Then there's a section dealing with how one 9 estimates liabilities, including a discussion about how 10 one deals with the fact that claims may be 80 per cent 11 likely if you estimate it on the basis they're 12 100 per cent likely or 80 per cent or, but I can ignore 13 that. 14 The passage I was going to show your Lordship starts 15 right at the bottom of 146, where Professor Goode 16 states: 17 "Different approaches are possible. One is to say 18 that if there is more than an even chance of the 19 contingency occurring, the liabilities should be taken 20 as the present value of the contingent liability, for 21 example the amount of a guaranteed debt discounted to 22 take account of its futurity. On this approach 23 a contingent liability with an 80 per cent chance of 24 accrual, although discounted for futurity, would not be 25 discounted for the 20 per cent chance that it would not</p> <p style="text-align: center;">Page 78</p>	<p>1 MR JUSTICE DAVID RICHARDS: I have a feeling this cropped up 2 a bit in Waterfall 1 or possibly MF Global. But 3 futurity is a difficult element with contingent 4 liabilities because it all depends on the contingent 5 liability. So that if you have your house insurance 6 which is an annual policy, the prospect of a fire 7 occurring in your house is probably statistically the 8 same as occurring tomorrow or at the end of the year. 9 It's very unlikely that futurity would play any part at 10 all in the estimation of the value of your claim. 11 Likewise, a guarantee of a debt which is either 12 presently payable or is payable on demand. That would 13 be the obvious example. Different of course if it's 14 a guarantee of a debt which does not fall due for 15 payment for five years. So whether futurity is an 16 element in the valuation of contingent liabilities very 17 much depends on the liability and could be quite 18 difficult sometimes, I think. 19 MR DICKER: My Lord, we agree with all of that. Our 20 submission is, however, that the process of estimation 21 for contingencies involve putting a present value. 22 MR JUSTICE DAVID RICHARDS: It undoubtedly does that, yes. 23 MR DICKER: Now, to the extent that the contingency 24 is -- the claim is contingent because it may or may not 25 fall due in the future, the process obviously involves</p> <p style="text-align: center;">Page 80</p>

<p>1 at least to the extent possible discounting for 2 futurity. 3 MR JUSTICE DAVID RICHARDS: I accept that. That seems 4 right. 5 MR DICKER: As your Lordship says, there may be cases in 6 which that's relatively straightforward, where one knows 7 that if the contingency occurs it's either going to 8 occur or not occur on a specific date or specific period 9 in the future. That's the easy case. Of course 10 your Lordship is right, it may be more difficult in 11 cases where the contingency may or may not occur equally 12 on any particular date. 13 MR JUSTICE DAVID RICHARDS: Yes. 14 MR DICKER: But that's the basic exercise which the rules 15 require. 16 MR JUSTICE DAVID RICHARDS: Yes. 17 MR DICKER: Now, just turning to Wentworth's approach. 18 Can I -- 19 MR JUSTICE DAVID RICHARDS: As you rightly say, it 20 doesn't -- it isn't an issue today, but is 21 Professor Goode right in what he says is the prevailing 22 practice? It comes as a bit of a surprise to me, I must 23 say. 24 MR DICKER: Yes. 25 MR JUSTICE DAVID RICHARDS: Take my example of the house</p> <p style="text-align: center;">Page 81</p>	<p>1 i.e. no rule which requires any discount to be made for 2 the time value of money or estimated value of the 3 contingent debt while it remains contingent." 4 MR JUSTICE DAVID RICHARDS: I see. 5 MR DICKER: So that's 162. 6 The other two paragraphs I need to show 7 your Lordship are 149 and 150. 8 MR JUSTICE DAVID RICHARDS: Yes. 9 MR DICKER: The other two paragraphs are 149 and 150 where 10 they say, at 149: 11 "The principal response of the SCG and York is that 12 the rules provide for all claims to be admitted at the 13 amount they bore as at the date of administration and 14 that in relation to contingent claims, this involves 15 'essentially a process of putting a present value on 16 possible future events or outcomes'. 17 150: 18 "Wentworth does not take issue with either of these 19 propositions, but contends that they are irrelevant to 20 the question of the date from which statutory interest 21 should run." 22 My Lord, I have to say we're not entirely clear on 23 Wentworth's position in relation to this. No doubt my 24 learned friend will explain it in due course. 25 So far as 162 is concerned, it's correct, of course,</p> <p style="text-align: center;">Page 83</p>
<p>1 policy. The simplest way of estimating the claim of the 2 insured is the cost of a replacement policy, but one 3 would hesitate to say that he had no claim at all 4 because the statistical chance of a fire was small. 5 Anyway, I am slightly puzzled by what Professor Goode 6 says there. 7 MR DICKER: And I -- your Lordship doesn't need to get into 8 that. 9 MR JUSTICE DAVID RICHARDS: But I don't need to get into 10 that. 11 MR DICKER: And I wasn't proposing to address your Lordship 12 on it. 13 MR JUSTICE DAVID RICHARDS: But, anyway, the point about 14 futurity certainly can arise. So there are two main 15 elements that arise with contingent liabilities: one is 16 the contingency, and the other is futurity. 17 MR DICKER: Absolutely. If you're estimating it, you have 18 to take both into account. 19 MR JUSTICE DAVID RICHARDS: Yes. 20 MR DICKER: Now, Wentworth's position on this, if I can just 21 show your Lordship its skeleton argument, is contained 22 in two paragraphs or at two points. The first is 23 paragraph 162. So at 162 they say: 24 "There is no equivalent to rule 2.105 [that's the 25 rule dealing with future debts] for contingent debts,</p> <p style="text-align: center;">Page 82</p>	<p>1 that there is no specific provision containing 2 a statutory discount formula for contingent debts as 3 there is for future debts, but we say that's built into 4 the estimation process required by rule 2.81. As your 5 Lordship just observed, there are two aspects to 6 a contingent claim and in estimating its present value 7 you need to take account of both. 8 Your Lordship raised a couple of minutes ago the 9 point that when you initially estimate a contingent 10 debt, it may or may not, depending on the facts, be easy 11 to estimate what discount you give for futurity. In 12 some cases it may be easy if the debt is contingent on 13 an event which will happen on a specific date, not in 14 other circumstances. So the question then arises, what 15 happens if and when the contingency occurs? Your 16 Lordship knows from rule 2.81, the passage I read, that 17 the administrator may revise any estimate previously 18 made if he thinks fit by reference to any change of 19 circumstances or to information becoming available to 20 him, she shall inform creditor as to his estimate and 21 any revision of it. 22 MR JUSTICE DAVID RICHARDS: Yes. 23 MR DICKER: Then effectively that becomes the new estimate 24 for the purposes of 2.81(2). 25 We say the object of this exercise is exactly the</p> <p style="text-align: center;">Page 84</p>

<p>1 same. The only difference is that it's conducted with 2 the benefit of hindsight. You are estimating the 3 present value of the debt as at the date of 4 administration with the value -- with the benefit of 5 hindsight.</p> <p>6 But taking your Lordship back, if you will forgive 7 me, to your Lordship's own judgment in MF Global, 1E, 8 tab 161, paragraph 48 and paragraph 51. My Lord, in 9 paragraph 48 --</p> <p>10 MR JUSTICE DAVID RICHARDS: Shall I just read it to myself? 11 MR DICKER: If your Lordship would, 48 and 51. 12 MR JUSTICE DAVID RICHARDS: Yes. (Pause) 13 Yes.</p> <p>14 MR DICKER: My Lord, I just emphasise, if I may, the 15 citation from Wight v Eckhardt, page 1044, just at 16 letter C, if your Lordship has that? 17 MR JUSTICE DAVID RICHARDS: Yes. 18 MR DICKER: "Adjustments are made to give effect to the 19 underling principle of pari passu distribution between 20 creditors."</p> <p>21 In other words, it's not a new exercise we're doing 22 at this stage; it's the same exercise being done with 23 the benefit of hindsight.</p> <p>24 The aim remains to produce a present value of the 25 contingent debt so that it can rank pari passu with all</p> <p style="text-align: center;">Page 85</p>	<p>1 contain any directions for the valuation of contingent 2 debts, although under the 177th section of the old 3 Bankruptcy Act 1849, if a contingency happened during 4 the bankruptcy, proof for the full amount of the debt 5 was allowed."</p> <p>6 So this obviously before codification of the 7 approach. That approach, your Lordship will see 8 reflected in the judgment of the Master of the Rolls, 9 345, shortly stated:</p> <p>10 "I am of the opinion as regard the £5,000 that upon 11 the principle I adopted in McFarlane's claim the 12 contingency having happened before certificate, the 13 claimant is entitled to prove for the full amount less 14 a rebate or discount at 4 per cent for the period 15 between the date of the judgment and the widow's death."</p> <p>16 MR JUSTICE DAVID RICHARDS: Yes. 17 MR DICKER: Entirely, we say, as one would expect. 18 The second authority is not in bundle 1A but in 19 bundle 1B. It's at tab 60A. The decision is in a case 20 called Law Car and General Insurance Corporation. 21 My Lord, it concerned employer's liability policies. 22 The judgment -- the first instance judgment was by 23 Mr Justice Neville. It was reversed in the 24 Court of Appeal. The judgment of the Master of the 25 Rolls Cozens-Hardy starts at page 116. If your Lordship</p> <p style="text-align: center;">Page 87</p>
<p>1 creditors.</p> <p>2 Now, it's fair to say that the present value part of 3 that exercise is not always stressed in the authorities, 4 but can I show your Lordship two authorities which do 5 make it express or from which it's clear. The first is 6 a case called Hill v Bridges which your Lordship has in 7 1A, tab 40A. My Lord, your Lordship needs one item from 8 the facts. Picking it up at the beginning:</p> <p>9 "A testator covenanted by deed for payment to his 10 daughter of a sum of £5,000 with interest at 4 per cent 11 per annum within one month after the death of his wife. 12 He then died in 1879 insolvent and the daughter having 13 sent him claims in respect of the principal sum and the 14 annuity.</p> <p>15 "Held: applying the rules in bankruptcy as to 16 contingent liabilities, the daughter was entitled to 17 prove for the full amount of the £5,000 less a rebate of 18 interest at 4 per cent per annum for the period between 19 the date of the judgment and the death of the widow and 20 that her proof in respect of the annuity must be treated 21 on the same principle."</p> <p>22 My Lord, then 344 from the argument of Mr Chitty QC, 23 six lines from the end of the line: 24 "It is singular that neither the present 25 Bankruptcy Act nor the general rules in bankruptcy</p> <p style="text-align: center;">Page 86</p>	<p>1 could ...</p> <p>2 MR JUSTICE DAVID RICHARDS: Yes. 3 MR DICKER: "The appeal raises the question whether under an 4 employer's liability policy ...(reading to the words)... 5 would have been wound up under the Companies Act then in 6 force." 7 Then dropping to the last line on that page: 8 "If during the currency of the policy an accident 9 occurred which if the contract of indemnity had not been 10 repudiated would have entitled the holder to X pounds, 11 the court treated that fact as evidence pro tanto of the 12 value of the indemnity and the holder could have proved 13 for X pounds less a discount for the period between the 14 winding-up order and the date of the accident." 15 My Lord, then from Lord Justice Buckley, whose 16 judgment starts on page 120. The last two words on 17 page 120 refer to section 158. That's of the 18 Companies Act 1862, which he says: 19 "... rendered admissible to proof debts payable on 20 a contingency and claims against the company present or 21 future, certain or contingent ...", et cetera. 22 The relevant words are "a just estimate being made 23 so far as possible of the value of all such debts or 24 claims as may be subject to contingency, sound only in 25 damages that for some other reason do not bear a certain</p> <p style="text-align: center;">Page 88</p>

<p>1 value".</p> <p>2 Then dropping to the last two lines, he says:</p> <p>3 "No one seems to have suggested that the proper</p> <p>4 amount was not the sum assured but the present value of</p> <p>5 the sum assured. The latter is, however, the accurate</p> <p>6 amount and it follows from the Vice-Chancellor's</p> <p>7 language, I think, that if the point that been mentioned</p> <p>8 he would have so directed."</p> <p>9 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>10 MR DICKER: So that's how the scheme works. We say one</p> <p>11 needs to construe rule 2.88(7) in the light of that, in</p> <p>12 particular one should not treat a contingent claim as if</p> <p>13 it was a claim which was unaffected by the statutory</p> <p>14 scheme. One has to bear in mind both the notional</p> <p>15 distribution on day one and also the valuation exercise</p> <p>16 which the scheme requires to take place.</p> <p>17 My Lord, if your Lordship then goes now to</p> <p>18 rule 2.88(7).</p> <p>19 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>20 MR DICKER: 2.88(7) requires any surplus remaining after pay</p> <p>21 amount of the debts proved --</p> <p>22 MR JUSTICE DAVID RICHARDS: Just before we do that, can we</p> <p>23 just go back to 2.88(1)?</p> <p>24 MR DICKER: Yes.</p> <p>25 MR JUSTICE DAVID RICHARDS: So applying the first two lines,</p> <p style="text-align: center;">Page 89</p>	<p>1 date.</p> <p>2 MR DICKER: We say this is what the rules require.</p> <p>3 Your Lordship is absolutely right that the process of</p> <p>4 estimation, admission, agreement of claims is often</p> <p>5 a rough and ready process and it may be a deal is struck</p> <p>6 which either expressly or implicitly accommodates that</p> <p>7 or does not, for whatever reason.</p> <p>8 My Lord, certainly there are cases where, as I said,</p> <p>9 the reference to discount for futurity is not made</p> <p>10 express. In some cases it's not entirely clear why.</p> <p>11 There's a reference, I think, in my learned friend</p> <p>12 Mr Smith's skeleton to <i>Stein v Blake</i>, where</p> <p>13 Lord Hoffmann just shortly says if a claim is</p> <p>14 quantified -- you use hindsight to quantify the claim</p> <p>15 and the quantified amount is then admitted. But it's</p> <p>16 not entirely clear from the way in which he puts it</p> <p>17 whether he's, as it were, focusing on both these</p> <p>18 elements. As your Lordship says, there may be</p> <p>19 circumstances in which it needs to be done and other</p> <p>20 cases in which it may not.</p> <p>21 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>22 MR DICKER: Now, our submissions on the meaning of the</p> <p>23 phrase "in respect of the periods during which they have</p> <p>24 been outstanding since the relevant date", in the light</p> <p>25 of the features of the statutory scheme I've shown your</p> <p style="text-align: center;">Page 91</p>
<p>1 you have the administration, you have a contingent</p> <p>2 liability, the contingency has not occurred, so you --</p> <p>3 so a value is placed upon the claim by reference to the</p> <p>4 probability of the contingency occurring, and, to the</p> <p>5 extent relevant, futurity.</p> <p>6 Then we go on:</p> <p>7 "... and he may revise any estimate previously made,</p> <p>8 if he thinks fit, by reference to changes in</p> <p>9 circumstances, most obviously the occurrence of the</p> <p>10 contingency".</p> <p>11 And the authorities you have shown me would suggest</p> <p>12 that if the contingency occurs, let us say, a year after</p> <p>13 the commencement date, then the claim is revalued to the</p> <p>14 full amount payable by the -- full amount payable but</p> <p>15 less a discount. I mean, I am taking a period of a year</p> <p>16 because it's rather more than a few weeks. It might not</p> <p>17 make much difference but let's say a year or two years,</p> <p>18 something of that sort, you would actually discount that</p> <p>19 back to the date of the -- to the relevant date, you</p> <p>20 would say?</p> <p>21 MR DICKER: My Lord, absolutely.</p> <p>22 MR JUSTICE DAVID RICHARDS: It might be that -- I notice</p> <p>23 that there was no such discounting in <i>McFarlane's</i> case</p> <p>24 which was the fire policy, but I think the fire occurred</p> <p>25 only a couple of months or something after the relevant</p> <p style="text-align: center;">Page 90</p>	<p>1 Lordship are these.</p> <p>2 Firstly, the rule refers to the surplus being used</p> <p>3 to pay interest on "those debts" and that is a reference</p> <p>4 to proved debts defined in rule 13.12 to include</p> <p>5 contingent debts. At least at this stage no distinction</p> <p>6 is being drawn, depending on whether the proved debt is</p> <p>7 present or future, certain or contingent. The surplus</p> <p>8 is to be paid in respect of all proved debts.</p> <p>9 Secondly, the rule requires interest to be paid on</p> <p>10 proved debts for the period during which they have been</p> <p>11 outstanding since the relevant date. The relevant date</p> <p>12 is the date of administration and the period starts on</p> <p>13 the date of administration. In other words, the</p> <p>14 formulation of the rule proceeds on the basis that all</p> <p>15 debts have been outstanding from the relevant date and</p> <p>16 the question is for how long after that date have they</p> <p>17 been outstanding for which interest needs to be paid?</p> <p>18 Put another way, the rules do not state merely that</p> <p>19 interest should have been paid in respect of the periods</p> <p>20 during which they have been outstanding. That</p> <p>21 formulation would more naturally encompass the idea that</p> <p>22 certain debts were not outstanding at the relevant date</p> <p>23 and therefore the period may start after the relevant</p> <p>24 date and may come to an end at a later date.</p> <p>25 My Lord, fourthly, the reference to the periods</p> <p style="text-align: center;">Page 92</p>

<p>1 during which they have been outstanding since the                  2 relevant date we say is intended to accommodate the                  3 simple fact that one or more dividends may have been                  4 paid since the relevant date; in other words, the full                  5 amount of the debt may not have been outstanding for the                  6 full period since the relevant date and only part of                  7 that period.                  8 My Lord, obviously nothing here cuts across or is                  9 intended to cut across our submissions in relation to                  10 question 2 which is whether or not this is -- this                  11 exercise is done by reference to actual payments or some                  12 notional recalculation.                  13 So that's what we say rule 2.88(7) means, in                  14 particular the word "outstanding" there.                  15 We also say that support for that is obtained from                  16 rule 2.105, if your Lordship goes on to that.                  17 MR JUSTICE DAVID RICHARDS: Yes.                  18 MR DICKER: My Lord, I'll come back to this rule because                  19 it's dealing with future debts and I need to deal with                  20 it in that context.                  21 MR JUSTICE DAVID RICHARDS: Yes.                  22 MR DICKER: Just by way of an aid to construction of                  23 2.88(7), your Lordship will note that 2.105, sub-rule 2,                  24 says:                  25 "For the purpose of dividend and no other purpose,</p> <p style="text-align: center;">Page 93</p>	<p>1 wrong because you can't use the word "outstanding" --                  2 you can't refer to a debt which is still a future debt                  3 as outstanding. You can't do that, unless and until the                  4 debt becomes due and payable.                  5 MR JUSTICE DAVID RICHARDS: Yes. I'm not sure about that.                  6 This is -- the phrase here is "the amount remaining                  7 outstanding in respect of his admitted proof". No one                  8 doubts that if you have had a proof admitted for                  9 a contingent liability and dividends are then paid,                  10 you're entitled to be paid a dividend in respect of your                  11 proof and that will reduce the amount of your proof and                  12 there will be then be an amount outstanding in respect                  13 of your proof.                  14 I'm not sure that --                  15 MR DICKER: But it's the use of the word -- it's the idea                  16 that this debt can naturally be referred to --                  17 MR JUSTICE DAVID RICHARDS: It's the proof. I'm not sure                  18 about that. That why I say it. There it is. It's an                  19 interesting use of the word but it seems to me to be                  20 focusing on something different or arguably different                  21 from 2.88. It's clear what in rule 2.105 to what that                  22 is focuses on, I think. You say it's clear under 2.88                  23 as well.                  24 MR DICKER: Yes. The only thing we're focusing on at this                  25 stage is the use of the word "outstanding", and we say</p> <p style="text-align: center;">Page 95</p>
<p>1 the amount of the creditor's admitted proof or, if                  2 a distribution has previously been made to him, the                  3 amount remaining outstanding in respect of his admitted                  4 proof shall be reduced by applying the following                  5 formula ..."                  6 Now, the phrase one needs to focus on is the phrase                  7 in brackets "or, if a distribution has previously been                  8 made to him, the amount remaining outstanding in respect                  9 of his admitted proof". 2.105 is dealing with future                  10 debts. It's therefore dealing with debts who have not                  11 yet become due and payable as at the relevant date of                  12 distribution. 2.105 says, in sub-rule 1:                  13 "Where a creditor has proof for a debt of which                  14 payment is not due at the date of the declaration of                  15 dividend, he's entitled to dividend equally to other                  16 creditors but subject as follows ..."                  17 So at this stage the debt is still a future debt.                  18 The draughtsman is referring to a situation where                  19 a distribution has briefly been made to him, removing                  20 part of the debt. He describes the balance as "the                  21 amount remaining outstanding in respect of his admitted                  22 proof". In other words, that part of the debt still                  23 a future debt is being described as "outstanding".                  24 Now, the administrators' case in relation to future                  25 and contingent debts is that that effectively must be</p> <p style="text-align: center;">Page 94</p>	<p>1 that use there is effectively the same use as in                  2 2.88(7), just as here it can refer to a debt which is                  3 still a future debt, so, likewise, under --                  4 MR JUSTICE DAVID RICHARDS: You say the proof or the amount                  5 of the proved debt is outstanding? That's what that                  6 says.                  7 MR DICKER: Yes.                  8 MR JUSTICE DAVID RICHARDS: It's the same -- effectively the                  9 same sense in 2.88 or it is the same sense. I follow,                  10 yes.                  11 MR DICKER: Yes.                  12 We also say this is consistent with the natural                  13 meaning of "outstanding"; in other words, looking at the                  14 word more broadly, the word "outstanding" is not                  15 synonymous simply with "due" or "due and payable". It's                  16 perfectly natural, for example, to speak of the                  17 outstanding principal under a loan facility which does                  18 not fall due until some future date.                  19 The word --                  20 MR JUSTICE DAVID RICHARDS: Less obvious in the context of                  21 an uncalled guarantee. I mean, I think there's a limit                  22 on these words or the senses in which one uses them                  23 because in a case of the future debt payable in the                  24 future, it is payable, albeit only in the future. So in                  25 that sense one would say it's outstanding, but I think</p> <p style="text-align: center;">Page 96</p>



<p>1 you would be unlike to say where I am the guarantor of 2 a debt that no call has been made, nor is any in view, 3 the amount outstanding under the guarantee is the 4 amount -- is the guaranteed debt. 5 MR DICKER: My Lord, everything depends on context. 6 MR JUSTICE DAVID RICHARDS: Yes, as Lord Hoffmann would tell 7 us, yes. 8 MR DICKER: But it depends on the way in which -- 9 MR JUSTICE DAVID RICHARDS: I am just pointing to 10 a limitation on -- you know, the same word naturally is 11 used in one context but not the other. 12 MR DICKER: And that's because "outstanding" itself can mean 13 slightly different things. One definition of 14 "outstanding" is "unresolved, pending or unsettled". 15 Your Lordship will see that, can I just show you 16 a judgment in a case called Paterson v Crystal Palace 17 Football Club. It's 1D/139. My Lord, it's a case 18 involving construction of agreement. If your Lordship 19 goes to paragraph 10. 20 MR JUSTICE DAVID RICHARDS: Yes. 21 MR DICKER: It's a sale and purchase agreement. Clause 2.2, 22 on the right-hand page: 23 "Not included in the assets. There shall not be 24 included in the assets and the buyer shall not acquire 25 with this agreement any right, title or interest in or</p> <p style="text-align: center;">Page 97</p>	<p>1 Then 56: 2 "By the time of this agreement it was commonplace 3 ...(reading to the words)... at any rate a contingent 4 debt." 5 Reference to 13.12(iii). 6 Then he says below the citation of the rule: 7 "In these circumstances it seems to me that in the 8 context of insolvency or potential insolvency 9 a reference to debt can readily be construed as 10 a reference to a contingent debt depending, of course, 11 upon the circumstances." 12 MR JUSTICE DAVID RICHARDS: I have just read over to 57 13 where Lord Justice Clarke comes to his -- or Lord Clarke 14 comes to his conclusions there. I can't help smiling at 15 the reference to the Shorter Oxford Dictionary. 16 I was once in a case which Lord Hoffmann heard, 17 tried, as an additional judge of the Chancery Division, 18 a rather curious situation when a member of the House of 19 Lords came down from on high to sit in this division. 20 One of the counsel in the case, not me, invited 21 Lord Hoffmann to look at the dictionary definition of 22 whatever the word was and he said, "Well, before do you 23 to that, I should tell you that I have not yet come 24 across a case where I have found the dictionary 25 definition helpful". Just as counsel was putting away</p> <p style="text-align: center;">Page 99</p>
<p>1 to ... (ix) any of the seller's cash at bank or 2 cash-in-hand or any of the seller's books or other debts 3 outstanding at the transfer date." 4 If your Lordship then goes on to paragraph 52 in the 5 judgment of Lord Justice Clarke, he says: 6 "For my part I would accept the submission that, 7 like any other clause in a contract ...(reading to the 8 words)... in the first edition it includes that stands 9 over, that remains undetermined, unsettled or unpaid." 10 53: 11 "In these circumstances the judge was, as it seems 12 to me, entitled to hold that an ordinary meaning of the 13 word is wide enough to include contingent debt which had 14 not yet become due and payable. The question for the 15 judge was whether the word 'outstanding' included that 16 meaning in clause 2.2(ix). That depends on the natural 17 meaning of the language in its context. It appears to 18 me the expression 'book or other debts outstanding' is 19 amply wide enough to include contingent liabilities in 20 debt arising out of an existing transfer arrangement." 21 Then 55 and 56: 22 "I would entirely accept the judgment of 23 Mr Justice Hoffmann who supports ...(reading to the 24 words)... this agreement was made long after the 25 Insolvency Act 1986."</p> <p style="text-align: center;">Page 98</p>	<p>1 the dictionary, he said, "But please don't let me deter 2 you from citing it here". So counsel continued to do 3 it, at the end of which Lord Hoffmann said, "Mr Mabbe 4 [for it was he], this is not my first case". 5 I mean, in truth the answer here is it's very much 6 the context of the agreement, isn't it? But it's 7 interesting, and I see why you cite it, that 8 Lord Justice Clarke brought in the insolvency rules. 9 MR DICKER: I wouldn't have bothered to cite it to 10 your Lordship had it not been for that fact. 11 MR JUSTICE DAVID RICHARDS: Thank you. 12 MR DICKER: My Lord, we also say this construction of 13 2.88(7) is consistent with the approach in previous 14 legislation. I think I can do this most easily just by 15 reminding your Lordship or showing your Lordship two 16 paragraphs in our written argument, paragraphs 293 and 17 294. My Lord, bearing in mind, of course, contingent 18 claims first rendered admissible by the 1862 Act, we 19 have included the relevant rule or section from the 20 General Rules in Bankruptcy 1869, then the 1883 Act and 21 then section 33.8 of the Bankruptcy Act 1914. If your 22 Lordship just looks, for example, at the last, 23 section 33(8): 24 "Provided that, if there is any surplus after 25 payment of the foregoing debts, it shall be applied in</p> <p style="text-align: center;">Page 100</p>

<p>1 payment of interest from the date of the receiving order 2 at the rate of £4 per centum per annum on all debts 3 proved in the bankruptcy." 4 MR JUSTICE DAVID RICHARDS: Yes. 5 MR DICKER: So difficult, we say, to escape the conclusion 6 that under certainly the pre-1986 legislation contingent 7 debts being one of the debts proved in the bankruptcy 8 would be entitled to interest "from the date of the 9 receiving order". 10 MR JUSTICE DAVID RICHARDS: And just -- the contingent debts 11 became provable in bankruptcy when? 12 MR DICKER: In 1862. 13 MR JUSTICE DAVID RICHARDS: Which Act was that? 14 MR DICKER: The Bankruptcy Act. 15 MR JUSTICE DAVID RICHARDS: It was the Companies Act 1862. 16 MR DICKER: The Companies Act 1862. 17 MR JUSTICE DAVID RICHARDS: At any rate, before the 18 Bankruptcy Rules 1869 or maybe it was the Bankruptcy Act 19 1869. Never mind, the point you're making is that 20 contingent liabilities were provable in bankruptcy by 21 1869. 22 MR DICKER: And I'll check the precise date, but, in any 23 event, certainly by 1914. 24 MR JUSTICE DAVID RICHARDS: Certainly, yes. Thank you. 25 MR DICKER: My Lord, so far as Wentworth's case is</p> <p style="text-align: center;">Page 101</p>	<p>1 MR JUSTICE DAVID RICHARDS: Yes. 2 MR DICKER: My Lord, so far as the administrators are 3 concerned, I confess to being slightly unclear at 4 present as to their position. Can I show your Lordship 5 three things. First of all, the administrators' 6 position paper, which is bundle 1, tab 7. 7 MR JUSTICE DAVID RICHARDS: Yes. 8 MR DICKER: It's 1, tab 7. The two paragraphs I want to 9 show your Lordship are 44.1 and 44.3. In 44.1, they 10 say: 11 "Contingent debts, although provable from the date 12 of administration, become outstanding for the purposes 13 of rule 2.88(7) only when the debt becomes an actual 14 debt." 15 My Lord, we say focusing on the right thing, by that 16 I mean the reference to the debt, though getting the 17 answer wrong. 18 Similarly, paragraph 44.3, they say: 19 "Until a debt becomes an actual debt it is not 20 outstanding in the sense of being due and payable. It 21 is in that sense the word 'outstanding' is used by the 22 draughtsman in rule 2.88(7). This reflects the fact 23 until a debt is due and payable the administration does 24 not operate so as to keep the creditor out of its 25 money."</p> <p style="text-align: center;">Page 103</p>
<p>1 concerned, as we understand it, its case is that 2 "outstanding" in relation to contingent debts requires 3 a debt due as an actual debt. Can I show your Lordship 4 two paragraphs from their skeleton argument. The first 5 is 147. 147, they say: 6 "Accordingly, a debt should not be considered 7 outstanding for the purposes of a rule designed to 8 compensate creditors for delay in payment of their debts 9 until such time as it comes into being as an actual 10 debt, i.e. until the occurrence of the contingency upon 11 which its existence depends." 12 My Lord, then if your Lordship goes to 167, they 13 say: 14 "In the absence of a rule requiring the discounting 15 back of a contingent debt to the date of administration 16 [my Lord, I have already addressed your Lordship on 17 that], it remains the case that, notwithstanding that an 18 amount equal to the estimated amount of the contingent 19 debt is payable from the insolvency date as from the 20 date of administration, the debt itself is not 21 outstanding until such time as the contingency occurs." 22 So on Wentworth's case apparently it's fine to say 23 the contingent debt is payable from the insolvency 24 estate as from the date of administration but it's not 25 fine to describe it as outstanding.</p> <p style="text-align: center;">Page 102</p>	<p>1 Again, focusing on "it needs to be due and payable", 2 obviously in response to the last sentence we say if you 3 look at the debt as if it was unaffected by the 4 administration, of course in that sense it's true that 5 you haven't been kept out of your money but that's not 6 describing the full effect of the administration on your 7 debt. It also discounts it and then pays you the 8 discounted amount. 9 My Lord, then in their skeleton argument, if 10 your Lordship could take that, my Lord, the relevant 11 paragraph is 137 and paragraph 138. 12 137: 13 "In the administrators' submission the start date 14 for the calculation of the amount of the interest 15 applicable to the debt, apart from the administration, 16 is the date on which the creditor would first have 17 become entitled to such interest, apart from the 18 administration." 19 MR JUSTICE DAVID RICHARDS: Yes. 20 MR DICKER: 138: 21 "This is a fact-specific issue. The precise date 22 for the calculation of the amount of the interest 23 applicable to the debt, apart from the administration, 24 will therefore vary from case to case, depending on the 25 facts. Whilst the start date for interest, apart from</p> <p style="text-align: center;">Page 104</p>

<p>1 the administration, will often be the due date, this 2 will not invariably be the case." 3 Then 142, sub-paragraph 1: 4 "The administrators' submissions in respect of 5 statutory interest at the rate applicable to the debt, 6 apart from the administration, have been set out above. 7 The start date for the rate applicable, apart from the 8 administration, will depend on the terms on which 9 interest would have been payable, apart from the 10 administration. The position is the same whether the 11 debt was actual or prospective or contingent at the 12 commencement. The administrators submit the terms 13 governing the payment of interest on the debt, apart 14 from the administration, must be considered in order to 15 ascertain the correct answer." 16 My Lord, finally, 156 -- 17 MR JUSTICE DAVID RICHARDS: So 142.2, I think, sets out 18 their position. 19 MR DICKER: Yes. 20 The other paragraph I want to show your Lordship is 21 just 156, where they say: 22 "In the context of rule 2.88(7), the word 23 'outstanding' has been used to describe the period of 24 time for which interest is payable on the debt at the 25 Judgments Act rate. The debt is therefore outstanding</p> <p style="text-align: center;">Page 105</p>	<p>1 MR DICKER: If I remain inaudible, no doubt my learned 2 friend can gesticulate. 3 MR TROWER: Yes, I'll wave. 4 MR DICKER: My Lord, Day 1, page 25, picking it up at 5 line 6. My learned friend says: 6 "I think rather than getting into any great 7 discussion of that now, because it's not the time, 8 I just want to make clear what the administrators' 9 position is. The administrators' position is that 10 a debt is outstanding for the purposes of rule 2.88 from 11 the moment at which the creditor had a complete cause of 12 action for its recovery. That's what we say the 13 question is, although there is the extra point about 14 where the applicable interest is payable at the rate 15 applicable to the debt, apart from the administration. 16 It must also be the case that the interest has become 17 payable." 18 So when you look at the word "outstanding" in 19 rule 2.88(7), as I understand the administrators' case, 20 it requires one to go through this exercise. No doubt 21 my learned friend will explain it. 22 Turning now to one argument made against us, the 23 argument is that if we're right contingent creditors 24 would receive interest from the date of administration. 25 They will receive a windfall.</p> <p style="text-align: center;">Page 107</p>
<p>1 for these purposes if it is a debt of the type which 2 could be said to attract an entitlement to interest at 3 the Judgments Act rate." 4 My Lord, I don't know whether that would be -- 5 MR JUSTICE DAVID RICHARDS: I think that probably would. 6 We'll resume at 2 o'clock, please. 7 MR DICKER: Thank you. 8 (1.03 pm) 9 (Luncheon Adjournment) 10 (2.00 pm) 11 MR JUSTICE DAVID RICHARDS: Mr Dicker. 12 MR DICKER: My Lord, looking at the transcript just over the 13 short adjournment, I think I should probably show 14 your Lordship one more reference to the administrators' 15 case on the meaning of "outstanding". I don't know if 16 your Lordship has been troubled with copies of the 17 transcript? 18 MR JUSTICE DAVID RICHARDS: Yes, I have. 19 MR DICKER: It's Day 1 -- 20 MR TROWER: Can I just say this. I really can't hear 21 Mr Dicker at the moment. I'm terribly sorry. 22 MR DICKER: I will try and speak up. 23 MR JUSTICE DAVID RICHARDS: There are microphones which are 24 meant to amplify a bit and I'm assuming they're on. 25 Anyway, see whether -- yes.</p> <p style="text-align: center;">Page 106</p>	<p>1 MR JUSTICE DAVID RICHARDS: Yes. 2 MR DICKER: My Lord, in fact, the opposite is obviously the 3 case. That submission ignores the rules governing the 4 estimation claims. If Wentworth is correct, the 5 contingent creditor will have had his claim given its 6 present value as at the date of commencement so as to 7 ensure claims can be paid pari passu with all creditors. 8 Like all creditors, he will receive dividends at some 9 later date. Unlike all other creditors, he will not 10 start to receive any interest unless and until the 11 contingency would otherwise have occurred. 12 My Lord, we say the obvious fallacy underlying this 13 is it ignores the effect of the statutory scheme and the 14 way in which the rules require contingent claims to be 15 estimated. 16 MR JUSTICE DAVID RICHARDS: Yes. 17 MR DICKER: If they're wrong about that, it appears that 18 they would agree with us on contingent claims as well. 19 I say that because in relation to future claims, where 20 they accept there is a discounting to present value, 21 they do agree with us and say interest should run in 22 relation to future debts from the date of 23 administration. 24 MR JUSTICE DAVID RICHARDS: Yes. 25 MR DICKER: My Lord, can I turn to a slightly different</p> <p style="text-align: center;">Page 108</p>

<p>1 matter. What I've dealt with so far is the nature of 2 the statutory scheme, the effect of that scheme on 3 contingent claims and the meaning of "outstanding" in 4 rule 2.88(7). That, as it were, is approaching it from 5 purely a sort of legal perspective. 6 MR JUSTICE DAVID RICHARDS: Yes. 7 MR DICKER: My Lord, can I now turn and deal briefly with 8 another matter we touch on in our opening skeleton and 9 develop in our reply skeleton, and it's this: as we 10 understand it, Wentworth's and the administrators' 11 position is that a contingent claim can never be 12 outstanding and interest can never run on such claim 13 regardless of the nature of the contingency. 14 If your Lordship can see how this, it appears, is 15 intended to be applied by the administrators, 16 your Lordship will see that in Mr Lomas's eleventh 17 statement. It's bundle 2, tab 5. 18 MR JUSTICE DAVID RICHARDS: Yes. 19 MR DICKER: My Lord, there's much in this statement which is 20 obviously relevant and helpful in other contexts, but 21 the passage that is relevant in this is that beginning 22 at section F, paragraph 34, on page 12. 23 MR JUSTICE DAVID RICHARDS: Yes. 24 MR DICKER: In 34 the issue is identified. 35 says: 25 "Its outcome will have a significant impact."</p> <p style="text-align: center;">Page 109</p>	<p>1 "At paragraph 45 of the administrators' position 2 paper, the joint administrators indicated they would 3 also provide evidence as to the potential, if the answer 4 to issue 7 is that that statutory interest is payable in 5 respect of a contingent claim from the date of 6 administration, for a creditor to receive, in respect of 7 the period between the date of administration and the 8 date the debt becomes due and payable, both the benefit 9 of coupon amounts received pursuant to the underlying 10 agreement ... and statutory interest calculated on the 11 basis of that increased claim." 12 Then he says: 13 "This can be illustrated by the following example." 14 So you take a creditor who has a claim under 15 a single agreement with LBIE, admitted and paid in full 16 on 15 September 2014. Had the agreement closed out at 17 the debt of administration, the close-out amount payable 18 by LBIE to the creditor would have been 10 million: 19 "However, had the agreement closed out at 20 15 September 2012 the close-out amount payable by LBIE 21 to the creditor would have been 12 million, due (for 22 instance) to the impact of the creditor's entitlements 23 in respect of coupon and dividend payments that accrued 24 pursuant to the agreement between the date of 25 administration and 15 September 2012."</p> <p style="text-align: center;">Page 111</p>
<p>1 36: 2 "In the administration contingent claims broadly 3 fall into two categories. [Firstly] Claims to net 4 financial claims as defined in the CRA, as crystallised 5 by the effect of the CRA". 6 36.2: 7 "Claims arising from the termination of financial 8 contracts after the date of administration whether 9 automatically or at the instigation of the creditor or 10 LBIE." 11 37: 12 "If the answer to issue 7 is that statutory interest 13 is payable on contingent claims from the date of 14 administration, rather than the date such claims became 15 due and payable, the amount of statutory interest 16 payable in respect of contingent claims will obviously 17 be higher." 18 He says: 19 "This can be illustrated, first, by looking at an 20 example ..." 21 Then if your Lordship will go to 41. Mr Lomas 22 identifies one particular example which, as we 23 understand it he suggests that the rules must have the 24 effect for which the administrators contend. He says, 25 at 41:</p> <p style="text-align: center;">Page 110</p>	<p>1 Now, the Senior Creditor Group responded to the 2 administrators' approach and that example in particular 3 in Mr Zambelli's statement which your Lordship has at 4 tab 6. My Lord, I don't know whether your Lordship has 5 had a chance to look at this statement before now? 6 MR JUSTICE DAVID RICHARDS: Well, I did. I have looked at 7 it, but it's a week or more now since did. 8 MR DICKER: If your Lordship is like me your Lordship will 9 probably have managed to retain very little of it. 10 My Lord, can I just pick it up at paragraph 9, where 11 Mr Zambelli says: 12 "The examples upon which I focus in this statement 13 are principally intended to reflect or illustrate claims 14 arising pursuant to prime brokerage agreements between 15 LBIE and creditors." 16 So effectively an ongoing custodial relationship, or 17 akin to that, between the two. 18 MR JUSTICE DAVID RICHARDS: Yes. 19 MR DICKER: Four or five lines from the end: 20 "The joint administrators and Wentworth say that 21 such claims were contingent claims prior to close-out 22 with the result, they say, that statutory interest does 23 not run until such debts become due and payable." 24 Then at 10 he refers to the worked example I showed 25 your Lordship from Mr Lomas's statement. In</p> <p style="text-align: center;">Page 112</p>

<p>1 paragraph 13, he says:  2 "I supplement the Lomas ... example (the increased  3 creditor) with the position of four other creditors,  4 each with a general unsecured claim that would have been  5 worth £10 million if closed out on the date of  6 administration. Although these creditors are  7 hypothetical ... based on my experience of reviewing  8 claims against LBIE and are indicative of issues arising  9 from real claims."  10 In 14, he says he'll present them in the same  11 manner.  12 Then those four other creditors. The first of  13 these, the benchmark creditor, closed out a prime  14 brokerage agreement with LBIE on the date of  15 administration. The value of the benchmark creditor's  16 claim is 10 million. The statutory interest from the  17 date of administration of 4.8 million calculated on the  18 same assumptions as used in Lomas 11. The benchmark  19 creditor's overall recovery in respect of principal and  20 interest is 14.8 million, regardless as to whose  21 arguments succeed on issues 11.  22 That's of course because the bench -- issue 7, I am  23 sorry. That's because, of course, that the benchmark  24 creditor's claim isn't on any basis a contingent or  25 future claim.</p> <p style="text-align: center;">Page 113</p>	<p>1 a later date. Mr Lomas's view appears to be that  2 therefore makes his claim, which is now a claim pursuant  3 to the CRA, a contingent claim, with the result that  4 interest should only run from the date of accession to  5 the CRA, even though, under the CRA, this creditor's  6 claim was valued, like the benchmark creditor's claim,  7 as at the date of administration.  8 MR JUSTICE DAVID RICHARDS: Yes.  9 MR DICKER: Now, what we say this illustrates is that even  10 if we're wrong on the law or further and alternatively  11 to our submissions on the law, there may be a question  12 of fact as to precisely what is meant by a contingent  13 claim or in what circumstances as a matter of fact you  14 treat a claim as contingent for the purposes of the  15 rule.  16 My Lord, your Lordship will see how that develops in  17 due course.  18 So that's the second creditor.  19 The third creditor is the cash creditor. The value  20 of the cash creditor's claim is an outstanding cash  21 balance of 10 million on its prime brokerage account in  22 respect of which the cash creditor was a general  23 unsecured creditor of LBIE. So, so far so like the  24 benchmark creditor. Like the increased creditor, the  25 cash creditor closed out its prime brokerage agreement</p> <p style="text-align: center;">Page 115</p>
<p>1 MR JUSTICE DAVID RICHARDS: Quite.  2 MR DICKER: Then the second creditor had its general  3 unsecured claim under a prime brokerage agreement valued  4 pursuant to the CRA. This is the first category of  5 contingent claims Mr Lomas referred, to CRA claims.  6 This creditor acceded to the CRA on 31 January 2010.  7 The value of the CRA creditor's unsecured claim under  8 the prime brokerage agreement in respect of securities  9 to which it had an unsecured claim would have been  10 12 million had the prime brokerage agreement been closed  11 out as at 31 January 2010. However, under CRA the  12 creditor -- the CRA creditor's claim is valued as at the  13 business day before the date of administration, giving  14 a claim of 10 million. The position with respect to the  15 CRA creditor is that, if interest is only treated as  16 accruing from the date of accession to the CRA, CRA  17 creditor is entitled to statutory interest of  18 3.7 million with an overall recovery of 13.7 million,  19 1.1 million less than the benchmark creditor, despite  20 the fact that the CRA creditor's claim has been valued  21 on the same basis.  22 So we have essentially a creditor in exactly the  23 same position. The only difference is that he, unlike  24 the benchmark creditor, enters into a CRA, so  25 effectively settles his claim pursuant to the CRA on</p> <p style="text-align: center;">Page 114</p>	<p>1 with LBIE on 15 September 2012. Unlike the increased  2 creditor, this results in no change to the value of its  3 claim. The position with respect to the cash creditor  4 is that if interest is only treated as accruing from the  5 date of close-out, the cash creditor is entitled to  6 statutory interest of only 1.6 million and an overall  7 recovery of 11.6 million, 3.2 million less than the  8 benchmark creditor. If interest accrues from the date  9 of administration, however, the cash creditor is in the  10 same position as the benchmark creditor.  11 So we have a creditor who had a cash balance of  12 10 million on its prime brokerage account as at the date  13 of administration. However, because the prime brokerage  14 agreement was only closed out later, according to the  15 administrators, interest only runs from that later date,  16 not from the date of administration, although there's  17 absolutely no change in the value of the claim between  18 those two dates.  19 MR JUSTICE DAVID RICHARDS: I'm not sure I fully follow this  20 because perhaps I don't understand exactly how the PB  21 account works. I mean, perhaps I -- I'm not sure how  22 far it matters, but what's the type of arrangement we  23 have here?  24 MR DICKER: It's -- PB is prime brokerage.  25 MR JUSTICE DAVID RICHARDS: Yes.</p> <p style="text-align: center;">Page 116</p>

<p>1 MR DICKER: So an arrangement in relation to securities, 2 collateral and it may be some cash as well. So, for 3 example, a creditor provides LBIE with securities in 4 exchange for sums which LBIE pays to the creditor. LBIE 5 can then re-hypothecate, depending on the terms of the 6 prime brokerage agreement or otherwise, and there may be 7 margins in collateral accounts and thing of that sort. 8 My Lord, I'm not sure -- 9 MR JUSTICE DAVID RICHARDS: It may not matter very much. 10 MR DICKER: I can certainly go through at some stage the 11 detail in relation to it. 12 MR JUSTICE DAVID RICHARDS: I mean, I wondered how in this 13 example the contingent claims -- I mean, the contingent 14 claim was valued at 10 million, or was it, on 15 15 September -- as at 15 September 28? Maybe it wasn't. 16 MR DICKER: Well, on the administrators' case, as we 17 understand it, my Lord, the answer to that may not be 18 clear. What they are, however, saying is that -- 19 I suppose what we say is that's what the rules require. 20 That's the first part of my argument. 21 The second part, which I'm now dealing with, is to 22 say let's look at how the administrators appear to be 23 intending to apply the contingent regime. Your Lordship 24 saw from Mr Lomas's witness statement he treats 25 contingent -- he treats a claim under the CRA as</p> <p style="text-align: center;">Page 117</p>	<p>1 5.5 million less than the benchmark creditor. 2 In 19 he says: 3 "I make the following additional observations with 4 regard to the observations set out above. 5 "(1) The benchmark creditor's and the CRA 6 creditor's against LBIE share the same underlying 7 economics as at the date of administration. However, if 8 interest runs from the date of close-out, the CRA 9 creditor is worse off than the benchmark creditor by 10 £1.1 million. 11 "(2) The decreased creditor, if interest runs from 12 the date of close-out, is worse off in three respects 13 when compared to the benchmark creditor." 14 He suffered a reduction of 2 million in the 15 close-out value due to the late close-out. Secondly, 16 statutory interest would not accrue at all on the amount 17 by which the value of the close-out amount fell. 18 Thirdly, statutory interest would not accrue until the 19 date of close-out. Thirdly, more generally, if interest 20 runs from the date of close-out all creditors in the 21 examples are worse off than the benchmark creditor. 22 Mr Zambelli makes the point, at paragraph 20, that 23 when considering the practical effect of the various 24 possible approaches to which interest accrues on claims, 25 he suggests the illustration should ideally reflect the</p> <p style="text-align: center;">Page 119</p>
<p>1 a contingent claim because it only crystallised when you 2 entered into the CRA. 3 MR JUSTICE DAVID RICHARDS: Presumably because the contract 4 in question hadn't closed out before then? 5 MR DICKER: Yes. Because he treats it as -- well, even -- 6 I'm not sure it even depends on that. If your Lordship 7 goes back to Mr Lomas, 36(1) is claims to net financial 8 claims as defined in CRA as crystallised by the effect 9 of the CRA. 10 My Lord, going back to paragraph 18, just giving 11 your Lordship the fourth example, the fourth creditor is 12 the decreased creditor. Like the increased creditor, 13 the decreased creditor closed out its prime brokerage 14 agreement with LBIE on 15 September 2012. Unlike the 15 increased creditor, this results in a loss because the 16 value of the claim decreased from 10 million to 17 8 million. While such a decrease in the value of 18 a claim is more likely for creditors who closed out in 19 the early part of the administration, the close-out on 20 15 September 2012 is assumed here for ease of comparison 21 with Lomas 11. The position with respect to the 22 decreased creditor is that if interest is only treated 23 as accruing from the date of off close-out, the 24 decreased creditor is entitled to statutory interest of 25 only 1.3 million and an overall recovery of 9.3 million,</p> <p style="text-align: center;">Page 118</p>	<p>1 position of all creditors affected by the question, 2 including those who have been substantially 3 disadvantaged as a result of closing out after the date 4 of administration, not solely creditors in the position 5 of the increased creditor referred to by Mr Lomas. 6 He then gives, and I can show your Lordship this 7 very shortly, just to finish the statement -- 8 MR JUSTICE DAVID RICHARDS: I mean, on the one hand, I very 9 much see the value of understanding the factual context 10 in which the issues we're debating arises and will be 11 implied, but, on the other hand, those issues we're 12 debating have to apply across the whole range of all 13 companies in administration or liquidation. So we're 14 talking about companies which have absolutely nothing to 15 do with investment banking at all. They are a million 16 miles from that. The same rules will apply. Either -- 17 I mean, the debate may be whether a particular liability 18 is a contingent liability or not, or is an unascertained 19 liability or something of that sort, but, I mean, the 20 point is shortly made that if you -- if at the date of 21 administration you are a trade creditor with a debt of 22 £10 million presently payable, then that's your proof 23 and you receive interest at the relevant rate from the 24 date of administration. Everyone has agreed with that. 25 If you have the benefit of a guarantee provided by</p> <p style="text-align: center;">Page 120</p>

<p>1 the company in administration for a debt of somebody 2 else's debt of £10 million, on that guarantee, you 3 become entitled to call the guarantee after two years, 4 then you will revalue your claim, hitherto a claim for 5 a contingent debt, up to £10 million, subject to your 6 futurity arguments. If you're right, interest will be 7 payable from the date of administration. If Mr Zacaroli 8 is right, Mr Trower is right, then interest will be 9 payable from the date when the guarantee was called. 10 Now, I mean, that may be said to -- I mean, I don't 11 know whether that is parallel or not to the facts being 12 put forward here, but it just illustrates, doesn't it, 13 that we -- what I'm saying is I'm not quite sure -- we 14 can't really mould the rules to fit the niceties of 15 investment banking. 16 MR DICKER: Your Lordship certainly can't do that. That's 17 obviously not what we're inviting your Lordship to do. 18 MR JUSTICE DAVID RICHARDS: No. 19 MR DICKER: My Lord, there are -- it's obviously -- one 20 would normally construe the rule by reference to at 21 least one -- it's always helpful to have at least one 22 example. 23 MR JUSTICE DAVID RICHARDS: Sure. 24 MR DICKER: Mr Lomas gives an example and he suggests that 25 if you look at that example, which is the claim that</p> <p style="text-align: center;">Page 121</p>	<p>1 talking about a contract which has not closed out at the 2 date of administration but closes out two years later, 3 necessarily it's a contingent claim and what becomes due 4 at close-out could be radically different from what it 5 would have been at close-out on 15 September 2008. 6 MR DICKER: My Lord, that brings one on to the second point 7 which Mr Zambelli's evidence is directed to. In our 8 submission take an example where you have a series of 9 existing liabilities which are then the subject of 10 a dispute settled with the administrators pursuant to 11 the CRA, for example. 12 MR JUSTICE DAVID RICHARDS: Now, the dispute settled by the 13 CRA, are they at the date of administration, are they 14 contingent claims or are they actual but unascertained? 15 MR DICKER: They may be a variety. What happens, as we 16 understand it, is they're all valued as at the date of 17 administration, but the short point is if the 18 administrators' approach is effectively simply to say, 19 "You have now entered into a settlement agreement, your 20 claim is pursuant to the settlement agreement, it was 21 therefore necessarily contingent" -- 22 MR JUSTICE DAVID RICHARDS: Well, I don't know if that is 23 their case, but, I mean, if I could take an example of 24 an ISDA agreement which automatically closes out on 25 15 September 2008, of course there is still a great deal</p> <p style="text-align: center;">Page 123</p>
<p>1 carries a coupon and therefore increases after the date 2 of administration -- 3 MR JUSTICE DAVID RICHARDS: Carries a coupon? 4 MR DICKER: Carries a coupon. So -- 5 MR JUSTICE DAVID RICHARDS: I noticed that. Then it gets 6 a bit more -- is that post-administration interest? 7 MR DICKER: Yes. Well, there may be an issue as to quite 8 what it represents, but it is something that results in 9 an increase in the value of the claim post the date of 10 administration. 11 Mr Lomas's point is essentially to say if you add 12 interest on that claim as well, from the date of 13 interest and from the date of administration, you will 14 essentially be getting before than you should do. It's 15 a windfall. 16 My Lord, we were concerned -- the first point is we 17 were concerned obviously that your Lordship shouldn't, 18 as it were, try to construe the rules to avoid that 19 consequence, at least not without appreciating that 20 there may be other factual scenarios in which the 21 solution produces results that one can equally say the 22 draughtsman cannot have intended. That's one exercise 23 that Mr Zambelli has -- 24 MR JUSTICE DAVID RICHARDS: What I don't quite follow with 25 Mr Zambelli's example, I suppose, is this: if you're</p> <p style="text-align: center;">Page 122</p>	<p>1 of litigation going on in respect of the proper 2 valuation of the close-out amount as at that date, but 3 when that is resolved by judgment or agreement, six or 4 seven years later, that's not a contingent claim. That 5 simply quantifies the claim as at the date of 6 administration. I doubt if the administrators would be 7 suggesting otherwise on that. 8 MR DICKER: Well, my Lord, as I said, one of the intentions 9 behind Mr Zambelli's evidence was to try and clarify 10 what is and what is not, so far as the administrators 11 are concerned, a contingent claim, not necessarily -- 12 MR JUSTICE DAVID RICHARDS: I think that clearly is not an 13 issue for today, is it? 14 MR DICKER: Absolutely not. 15 So the first exercise is when one construes the 16 rules, if you're trying to think does one's construction 17 make sense and test it by way of an example, don't just 18 test it by way of Mr Lomas's example but also by 19 reference to the four other possibles. Of course there 20 are only four more possible outcomes and there may be 21 others. But, in a sense, better five rather than simply 22 one. 23 The second point, which I entirely accept is not for 24 your Lordship but which we hoped might at least receive 25 some sort of airing during the course of this hearing,</p> <p style="text-align: center;">Page 124</p>

<p>1 is quite what a contingent claim is. Your Lordship 2 referred to -- can I illustrate it in a different way? 3 One issue may be, for example, whether a prime 4 brokerage agreement is effectively a relationship 5 between LBIE and its counterparty which, given the 6 nature of the right and obligations, should be treated 7 as containing claims which are properly to be regarded 8 as outstanding as at the date of administration or only 9 claims contingent on close-out? 10 MR JUSTICE DAVID RICHARDS: I.e. a non-automatic close-out 11 MR DICKER: Yes. 12 MR JUSTICE DAVID RICHARDS: Yes. 13 MR DICKER: Now, just taking that very simple example of 14 a prime brokerage agreement which only, for whatever 15 reason, at any particular time, has cash being held by 16 LBIE. Now one knows from cases like the Russian Bank 17 case that if you have a current account with a bank and 18 the bank becomes insolvent, although your claim against 19 the bank for return of the sum credited to your current 20 account is only repayable by the bank of demand, 21 effectively the winding up brings to an end the 22 underlying commercial relationship and the court 23 proceeds on the basis no demand is necessary. 24 MR JUSTICE DAVID RICHARDS: Yes. 25 MR DICKER: So what we're concerned to ensure is that</p> <p style="text-align: center;">Page 125</p>	<p>1 are outstanding from the date of administration for the 2 purposes of 2.88(7) and interest accrues on them from 3 that date. Wentworth agrees. 4 The administrators contend, however, that the 5 contrary, as they put it in their position paper, is 6 arguable. They say, in a sense, it must be arguable 7 because you would expect the same result to apply to 8 future debts as applies for contingent debts and, given, 9 they say, that contingent debts only accrue interest 10 from the date the contingency falls due, that must also 11 be true in relation to future dates. Obviously we say 12 the argument flows in the other direction. 13 As your Lordship knows, the rules relating to future 14 debts are different from those in relation to contingent 15 debts. 16 MR JUSTICE DAVID RICHARDS: Yes. 17 MR DICKER: The mechanism by which those debts are 18 ascertained and valued is different. My Lord, the two 19 rules, although there is a tendency simply to focus on 20 one, are firstly 2.89: 21 "The creditor may prove for a debt of which payment 22 was not yet due at the date when the company entered in 23 to administration, subject to rule 2.105, adjustment of 24 dividend where payment made before time." 25 Then 2.105, which your Lordship saw this morning.</p> <p style="text-align: center;">Page 127</p>
<p>1 somehow during the course of this application potential 2 subsidiary issues of that sort don't, as it were, get 3 decided without further consideration. 4 Now, we said that out in our -- we referred to this 5 in our opening skeleton. We served Mr Zambelli's 6 witness statement. We have had -- we had no response. 7 We have developed the points further in our reply 8 skeleton. I'm not going to take your Lordship to that, 9 but that's the only issue we essentially deal with in 10 our reply skeleton. We have also had no response from 11 either administrators or Wentworth. 12 It may be that their view is that there is no useful 13 response they can give at this stage. From our 14 perspective, that's fine, provided that everyone 15 therefore understands that issues of this sort may 16 remain to require to be determined at some subsequent 17 date. 18 MR JUSTICE DAVID RICHARDS: Yes. 19 MR DICKER: That's all I had to say in relation to 20 contingent debts. 21 Can I turn to future debts? 22 MR JUSTICE DAVID RICHARDS: Yes. 23 MR DICKER: The Senior Creditor Group, as your Lordship 24 knows, submits the same basic analysis applies in 25 relation to future debts, with result that such debts</p> <p style="text-align: center;">Page 126</p>	<p>1 The basic intent of this rule is obviously that 2 a creditor receives dividends based on the value of his 3 debt as at the date of administration, arrived at by 4 discounting for the period between the date that it 5 would otherwise be due and the date of administration. 6 One can see that in 2.105(ii): 7 "For the purposes of dividend, the amount of the 8 creditor's admitted proof shall be reduced by applying 9 the following formula: X divided by 1.05 to the power N, 10 where X is the value of the admitted proof and that is 11 required to be divided by 1.05 to the power N, N being 12 the period beginning with the relevant date and ending 13 with the date on which the payment of the creditor's 14 debt would otherwise be expressed in years and months in 15 a decimalised form." 16 So you take the final date of payment and you 17 discount it back by the statutory discount factor back 18 to the date on which the -- back to the relevant date, 19 the date of administration. 20 MR JUSTICE DAVID RICHARDS: Yes. 21 MR DICKER: Now, we say it's therefore not surprising that 22 rule 2.88(7) entitles creditors to receive interest on 23 their debts from the date of administration. If this 24 was not so, creditors with future debts might never 25 receive the full value of their debts and might never</p> <p style="text-align: center;">Page 128</p>



<p>1 receive any compensation for delayed payment of their 2 claims. That obviously follows.</p> <p>3 Wentworth -- so we say the same logic applies to 4 future debts, therefore, as applies to contingent debts.</p> <p>5 Wentworth seek to distinguish the two. One point of 6 distinction, they say, appears to be that future debts 7 are different. Can I show your Lordship their skeleton 8 argument at paragraph 172. They say:</p> <p>9 "Future debts differ from contingent debts in three 10 main respects."</p> <p>11 "(1) As at the date of administration the future 12 debt is certain to become payable."</p> <p>13 We say that's true but irrelevant.</p> <p>14 Secondly:</p> <p>15 "As a result of the insolvency the future debt its 16 accelerated and treated as payable as at the date of 17 administration."</p> <p>18 The two cases referred to I'll come back into 19 a moment.</p> <p>20 "(3) To compensate for that acceleration, there is 21 a discount applied for early receipt, where payment is 22 not due at the date of at the date of the declaration of 23 the dividend."</p> <p>24 So far as (3) is concerned, we say absolutely right 25 in relation to future debt and there's a similar</p> <p style="text-align: center;">Page 129</p>	<p>1 behalf of the defendants [in other words, the insolvent 2 company] seem to involve this, that where a company 3 becomes ...(reading to the words)... that really is the 4 practical effect of the argument which has been 5 addressed to me."</p> <p>6 So the argument essentially was, well, this is 7 a future debt, it hasn't yet become due and payable. We 8 therefore continue to be entitled to use all the assets 9 of the company, although we're insolvent.</p> <p>10 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>11 MR DICKER: Just by the first hole-punch, the 12 Vice-Chancellor says:</p> <p>13 "It seems to me that the clause on which the 14 liquidator relies is one which contemplates ...(reading 15 to the words)... the money becomes immediately payable 16 and the security immediately enforceable."</p> <p>17 One way of analysing this is, effectively, there's 18 an implied term, the relationship comes to an end and 19 the liability is accelerated in the event the debtor 20 becomes insolvent --</p> <p>21 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>22 MR DICKER: -- which the parties cannot sensibly have 23 intended to permit, the liquidator had continued to use 24 the assets post-winding up and to leave the debenture 25 holder unable to do anything about it.</p> <p style="text-align: center;">Page 131</p>
<p>1 discount embedded in rule 2.88(6) for the purposes of 2 contingent claims.</p> <p>3 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>4 MR DICKER: Just focusing on the middle point. The 5 suggestion appears to be there's something special about 6 future debts because they are accelerated and treated as 7 payable as at the date of the administration.</p> <p>8 My Lord, just looking at those two authorities. The 9 first, Hodson v Tea Company, your Lordship has in 10 bundle 1A and tab 38.</p> <p>11 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>12 MR DICKER: Your Lordship can see what the case concerned 13 from the headnote:</p> <p>14 "A company borrowed money on the security of 15 debentures ...(reading to the words)... which might from 16 time to time be held by the company ...", et cetera.</p> <p>17 The last two lines of the facts:</p> <p>18 "Before the principal money became due or the 19 interest had fallen into arrears ...(reading to the 20 words)... as they existed at the date of the winding 21 up."</p> <p>22 Your Lordship needs to see why that occurred.</p> <p>23 Vice-Chancellor Hall's judgment starts at the bottom 24 of 861:</p> <p>25 "The argument which has been addressed to me on</p> <p style="text-align: center;">Page 130</p>	<p>1 MR JUSTICE DAVID RICHARDS: No.</p> <p>2 MR DICKER: The other case is Wallace v Universal Automatic 3 Machine Company which is at tab 49.</p> <p>4 MR JUSTICE DAVID RICHARDS: Just give me one moment.</p> <p>5 (Pause)</p> <p>6 Sorry, the other one is where?</p> <p>7 MR DICKER: My Lord, tab 49 of the same bundle.</p> <p>8 MR JUSTICE DAVID RICHARDS: Thank you. Yes.</p> <p>9 MR DICKER: Wallace v Universal Automatic Machine Company 10 it's a similar point. Your Lordship will see from the 11 facts:</p> <p>12 "Where a debenture issued by a company by way of 13 floating ...(reading to the words)... to realise his 14 security for the full of amount of principal, interest 15 and costs."</p> <p>16 If your Lordship goes to 552 for the judgment of 17 Lord Justice Lindley. He says, three lines into his 18 judgment:</p> <p>19 "The question raised by this appeal is whether, for 20 the purpose of realising such security, the principal 21 money secured by the debentures and thereby made payable 22 at a future date can be treated as if they had become 23 due at the date of the commencement of the winding up."</p> <p>24 Then, going down to the penultimate paragraph on 25 that page, he says:</p> <p style="text-align: center;">Page 132</p>

<p>1 "The plaintiff is not seeking to prove his debt, nor 2 is he bound to do so...(reading to the words)... 3 realise this security at once. The point was determined 4 in Hodson v Tea Company." 5 So we say the short point is Wentworth is incorrect 6 in paragraph 172 to suggest that there is a point of 7 distinction between contingent claims and future claims 8 because, as a result of the insolvency, the future debt 9 is accelerated and treated as payable as at the date of 10 administration. 11 My Lord, that may be the consequence of particular 12 agreements between parties, as it was in Hodson v Tea 13 Company and Wallace v Universal Automatic Machine 14 Company. It's not true in relation to all future debts. 15 Indeed, it couldn't conceivably be because, if it were, 16 rule 2.105 would have no role to play in the insolvency 17 regime at all. Every future debt is accelerated to the 18 date of administration. The question of discounting 19 a future debt back to the date of administration simply 20 doesn't arise. 21 MR JUSTICE DAVID RICHARDS: Sorry, did you mean 2.105? 22 MR DICKER: 2.105. 23 MR JUSTICE DAVID RICHARDS: Yes. Yes, I see. I mean -- 24 yes, I follow. 25 MR DICKER: So we say this isn't a point of distinction; it</p> <p style="text-align: center;">Page 133</p>	<p>1 the date when the company entered administration because 2 it entered administration on 2 January and the effect of 3 that clause was to make that debt payable on 2 January, 4 is that the way you put it? 5 MR DICKER: My Lord, one wouldn't discount -- if there's an 6 agreement between the parties and the effect of that 7 agreement is that a debt will become due and payable on 8 an event, whether its insolvency or otherwise, that debt 9 is then due and payable on that date. 10 MR JUSTICE DAVID RICHARDS: Yes. 11 MR DICKER: It's no longer a future debt and you're not 12 going to discount it. 13 MR JUSTICE DAVID RICHARDS: I follow. 14 MR DICKER: Our only point is: so whilst it's true that 15 happens for some future debts, not all future debts, 16 therefore it can't be a point of distinction between 17 future debts and contingent debts. 18 MR JUSTICE DAVID RICHARDS: Your point on 2.105 is that that 19 applies where the debt is not due at the date of 20 declaration of dividend. 21 MR DICKER: Yes. I was going to come on to that because -- 22 MR JUSTICE DAVID RICHARDS: Which necessarily is obviously 23 a later date. 24 MR DICKER: Yes. It's one of the features of rule 2.105 25 that one obviously needs to deal with. I said in</p> <p style="text-align: center;">Page 135</p>
<p>1 is undoubtedly true some agreements come to an end on 2 insolvency and it may well be that the effect of those 3 agreements coming to an end is to accelerate the 4 liability. It doesn't follow that that's true for every 5 future debt. 6 Now, just so your Lordship knows, we in fact 7 referred to those two authorities in paragraph 329, 8 sub-paragraph 2, at footnote 42, of our skeleton 9 argument. 10 MR JUSTICE DAVID RICHARDS: So in Hodson and Wallace, 11 because of the terms of the agreements, they would not 12 be future debts for the purposes of 2.89. 13 MR DICKER: Absolutely. 14 MR JUSTICE DAVID RICHARDS: Because the test is whether -- 15 because 2.88(9) applies to a debt of which payment was 16 not yet due on the date when the company entered 17 administration. 18 MR DICKER: And it wouldn't apply to Hodson because there 19 the effect of the insolvency was to accelerate their 20 debt. So it's no longer a future debt, it's payable 21 today. 22 MR JUSTICE DAVID RICHARDS: Only as a result of the company 23 going into liquidation. 24 MR DICKER: Yes. 25 MR JUSTICE DAVID RICHARDS: But, nonetheless, it was due on</p> <p style="text-align: center;">Page 134</p>	<p>1 general terms what the rule does effectively is discount 2 future debts back to the date of administration because 3 that's what rule 2.105, sub-rule 2, says. Your Lordship 4 is quite right, it only does that in certain 5 circumstances. It only does that when the debt is still 6 a future debt as at the date of declaration of the 7 dividend. 8 MR JUSTICE DAVID RICHARDS: Yes. 9 MR DICKER: Can I come on to that after very quickly dealing 10 with the meaning of "outstanding" in the context of 11 future debts. 12 I have dealt with it in the context of contingent 13 debts. I have already referred your Lordship to 2.105 14 (2) and the word "outstanding". The same points as 15 I made in relation to contingent debts can also be made 16 in relation to future debts. 17 There's only one other reference I want to give your 18 Lordship. That's going back in 2.105, sub-rule 2, 19 paragraph (b), what the rule provides is for a discount 20 of 1.5N: 21 "N is the period beginning with the relevant date 22 and ending with the date on which the payment of the 23 creditor's debt [and then these words] would otherwise 24 be due expressed in years and months in a decimalised 25 form".</p> <p style="text-align: center;">Page 136</p>

<p>1 Now, "otherwise be due", we suggest, is consistent 2 with our submissions because the implication of the 3 phrase "otherwise be due" is that although the debt 4 would otherwise be due at the date that it would have 5 been payable, for the purposes of rule 2.105 that's not 6 how it's treated. In other words, the draughtsman, 7 because the rules treat the debt as effectively 8 outstanding as at the date of administration, when the 9 draughtsman comes to consider the discount point he has 10 to go back, as it now is, to a sort of alternative 11 world, which is the date it otherwise would have been 12 due; in other words, the date it was originally due for 13 payment.</p> <p>14 MR JUSTICE DAVID RICHARDS: Yes, I follow.</p> <p>15 MR DICKER: Now, there's a similar windfall argument in 16 relation to future debts, although it rapidly becomes 17 considerably more complicated than it is in relation to 18 contingent debts. My Lord, I'll try and deal with it as 19 clearly as I can.</p> <p>20 The administrators contend that in certain 21 circumstances creditors with a future debt submitted to 22 proof would receive a windfall if interest was payable 23 from the date of administration.</p> <p>24 Now, the short answer is the administrators only 25 identify one situation, and I'll come to this, in which</p> <p style="text-align: center;">Page 137</p>	<p>1 debts; in other words, future debts that do not 2 themselves carry interest. So they're £100 payable in 3 ten years' time. Then if one applies 2.105 both to 4 a situation where the debt has become due before the 5 declaration of dividend and the situation where it has 6 not. Dealing first with where the rule does operate, we 7 have a debt that is still a future debt at the date the 8 dividend is declared. So it is discounted.</p> <p>9 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>10 MR DICKER: There is no windfall in this situation. The 11 debt is discounted to its present value as at the date 12 of administration and it ranks pari passu with all other 13 claims.</p> <p>14 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>15 MR DICKER: We say on that basis the creditor should receive 16 interest from the date of administration. If he does 17 not do so, he will not be treated equally. So that's an 18 easy category.</p> <p>19 The second category, which is the one the 20 administrators identify, is where the debt has ceased to 21 be a future debt before the date the dividend is 22 declared, such that it is not discounted. This is the 23 situation in which they say a windfall may arise.</p> <p>24 Now, it is correct the rule doesn't discount back to 25 the date of administration in this situation and if</p> <p style="text-align: center;">Page 139</p>
<p>1 it may give rise to a windfall, they say, in every other 2 situation it appears to give rise to substantial losses. 3 The application of rule 2.105 is complicated and it's 4 not always easy to discern the logic for the approach 5 being taken. I said that the basic effect of the rule, 6 2.105(2) is to discount the debt back from the date that 7 it would otherwise have become due and payable -- so, 8 the date of payment -- you discount it from that date 9 all the way back to the date of administration and one 10 can see the sense in that, because that then gives you 11 a value which ranks pari passu with everyone else.</p> <p>12 Now, the difficulty arises because 2.105 only does 13 that in certain circumstances. It only does it where 14 a creditor has proved for a debt of which payment is not 15 due at the date of the declaration of dividend. So if 16 your debt has already become due prior to the date of 17 declaration of the dividend, you are not discounted.</p> <p>18 MR JUSTICE DAVID RICHARDS: No.</p> <p>19 MR DICKER: If it becomes due only at a later date or will 20 become due only at a later date, you are.</p> <p>21 MR JUSTICE DAVID RICHARDS: Right.</p> <p>22 MR DICKER: My Lord, what one needs to do now is divide 23 future debts up into two categories, we say, for the 24 purposes of seeing how the rule operates. The first 25 category involves what may be called simple future</p> <p style="text-align: center;">Page 138</p>	<p>1 interest is applied, it's being applied on an 2 undiscounted amount.</p> <p>3 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>4 MR DICKER: Nevertheless, to describe that simply as 5 a windfall in our submission ignores the bigger picture. 6 Rule 2.105 more often than not applies when the company 7 is insolvent, when no question of a windfall, in other 8 words receiving more than the creditor would otherwise 9 have received, is likely to arise. The creditor is 10 going to suffer a shortfall. The only question is the 11 amount of his shortfall.</p> <p>12 So if one is talking but windfall in the sense of 13 receiving more than 100p in the pound, that can only 14 occur in the event of a surplus.</p> <p>15 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>16 MR DICKER: No doubt the draughtsman, when he drafted rule 17 2.105, was thinking primarily of the situation of an 18 insolvent company, rather than the situation of 19 a solvent one.</p> <p>20 MR JUSTICE DAVID RICHARDS: Do you think?</p> <p>21 MR DICKER: Well, in the sense if only because insolvent 22 companies are rather more common than those who turn out 23 to be solvent.</p> <p>24 MR JUSTICE DAVID RICHARDS: Yes, okay. I mean, 2.105 25 applies in the liquidation of a solvent company,</p> <p style="text-align: center;">Page 140</p>

<p>1 doesn't it?</p> <p>2 MR DICKER: Yes.</p> <p>3 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>4 MR DICKER: As I say, if one thinks of it in the context of</p> <p>5 an insolvent company, it would be wrong to say the</p> <p>6 effect of the rules is to give such a creditor -- an</p> <p>7 undiscounted creditor -- a windfall. He's going to have</p> <p>8 a shortfall. The only question is as to its amount. It</p> <p>9 may be one could say something slightly different which</p> <p>10 is that he is not being treated equally with all other</p> <p>11 creditors, in the sense for some reason his debt isn't</p> <p>12 being presently valued as at the date of administration.</p> <p>13 He's not receiving a dividend, therefore equally with</p> <p>14 everyone else, but that simply seems to be the effect of</p> <p>15 the rule. It's not -- none of this is a reason for</p> <p>16 construing the word "outstanding" to mean anything other</p> <p>17 than what we say it means.</p> <p>18 MR JUSTICE DAVID RICHARDS: Mmm.</p> <p>19 MR DICKER: My Lord, I don't know when would be a convenient</p> <p>20 moment.</p> <p>21 MR JUSTICE DAVID RICHARDS: I would prefer to go on for</p> <p>22 a little while. We will go on until about 3.15.</p> <p>23 I am just trying to get this right. If you have</p> <p>24 a future debt, the creditor proves for the full nominal</p> <p>25 amount of the debt, but he receives dividends as</p> <p style="text-align: center;">Page 141</p>	<p>1 2.105. When it comes then subsequently or there is</p> <p>2 a surplus out of which statutory interest can be paid,</p> <p>3 he gets, on your argument and Mr Zacaroli's argument,</p> <p>4 interest at the statutory rate on the full amount of his</p> <p>5 debt from the date of the commencement of the</p> <p>6 administration. It may be that Mr Trower says in that</p> <p>7 circumstance there is a windfall, because he's received</p> <p>8 the undiscounted amount of his debt plus interest for</p> <p>9 a period when the debt was not payable. That may be the</p> <p>10 windfall example.</p> <p>11 MR DICKER: And we agree that if there is a windfall, it can</p> <p>12 be properly described as such. This is precisely the</p> <p>13 situation in which it can arise. In other words, where</p> <p>14 you have a debt falling due after two years and</p> <p>15 a dividend after three years, the discounting mechanism</p> <p>16 for whatever reason isn't applied in that situation.</p> <p>17 A creditor therefore receive dividend by reference to</p> <p>18 the full amount of his proof, not by reference to</p> <p>19 a present value of the full amount of his original</p> <p>20 future debt. What we say is that to describe that as</p> <p>21 a windfall in the sense of something that must dictate</p> <p>22 an alternative construction of the rules, we say you</p> <p>23 can't do that. That simply appears to be the</p> <p>24 consequence of rule 2.105. To describe it as a windfall</p> <p>25 when the company is insolvent is not accurate. The most</p> <p style="text-align: center;">Page 143</p>
<p>1 discounted under 2.105. That's right. If by the</p> <p>2 time -- no, hold on. (Pause)</p> <p>3 If by the date of the declaration of the dividend --</p> <p>4 let's say two dividends are declared and the future debt</p> <p>5 is by its terms not yet payable, so his dividend is</p> <p>6 there discounted, but by the time of the third</p> <p>7 declaration and subsequent declarations his debt would</p> <p>8 otherwise have become due or is due in fact, is due,</p> <p>9 according to its terms.</p> <p>10 MR DICKER: As we understand the intended -- as we</p> <p>11 understand, whether intended or not, the operation of</p> <p>12 the rule, this is an exercise that has to be done with</p> <p>13 each declaration of dividend.</p> <p>14 MR JUSTICE DAVID RICHARDS: That's as I would have read it</p> <p>15 yes. That's what I would have thought so.</p> <p>16 MR DICKER: Now, working out the overall effect if one tries</p> <p>17 to take dividends and the possibility of different</p> <p>18 results isn't an exercise I confess I've --</p> <p>19 MR JUSTICE DAVID RICHARDS: No. One could take a simple</p> <p>20 case then, perhaps just one declaration. You have --</p> <p>21 the company goes into administration and then three</p> <p>22 years later, let's say, a dividend is declared, maybe</p> <p>23 100p in the pound. This particular creditor's debt</p> <p>24 became due according to its terms two years after the</p> <p>25 commencement of the administration so no discount under</p> <p style="text-align: center;">Page 142</p>	<p>1 you can say is that it affects the extent of -- likely</p> <p>2 to affect the extent of the debtor -- the creditor's</p> <p>3 shortfall and that's no doubt what the draughtsman, we</p> <p>4 say, probably the situation he had in mind when thinking</p> <p>5 about rule 2.105.</p> <p>6 We accept there is a wrinkle in that situation, but</p> <p>7 your Lordship needs to take into account that if the</p> <p>8 administrator is right, go to the other situation which</p> <p>9 is a situation in which 2.105 does apply. So you have</p> <p>10 dividend after three years. Debt due after four.</p> <p>11 A four-year debt, discounted all the way back to the</p> <p>12 date of administration, but on the administrators' case</p> <p>13 no interest payable.</p> <p>14 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>15 MR DICKER: So we quibble with the administrators'</p> <p>16 characterisation of windfall in the first situation, but</p> <p>17 in the second situation there can be no doubt but that</p> <p>18 the creditor doesn't -- isn't treated pari passu with</p> <p>19 everyone else. The debt is discounted back to the same</p> <p>20 date so he can, but then for some reason he, but only</p> <p>21 he, doesn't receive interest from that date.</p> <p>22 MR JUSTICE DAVID RICHARDS: I follow that, yes.</p> <p>23 MR DICKER: My Lord the second category is rather more</p> <p>24 complicated. It involves a future debt which is not</p> <p>25 a simple future debt. It involves a future debt which</p> <p style="text-align: center;">Page 144</p>

<p>1 carries interest.</p> <p>2 MR JUSTICE DAVID RICHARDS: Right.</p> <p>3 MR DICKER: Again, you have to do the same exercise under</p> <p>4 2.105 in relation to a future debt that becomes due and</p> <p>5 payable before and which becomes due and payable after</p> <p>6 the date of declaration of the dividend.</p> <p>7 Now, in relation to such debts -- in other words,</p> <p>8 future debts carrying interest -- we say the</p> <p>9 administrators' regime of you don't pay interest until</p> <p>10 the future debt becomes due and payable, which was their</p> <p>11 position in their position paper, invariably prejudices</p> <p>12 creditors in both situations. So this isn't a situation</p> <p>13 in which you could arguably describe one way in which --</p> <p>14 one situation in which the rules operates as giving rise</p> <p>15 to a windfall and the other giving rise to a loss. They</p> <p>16 both, on the administrators' case, give rise to a loss.</p> <p>17 Now, just dealing with those two situations. The</p> <p>18 first situation is where the debt has ceased to be</p> <p>19 a future debt; to take an example, one day before the</p> <p>20 date the dividend is declared such that it's not</p> <p>21 discounted. This is the equivalent therefore of the</p> <p>22 first situation where the administrator said there</p> <p>23 was -- there is a windfall, as they would describe it.</p> <p>24 MR JUSTICE DAVID RICHARDS: Hmm, hmm.</p> <p>25 MR DICKER: On the administrators' case, the creditor gets</p> <p style="text-align: center;">Page 145</p>	<p>1 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>2 MR DICKER: In other words, there's a double loss for this</p> <p>3 creditor. His debt is discounted all the way back. He</p> <p>4 doesn't get anything, along with every other creditor,</p> <p>5 by way of interest on his principal debt, and he doesn't</p> <p>6 get the interest -- he doesn't get anything in respect</p> <p>7 of the interest which would have accrued on his debt</p> <p>8 between the date of administration and the date it was</p> <p>9 eventually paid. So he is particularly worse off.</p> <p>10 My Lord, it may be that the administrators' latest</p> <p>11 case, set out in the skeleton, and then the further</p> <p>12 case, identified by my learned friend in the transcript</p> <p>13 on Day 1, is effectively to try and avoid results of</p> <p>14 that sort, to try and deal with a situation,</p> <p>15 particularly the situation in which a debt carries --</p> <p>16 a future debt carries interest.</p> <p>17 My Lord, I'll hear no doubt in due course how my</p> <p>18 learned friend puts it, but we say the big problem with</p> <p>19 that is it may or may not, depending on how it operates,</p> <p>20 produce what would appear to be a sensible, tidy,</p> <p>21 commercial outcome, but what it attempts to do is to</p> <p>22 construe the fairly plain language of 2.88(7) in a way</p> <p>23 that that language simply doesn't permit. That language</p> <p>24 is simply talking about the date -- the period for which</p> <p>25 the debt was outstanding. It's not talking about some</p> <p style="text-align: center;">Page 147</p>
<p>1 full undiscounted amount of his principal but does not</p> <p>2 receive any interest. That's simply the mirror of the</p> <p>3 first. So just look at the principal. You get the full</p> <p>4 discounted amount and the administrators say no</p> <p>5 interest. But no interest at all, which means that the</p> <p>6 creditor has effectively lost the right to interest</p> <p>7 accruing on his debt between the date of the</p> <p>8 administration and the date that his future debt became</p> <p>9 due and payable.</p> <p>10 The second situation is where the debt is still</p> <p>11 a future debt at the date of the dividend is declared,</p> <p>12 such that it is discounted. On the administrators'</p> <p>13 case, certainly as originally explained, a creditor's</p> <p>14 debt is discounted to its present value as at the date</p> <p>15 of the administration and the creditor receives</p> <p>16 dividends up to the amount of that discounted sum. We</p> <p>17 all agree on that. The administrators say he doesn't</p> <p>18 receive any interest on that discounted amount because</p> <p>19 he's not entitled to interest until his debt has ceased</p> <p>20 to be a future debt and has become due, and that debt</p> <p>21 has become due and payable. Nor, it appears, does he</p> <p>22 receive the interest accruing on his debt to which he</p> <p>23 was otherwise entitled between the date of</p> <p>24 administration and the date his debt became due and</p> <p>25 payable.</p> <p style="text-align: center;">Page 146</p>	<p>1 hybrid situation.</p> <p>2 My Lord, I'll deal with that in due course.</p> <p>3 It's fair to say that the -- that rule 2.105 has</p> <p>4 a slightly chequered history. My Lord, the old rule,</p> <p>5 prior to the 1986 Act, discounted a future debt from the</p> <p>6 date it was otherwise due back to the date of dividend.</p> <p>7 It didn't discount it all the way back to the date of</p> <p>8 administration. It discounted it back to the date of</p> <p>9 dividend. Effectively, no doubt, the rationale for that</p> <p>10 being that the accelerated receipt, the period for which</p> <p>11 payment has been accelerated, was the period between the</p> <p>12 date of declaration -- dividend being declared, which</p> <p>13 was when you actually got some money, and the date when</p> <p>14 you would otherwise have got the money when the debt</p> <p>15 became due.</p> <p>16 The new rule obviously takes a slightly different</p> <p>17 approach, given that it discounts back to the date of</p> <p>18 administration. Presumably that was thought more</p> <p>19 accurately to reflect the pari passu treatment of</p> <p>20 creditors. In its original form it was the subject of</p> <p>21 criticism by Lord Millett in Park Air Services and was</p> <p>22 redrafted as a result. The redrafting appears to have,</p> <p>23 at least partially, dealt with some of the issues that</p> <p>24 Lord Millett identified. It does appear to have thrown</p> <p>25 up these features so far as its operation is concerned.</p> <p style="text-align: center;">Page 148</p>

<p>1 As I say, it's not entirely clear to us quite what 2 the draughtsman's logic was in adopting the approach he 3 did and then making it dependent on whether or not 4 a dividend had been declared by the time the debt became 5 due and payable.</p> <p>6 My Lord, the final and very last point is, again, as 7 with so many of these questions, the Senior Creditor 8 Group has a fallback position. What we say is if 9 interest does not run until a contingent or future debt 10 has become due and payable, then it's possible that the 11 creditors may have a non-provable claim. If the 12 consequence of that is they end up receiving in total 13 less than the sum to which they were otherwise entitled, 14 they may be able to say, "Our claim outside of the 15 administration has not been satisfied in full. 16 Therefore, we should have a non-provable claim before 17 any surplus is distributed to shareholders or others 18 lower down in the statutory waterfall".</p> <p>19 My Lord, that's all I think I was proposing to say 20 by way of opening in relation to 6, 7 and 8.</p> <p>21 MR JUSTICE DAVID RICHARDS: Right.</p> <p>22 MR DICKER: Unless I can help your Lordship any further?</p> <p>23 MR JUSTICE DAVID RICHARDS: No. Thank you very much.</p> <p>24 Mr Dicker.</p> <p>25 Mr Smith, are you going to be addressing me on these</p> <p style="text-align: center;">Page 149</p>	<p>1 the second line to "those debts", which are the debts 2 which are outstanding, is obviously the reference to the 3 proved debts in the first line. So, my Lord, it's 4 important to emphasise that what we're -- the question 5 we're concerned with is when does the proved debt become 6 outstanding and, in particular, in our submission, the 7 focus is on that question, on the question of when the 8 proved debt becomes outstanding and not on the question 9 of when the underlying contractual or other liability 10 becomes outstanding.</p> <p>11 My Lord, your Lordship obviously knows the right to 12 prove is a right conferred by the statutory scheme so 13 the question of when a proved debt becomes outstanding 14 in our submission is a question of the operation of that 15 scheme. My Lord, it is an important point because the 16 proved debt obviously may be different from the 17 underlying contractual or other liability in material 18 respect. One obvious example of that is the conversion 19 of a foreign currency debt into sterling for the 20 purposes of proving obviously also there's a cut-off 21 date which delineates the amount which can be proved. 22 We'll also come in a moment in the way to which 23 contingent and future debt are treated, but, in our 24 submission, there are important differences between the 25 proved debt allowed under the rules in respect of such</p> <p style="text-align: center;">Page 151</p>
<p>1 issues?</p> <p>2 MR SMITH: Yes, I was, my Lord.</p> <p>3 MR JUSTICE DAVID RICHARDS: Maybe now would be a convenient 4 time to take our break then. So I'll rise for 5 five minutes now.</p> <p>6 (3.12 pm)</p> <p>7 (Short break)</p> <p>8 (3.18 pm)</p> <p>9 Submissions by MR SMITH</p> <p>10 MR JUSTICE DAVID RICHARDS: Mr Smith.</p> <p>11 MR SMITH: My Lord, I was going to deal with issues 7 and 8 12 together because our position is that same analysis 13 equally applies to both contingent and future debts.</p> <p>14 So far as issue 6 is concerned, I'm not going to add 15 anything. The answer to that issue in our submission 16 simply follows from issues 7 and 8.</p> <p>17 My Lord, if I can perhaps start with rule 2.88(7) 18 itself. My Lord, our case in a nutshell is that the 19 proved debt becomes outstanding on the date of the 20 commencement of the administration. The wording in the 21 second part of the rule is simply directed at 22 identifying the period or period following that day 23 during which interest runs.</p> <p>24 Now, my Lord, there's one obvious very important 25 point to start with on 2.88(7) which is the reference in</p> <p style="text-align: center;">Page 150</p>	<p>1 liabilities and the liabilities themselves. So there's 2 very important distinctions we suggest between the 3 proved debt and the underlying liability.</p> <p>4 My Lord, turning very briefly to the other 5 provisions of the rules. Obviously in distributing 6 administration, although the distributing element only 7 comes into effect when the notice is given, it is clear 8 that the creditor proves in respect of his claim as 9 ascertained at the date of the commencement of the 10 administration. I don't think that's in dispute. And 11 Mr Dicker, I think, referred you to rule 2.72.3(b)(ii) 12 which deals with the proof.</p> <p>13 My Lord the other machinery in the rules is 14 obviously directed at ascertaining the position as at 15 the debt of commencement of the administration as well, 16 dealing with conversion to foreign currency, contingent 17 debt and future debts, and so on and so forth.</p> <p>18 My Lord, it's rule 2.88 really fits into that 19 scheme.</p> <p>20 There's two specific points we would also make on 21 rule 2.88 itself. The first point is in relation to 22 2.88, sub-rule 1, which obviously provides that where 23 a debt proved in the administration bears interest, that 24 interest is provable as part of the debt except insofar 25 as it is payable in respect of any period after the</p> <p style="text-align: center;">Page 152</p>

<p>1 commencement of the administration.</p> <p>2 So, my Lord, just stopping there for a moment. If</p> <p>3 interest on the proof runs to the date of the</p> <p>4 administration, it might be thought logical if there was</p> <p>5 a surplus for interest to continue running from that</p> <p>6 date. My Lord, that would reflect, in our submission,</p> <p>7 the logic underlying the original judge-made rule which</p> <p>8 one sees in Humber Ironworks, which effectively limited</p> <p>9 the creditor to his principal and interest up to the</p> <p>10 date of the winding-up order, but the moment the surplus</p> <p>11 came that limitation was in effect lifted and the</p> <p>12 creditor was then back in the position of being able to</p> <p>13 exercise his ordinary rights which in my submission</p> <p>14 would run continue to run from the debt of the winding</p> <p>15 up order.</p> <p>16 Obviously rule 2.88(1) applies equally to future and</p> <p>17 contingent debts.</p> <p>18 My Lord that's the first point.</p> <p>19 The second point is in relation to rule 2.88(6)</p> <p>20 which deals with the rate of interest to be claimed in</p> <p>21 the first instance under paragraphs 3 and 4. It's the</p> <p>22 Judgments Act rate. Obviously your Lordship knows</p> <p>23 that's applied to statutory interest by rule 2.88(9).</p> <p>24 My Lord, the point to note is obviously that is fixed in</p> <p>25 rule 2.88(6) by reference to the date on which the</p> <p style="text-align: center;">Page 153</p>	<p>1 is his claim as ascertained at the date of commencement</p> <p>2 of the administration. There's no distinction in the</p> <p>3 rules in relation to any type of debt, whether actual,</p> <p>4 future or contingent. My Lord, at one level it could</p> <p>5 therefore be said that the proved debt is outstanding</p> <p>6 from that date simply as a matter of operation of those</p> <p>7 rules.</p> <p>8 Now, my Lord, we would also submit that's consistent</p> <p>9 with the theory of notional realisation and</p> <p>10 distribution, which Mr Dicker made submissions on</p> <p>11 earlier, which assumes that the assets are realised and</p> <p>12 notionally distributed as at the date of the</p> <p>13 commencement of the insolvency. That's all of one</p> <p>14 piece. It's all looking to the position as at the date</p> <p>15 of commencement of the insolvency which in the case of</p> <p>16 administration is the date of commencement of the</p> <p>17 administration.</p> <p>18 Now, my Lord, just turning then to the approach of</p> <p>19 Wentworth and the administrators. They accept that</p> <p>20 proof in respect of an existing debt, in other words</p> <p>21 a debt which has accrued due, is outstanding from the</p> <p>22 date of the commencement of the administration. The</p> <p>23 question we suggest is why should it be any different in</p> <p>24 relation to contingent and future debts?</p> <p>25 Now, the approach of Wentworth in relation to</p> <p style="text-align: center;">Page 155</p>
<p>1 company entered administration.</p> <p>2 Now, my Lord, if the Judgments Act rate for the</p> <p>3 purposes of statutory interest is fixed by reference to</p> <p>4 the position as at the commencement of the</p> <p>5 administration, again it might be thought that it was</p> <p>6 understood by the draughtsman that statutory interest</p> <p>7 would run from that date. If was intended that</p> <p>8 statutory interest might run from a different date, it</p> <p>9 seems likely he would have fixed the rate in a different</p> <p>10 way. So, my Lord, those two points on rule 2.88 we</p> <p>11 suggest do support the general notion that interest runs</p> <p>12 from the date of commencement of the winding up.</p> <p>13 My Lord, as I mentioned, the other parts of the</p> <p>14 machinery are obviously directed as well at ascertaining</p> <p>15 the value of debts as at the date of the administration.</p> <p>16 Obviously in addition the rule 13.12 itself which</p> <p>17 provides for the cut-off for proving in the case of</p> <p>18 administration at the date of commencement.</p> <p>19 My Lord, then in addition to that one has rule 2.69</p> <p>20 which is the fairly basic provision that provides for</p> <p>21 the proved debts then to be paid in full insofar as</p> <p>22 possible, but otherwise to rank pari passu.</p> <p>23 Now, my Lord, just stopping there. We do submit</p> <p>24 there is a short and rather obvious point, that the</p> <p>25 proved debt which the creditor is entitled to have paid</p> <p style="text-align: center;">Page 154</p>	<p>1 issue 7 is to look really to the question of when the</p> <p>2 underlying contractual or other liability becomes due.</p> <p>3 That's how they approach it, either because the relevant</p> <p>4 contingency occurs or, if it was a future debt, by</p> <p>5 reason of the passage of time. The approach of the</p> <p>6 administrators may now be somewhat different, but</p> <p>7 they're still obviously looking to the nature of the</p> <p>8 underlying liability itself.</p> <p>9 Now, my Lord, we say that's simply the wrong</p> <p>10 approach in principle because rule 2.88(7) is directed</p> <p>11 to the question of the period for which the proved debt</p> <p>12 has been outstanding and not at all to the question of</p> <p>13 when the underlying contractual or other liability has</p> <p>14 been outstanding. They are two separate things and</p> <p>15 really the problem with the -- we would suggest with the</p> <p>16 submissions made by the administrators and Wentworth is</p> <p>17 they confuse the two distinct concepts.</p> <p>18 Now, my Lord, if you take, for example,</p> <p>19 a contractual claim which would only accrue due on the</p> <p>20 occurrence of a future contingency, the position in our</p> <p>21 submission would be as follows. As a matter of the</p> <p>22 underlying contractual claim, it may well only accrue</p> <p>23 due in the future. However, under the scheme</p> <p>24 established by the rules, notwithstanding the</p> <p>25 contingency, the creditor obviously has a statutory</p> <p style="text-align: center;">Page 156</p>

<p>1 right to submit a proof in respect of an amount as 2 ascertained at the date of the commencement of the 3 administration. 4 Now, my Lord, obviously that's provided for by rule 5 2.81. If I can just take your Lordship to that. 6 MR JUSTICE DAVID RICHARDS: Yes. 7 MR SMITH: That obviously falls into two parts. There's 8 firstly the provision in the first sub-paragraph for the 9 administrator to undertake the estimate, but 10 your Lordship then sees, in rule 2.812, it provides that 11 where the value of the debt is estimated under this 12 rule, the amount provable in the administration in the 13 case of that debt is that of the estimate for the time 14 being. 15 So, my Lord, the right to prove is expressly in 16 respect of the estimated amount. That's in effect the 17 right which the statutory scheme confers and it's that 18 amount which constitutes the proved debt. 19 Now, the proof in respect of that amount will 20 obviously be a liquidated figure for a specific amount. 21 In our submission it's then outstanding in exactly the 22 same way as a proof submitted in respect of an underlying 23 contractual claim which had already accrued due. 24 There's no real difference so far as the rules are 25 concerned in that respect.</p> <p style="text-align: center;">Page 157</p>	<p>1 MR SMITH: So rather than the creditor proving for 2 a specific amount which has been estimated, the way the 3 rule works is that he simply proves for the full debt, 4 ignoring the future element of it. 5 MR JUSTICE DAVID RICHARDS: Yes. 6 MR SMITH: So in that respect there's no difference, so far 7 as proving under the rules is concerned, between a proof 8 in respect of an actual debt and a proof in respect of 9 a future debt. Essentially the proved debt is the same. 10 The only difference is when it comes to the calculation 11 of dividends, as your Lordship knows, where rule 2.185 12 then applies to determine the dividend which is paid. 13 But that's a point which goes to the calculation of 14 dividends, not to the amount for which the creditor 15 proves for under rule 2.88(9). 16 My Lord, this ties into a related point which has 17 been canvassed in the skeleton arguments as to whether 18 contingent and future debts are accelerated by reason of 19 commencement of an insolvency. My Lord, in our 20 submission it's necessary to take some care with the 21 word "acceleration" and, again, it's important to 22 distinguish between the creditor's rights under the 23 underlying contract, or other obligations, and the 24 creditor's proved debt under the statutory scheme. 25 Now, in our submission the position is as</p> <p style="text-align: center;">Page 159</p>
<p>1 In effect what the rule does is confer a statutory 2 right to prove in respect of a liquidated sum, 3 ascertained as at the date of administration, and 4 there's no reason why that shouldn't be outstanding in 5 the same way as a proof is outstanding in respect of 6 a debt which had accrued due. 7 Now, my Lord, it's true that the estimate of the 8 value of the debt may be revised from time to time. 9 Rule 2.811 specifically provides for that. But that 10 ability to revise the value doesn't alter the fact that 11 creditor has at the outset a right to prove in respect 12 of an amount -- specific amount as from the date of the 13 administration. 14 So, my Lord, against that context, in our submission 15 the approach of the administrators and Wentworth in 16 relation to contingent debts is to confuse two separate 17 things. There's a specific right to prove in the case 18 of contingent debts conferred by rule 2.812, that's one 19 thing, and the question of when that becomes 20 outstanding, and then distinct from that is the question 21 of the underlying contractual or other liability. 22 My Lord, so far as future debts are concerned, they 23 are obviously dealt with in a slightly different way in 24 rule 2.89. 25 MR JUSTICE DAVID RICHARDS: Yes.</p> <p style="text-align: center;">Page 158</p>	<p>1 follows: so far as the underlying contractual rights are 2 concerned, obviously wherever an insolvency has the 3 effect of accelerating those rights will depend on their 4 nature. 5 MR JUSTICE DAVID RICHARDS: Yes. 6 MR SMITH: But, as already explained, the creditor obviously 7 has a right to prove irrespective of whether there's 8 been an acceleration and his ability to do so doesn't 9 depend in any way on the contractual position. The 10 contractual position in our submission really is 11 irrelevant to his position under the scheme in terms of 12 his ability to prove. 13 Now, whilst one can say that there is acceleration 14 in a very loose sense, in practical terms a creditor has 15 a matter of practice will have a right to payment under 16 the scheme sooner than he might have had under his 17 contractual liabilities. That's really as far as it 18 goes and really, aside from that very loose sense, 19 acceleration isn't relevant to this analysis. 20 Now, my Lord, it's on that aspect of the analysis 21 that we part company with Wentworth in relation to its 22 treatment of future debts. Your Lordship knows it's 23 obviously common ground between the Senior Creditor 24 Group, York and Wentworth -- 25 MR JUSTICE DAVID RICHARDS: Sorry, you part company with</p> <p style="text-align: center;">Page 160</p>



<p>1 Wentworth on future debts?</p> <p>2 MR SMITH: In relation to the analysis in respect of future</p> <p>3 debts, not the results.</p> <p>4 MR JUSTICE DAVID RICHARDS: Not the results.</p> <p>5 MR SMITH: No. We agree with -- well, the Senior Creditor</p> <p>6 Group, York and Wentworth all agree on the result in</p> <p>7 relation to future debts.</p> <p>8 MR JUSTICE DAVID RICHARDS: But you get there by a different</p> <p>9 route, do you?</p> <p>10 MR SMITH: Yes. We part company with them on the analysis.</p> <p>11 The reason why we part company on the analysis is that</p> <p>12 Wentworth says that the position in relation to future</p> <p>13 debts is essentially governed by a principle that the</p> <p>14 effect of the insolvency is to accelerate those future</p> <p>15 debts.</p> <p>16 MR JUSTICE DAVID RICHARDS: I see.</p> <p>17 MR SMITH: And they derive that --</p> <p>18 MR JUSTICE DAVID RICHARDS: You say that can't be right for</p> <p>19 the reasons that we've -- I've discussed with -- or</p> <p>20 Mr Dicker has submitted to me.</p> <p>21 MR SMITH: Yes, exactly. So that's -- I'm just submitting</p> <p>22 the question of the acceleration of the contractual</p> <p>23 position is really irrelevant to the position under the</p> <p>24 statutory scheme. It doesn't bear on it. It doesn't</p> <p>25 affect the creditor's ability to prove in any way.</p> <p style="text-align: center;">Page 161</p>	<p>1 security."</p> <p>2 Now, my Lord, in agreement with Mr Dicker we submit</p> <p>3 those cases really don't bear at all on the question of</p> <p>4 when proved debts are outstanding under the scheme. So</p> <p>5 whilst we agree with Wentworth's position in relation to</p> <p>6 future debts, we say its reasoning is wrong.</p> <p>7 My Lord, that then brings me to the question of</p> <p>8 discounting and, in particular, the question of</p> <p>9 discounting future and contingent debts for present</p> <p>10 value at the date of commencement of the administration</p> <p>11 for the purposes of proof.</p> <p>12 My Lord, in our submission this point doesn't answer</p> <p>13 the question of when debts -- when contingent and future</p> <p>14 debts become outstanding. That's a question of the</p> <p>15 operation of the scheme. But it is obviously relevant</p> <p>16 to the criticism which the administrators and Wentworth</p> <p>17 make, that our case would result in a windfall, and it</p> <p>18 obviously goes to that point.</p> <p>19 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>20 MR SMITH: Now, my Lord, dealing with it very briefly, as</p> <p>21 Mr Dicker has obviously already explained and covered</p> <p>22 a lot of the ground. In the case of future debts,</p> <p>23 obviously the creditor proves for the full amount. That</p> <p>24 debt is not discounted as a matter of proof. But there</p> <p>25 is the statutory mechanism in 2.105 which reduces the</p> <p style="text-align: center;">Page 163</p>
<p>1 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>2 MR SMITH: As I think Mr Dicker showed your Lordship, those</p> <p>3 two cases weren't in any way concerned with the ability</p> <p>4 to prove in a winding up.</p> <p>5 MR JUSTICE DAVID RICHARDS: No.</p> <p>6 MR SMITH: What they were concerned with was the effect of</p> <p>7 the winding up on the terms of the debenture</p> <p>8 essentially, and whether, under the terms of the</p> <p>9 debenture, the effect of the winding up was to render</p> <p>10 the secured monies payable with the result the creditor</p> <p>11 could enforce his security.</p> <p>12 Mr Dicker showed you Hodson. He also showed you</p> <p>13 Wallace, my Lord. There was just one other passage he</p> <p>14 didn't show you in Wallace which I would like to show</p> <p>15 you, if I may. It's in bundle 1A, tab 49. My Lord,</p> <p>16 it's just at page 554 of the report. I think Mr Dicker</p> <p>17 showed you the judgment of Lord Justice Lindley. On</p> <p>18 page 554 Lord Justice Kay also gave a judgment. Your</p> <p>19 Lordship sees he says:</p> <p>20 "The question is whether the debenture holders can</p> <p>21 claim as...(reading to the words)... the principal</p> <p>22 becomes due."</p> <p>23 Then he expressly makes the point:</p> <p>24 "It is material to observe it is not a question</p> <p>25 proved from the winding up, the realisation on the</p> <p style="text-align: center;">Page 162</p>	<p>1 dividends, discounts back to the date of administration.</p> <p>2 In the case of contingent debts, it obviously works</p> <p>3 slightly differently. We agree with Mr Dicker where the</p> <p>4 contingency is yet to occur, its value clearly will be</p> <p>5 estimated under rule 2.81. That involves putting</p> <p>6 a present value on the debt at the date of the</p> <p>7 administration and that necessarily, we would suggest,</p> <p>8 includes a discount for maturity. My Lord, Mr Dicker</p> <p>9 obviously showed you some of the authorities that deal</p> <p>10 with that, in particular the European Assurance case.</p> <p>11 Where the contingency has occurred, there's</p> <p>12 obviously then a crystallised value to the claim in the</p> <p>13 sense of a crystallised value has accrued at the future</p> <p>14 date, but we submit the debt in that respect -- in that</p> <p>15 case is still discounted to a present value at the date</p> <p>16 or to the date of the administration. Obviously in that</p> <p>17 case what will have happened is the claim will have been</p> <p>18 given an initial estimated value under rule 2.81 with</p> <p>19 a discount for both the contingency and the futurity</p> <p>20 element. The contingency then occurs. So what we</p> <p>21 suggest effectively happened is the discount for the</p> <p>22 contingency drops away. There's then a revised value</p> <p>23 under 2.81 but the discount for the futurity would</p> <p>24 remain.</p> <p>25 Now, my Lord, we submit that under the wording of</p> <p style="text-align: center;">Page 164</p>

<p>1 rule 2.81 that approach is permitted and, indeed, 2 mandated by the rule. Perhaps if your Lordship can take 3 2.81. Your Lordship sees the relevant part at the 4 beginning of sub-paragraph 1: 5 "The administrators shall estimate the value of any 6 debt which by reason of its being subject to any 7 contingency or for any other reason does not bear 8 a certain value." 9 Now, two points we make on that. Firstly, the 10 certain value must mean certain value as at the date of 11 the winding -- as at the date of the administration. 12 MR JUSTICE DAVID RICHARDS: Yes. 13 MR SMITH: As at the date of the commencement of the 14 administration. The second point is it makes clear it 15 applies where the lack of certainty is by reason of the 16 debt being subject to any contingency or for any other 17 reason. 18 MR JUSTICE DAVID RICHARDS: Yes. 19 MR DICKER: So, my Lord, on that basis we do submit it 20 continues to be operative in relation to a contingent 21 debt where the contingency occurs subsequently to the 22 commencement of the administration, because the element 23 of futurity means that the debt still does not bear 24 a certain value as at the date of the administration. 25 One has a crystallised value of the future date but in</p> <p style="text-align: center;">Page 165</p>	<p>1 reflect the statistical probability of the contingency, 2 but, nonetheless, there is a time value of money point 3 and therefore I won't substitute the full amount for the 4 estimated amount, I'll substitute a discounted amount"? 5 That's, you say, the right approach there. 6 MR SMITH: Yes, exactly how we submit it works. 7 MR JUSTICE DAVID RICHARDS: I see. 8 MR SMITH: My Lord, obviously Mr Dicker showed you a couple 9 of authorities which provide support for that being the 10 right approach. Hills v Bridges was one. Re Law Car 11 was another. There's one other authority on that point 12 which I'd also like to show your Lordship which is 13 a case called Ellis &amp; Company's Trustee, which is in 14 bundle 1B at 63A. 15 As your Lordship sees, this is Ellis &amp; Company's 16 Trustee v Dixon-Johnson. I don't think the facts matter 17 too much. Broadly it concerned a bankrupt firm of 18 stockbrokers and the trustees sought to recover sums due 19 from the defendant on his client account. He was 20 a client of the firm. 21 MR JUSTICE DAVID RICHARDS: Right. 22 MR SMITH: Then he in turn then sought to set off a claim 23 for damages for a failure by the firm to return certain 24 shares which had been pledged as security. So he had 25 given shares to the firm as security. The firm hadn't</p> <p style="text-align: center;">Page 167</p>
<p>1 terms of its present value, that is still uncertain. 2 Rule 2.81, we suggest, continues to apply to allow -- 3 and indeed require -- the administrator to estimate its 4 actual present value. 5 MR JUSTICE DAVID RICHARDS: Do you say -- if we take 6 a contingent liability of a straightforward kind, when 7 the proof is lodged at a time when the contingency has 8 not occurred, so the proof is in an estimated sum 9 reflecting the probability of the contingency occurring 10 and any element of futurity, and then, prior to the 11 declaration of a dividend, the contingency occurs so the 12 amount of the contingent liability becomes fixed, not 13 necessarily the amount for which it's admitted to proof 14 but the amount or the contingent liability becomes an 15 actual liability. Now, at that point, just looking at 16 this, the administrator may revise -- may -- any 17 estimate previously made if he thinks fit by reference 18 to any change of circumstances or information. 19 MR SMITH: Yes. 20 MR JUSTICE DAVID RICHARDS: So do you say that the proper 21 approach of the administrator is that which was adopted 22 in the I think couple of cases Mr Dicker showed me this 23 morning, that the administrator would say, "Yes, well 24 I see that the contingency has occurred, that your claim 25 has crystallised, we must eliminate any discount to</p> <p style="text-align: center;">Page 166</p>	<p>1 returned them in breach of contract. 2 The particular or the main issue in the case was the 3 question at what date the shares were to be valued for 4 the purposes of his claim for damages which he sought to 5 set off. Mr Justice PO Lawrence dealt with that at 6 page 357. Your Lordship will see, toward the bottom of 7 page 357, the last full paragraph, he's actually just 8 referred to Re Law Car. 9 MR JUSTICE DAVID RICHARDS: Yes. 10 MR SMITH: Then he says: 11 "The defendant's claim for damages in the present 12 case being a provable debt...(reading to the words)... 13 in this action and not by way of proof." 14 He refers to Re Daintrey, amongst other things: 15 "The damages for which the defendant would be 16 entitled to prove...(reading to the words)... on the 17 day when they ought to be returned." 18 So he's saying you assess damages as at -- by 19 reference to the value of the shares as at the date they 20 should have been returned, but then, my Lord, he then 21 goes on to make the point that that then ought to be 22 discounted back for the period between that day, which 23 was post the date of the receiving order, and the date 24 of the receiving order itself. 25 MR JUSTICE DAVID RICHARDS: Yes, I see.</p> <p style="text-align: center;">Page 168</p>

<p>1 MR SMITH: So that seems to be adopting exactly the same 2 approach. He's saying when one discounts the claim back 3 to a value as at the date of the receiving order. 4 MR JUSTICE DAVID RICHARDS: Yes. 5 MR SMITH: Then, my Lord, just on rule 2.88 itself, on the 6 language of rule 2.88. It's obviously, I think, now 7 common ground that as a matter of ordinary language 8 "outstanding" is not synonymous with "due". I think the 9 administrators' own case seems to involve giving 10 a meaning of "outstanding" that means something other 11 than "due" in the context of rule 2.88. 12 Obviously when the draughtsman in the insolvency 13 action rules does want to convey the meaning of "due", 14 that's exactly the word he uses. Obviously that word 15 appears frequently in the Act and the rules, not least 16 in section 123. 17 My Lord, it also doesn't appear now to be in dispute 18 that the word "outstanding" is as a matter of language 19 capable of including future and contingent debts. 20 Now, my Lord, the other point on the language of 21 rule 2.88(7) is really derived from the way in which the 22 last part of that sub-paragraph is put together. As 23 your Lordship obviously knows, it requires that the 24 surplus be applied in paying interest on those debts in 25 respect of the periods -- so not any periods, it's "the</p> <p style="text-align: center;">Page 169</p>	<p>1 2.88(9) is applicable." 2 This is paragraph 160 of their skeleton argument. 3 MR JUSTICE DAVID RICHARDS: Yes. 4 MR SMITH: So they make the point, first of all, the word 5 must have the same meaning whichever of the two rates 6 specified in 2.88(9) is applicable. We would 7 respectfully agree with that. 8 They then go on to deal with what they say is the 9 meaning in the context of the two rates. They deal, 10 firstly, in paragraph 161, with the rate applicable to 11 the debt, apart from the administration. Your Lordship 12 will see at the top of page 59 of the skeleton argument, 13 they say: 14 "In that context 'outstanding' is the period since 15 the date on which the creditor could first have sought 16 interest at that rate, apart from the administration." 17 So that's what they say it means in the context of 18 rate applicable to the debt, apart from the 19 administration. 20 Then they go on in paragraph 163 to deal with the 21 position where the Judgments Act rate applies. They 22 say: 23 "In that context 'outstanding' means the period 24 since the date on which the creditor was first entitled 25 but for the administration to seek a money judgment."</p> <p style="text-align: center;">Page 171</p>
<p>1 periods" -- during which they have been outstanding 2 since the relevant date. 3 Now, my Lord, there's obviously a limit to how far 4 one can push points of language and grammar but we do 5 suggest that more naturally that's describing something 6 that began in the past and continues afterwards. It 7 suggests that proved debts will have been outstanding 8 for at least some period. That seems to be the natural 9 or the more natural way to read it. 10 MR JUSTICE DAVID RICHARDS: Yes. 11 MR SMITH: It's reinforced, we suggest, by the use of the 12 periods, not any period. It does appear to be implicit 13 in the formulation that the debts would have become 14 outstanding at some point, and the question the language 15 is addressing is simply how long since that date they 16 remained outstanding. 17 Now, my Lord, we then come to the question of what 18 the administrators say outstanding means which they deal 19 with in their skeleton argument at paragraph 160 through 20 to paragraph 164. It's bundle 6, tab 4. 21 MR JUSTICE DAVID RICHARDS: Yes. 22 MR SMITH: Now, picking it up firstly at paragraph 160, 23 they say: 24 "The word 'outstanding' must have the same meaning 25 in rule 2.88(7) whichever of the two rates specified in</p> <p style="text-align: center;">Page 170</p>	<p>1 Now, it's not at all obvious to us that those will 2 necessarily be the same date. It appears to imply in 3 the case of a Judgments Act interest case that the 4 creditor would need an accrued right to debt or damages 5 which would entitle him to proceed to obtain a judgment, 6 but it's not obvious that it means the same in the case 7 of a rate applicable, apart from the administration, 8 because on the administrators' formulation, if one had, 9 for example, a debt that was contingent but nonetheless 10 had a rate of interest applying to it under the terms of 11 the contract, that would seem to be sufficient to fall 12 within paragraph 161.3. 13 So it does seem to us that on the administrators' 14 approach to this, which obviously firstly is not 15 necessarily a natural reading of the word "outstanding", 16 there may well be a difference between the meaning of 17 that word as applied in relation to Judgments Act 18 interest and the meaning of that word as applied in 19 relation to the rate applicable, apart from the 20 administration. 21 It may depend on what exactly they mean by "the 22 creditor could first have sought interest", but it's not 23 clear why they adopt a different formulation for 24 a Judgments Act case than the rate applicable apart from 25 the administration case, unless they do intend to mean</p> <p style="text-align: center;">Page 172</p>

<p>1 something different in the two cases.  2 To the extent they are suggesting there's  3 a difference in meaning between the two cases, well, we  4 would suggest that itself is a powerful reason against  5 their construction of the rule.  6 My Lord, the next topic I just wanted to very  7 briefly deal with was the question of insolvency set-off  8 and how that works and how that impacts on this  9 particular question.  10 In our submission, consideration of the way  11 insolvency set-off operates also supports the conclusion  12 that the contingent or future debt is outstanding from  13 the date of the commencement of the insolvency.  14 Obviously set-off is dealt with by rule 2.85.  15 Your Lordship will no doubt be very familiar with this.  16 2.85(1), the rule applies where the administrator's  17 given the notice of intention to make a distribution.  18 Rule 2.85(3), the account is taken as at the date of the  19 notice of what is due from each party to the other in  20 respect of the mutual dealings and sums due from one  21 party and the sums due from one party shall be set-off  22 against the sums due from the other party.  23 Now, that refers to the account being taken as of  24 the date of the notice, but it doesn't mean that the  25 set-off is between the liabilities as they exist as at</p> <p style="text-align: center;">Page 173</p>	<p>1 of the commencement of the administration. So there,  2 again, for the purposes of set-off, ascertained as at  3 the debt of the administration.  4 MR JUSTICE DAVID RICHARDS: Yes.  5 MR SMITH: Then, finally, your Lordship sees 2.85(8), the  6 sum total of all of that is it's only the balance of the  7 account -- only the balance, if any, of the account owed  8 to the creditor is provable in the administration.  9 Now, if one just considers for a moment how that  10 works in relation to contingent or future debts, where  11 they're subject to mandatory set-off. The effect is  12 essentially to cancel out those debts and produce a net  13 balance which is provable. In our submission that net  14 balance is plainly outstanding from the date of the  15 administration and there's a number of reasons for that.  16 Firstly, it obviously represents the net balance  17 after setting off the claims as ascertained at the date  18 of the administration. So that's what goes into the  19 account. The balance expressly -- is expressly provable  20 pursuant to the express provision of 2.85(8) alongside  21 all other provable debts, ranking pari passu as  22 ascertained at the date of the commencement of the  23 administration. That net balance itself is obviously  24 not itself contingent or future. It's the net balance  25 which remains after one has gone through the process in</p> <p style="text-align: center;">Page 175</p>
<p>1 the date when the account is actually done. I think it  2 was described -- the account -- the taking of the  3 account was described by Lord Hoffmann really as meaning  4 no more than the calculation of the balance due. It's  5 the sitting down and actually manually or otherwise  6 taking of the account -- taking the account, but in  7 terms of to what goes into the calculation of the  8 balance due mutual dealings are obviously defined in  9 sub-paragraph 2. They include mutual credits, mutual  10 debts and other mutual dealings of the company, and any  11 creditor of the company claiming or claiming to prove.  12 And then there's an exclusion of various matter which  13 aren't allowed into the account.  14 Now, again, by reference to Stein v Blake, the  15 effect of that formulation is that the creditor is  16 essentially entitled to set-off the claim which, but for  17 the insolvency set-off, he would have been entitled to  18 prove. So on his side of the account it's his provable  19 claim. Your Lordship also then sees, under 2.85(4),  20 set-off applies specifically in relation to contingent  21 and future debts, whether or not they're due from the  22 company.  23 Then 2.85(5) to (7), the rule applies to the other  24 machinery one finds elsewhere in the rules for producing  25 the value of future and contingent claims as at the date</p> <p style="text-align: center;">Page 174</p>	<p>1 2.85, having notionally accelerated or otherwise the  2 contingent or future debt.  3 Now, my Lord, the short point in our submission is  4 that if a contingent or future debt owed by the company,  5 which is subject to set-off, results in a net balance  6 which is outstanding from the date of the  7 administration, then it would seem to be very odd if  8 contingent or future debts which were not subject to  9 set-off, because there didn't happen to be  10 a cross-claim, were outstanding from a different date.  11 One would have a slight --  12 MR JUSTICE DAVID RICHARDS: What sort of claims would they  13 be?  14 MR SMITH: Sorry?  15 MR JUSTICE DAVID RICHARDS: What sort of claims would they  16 be?  17 MR SMITH: They would be claims that --  18 MR JUSTICE DAVID RICHARDS: Well, that wouldn't be the  19 subject of set-off?  20 MR SMITH: Well, any claim where there isn't a cross-claim,  21 for whatever reason.  22 MR JUSTICE DAVID RICHARDS: I see. Like what? Can you give  23 me an example?  24 MR SMITH: Well, any debt claim, any contingent debt claim,  25 where there isn't a cross-claim.</p> <p style="text-align: center;">Page 176</p>

<p>1 MR JUSTICE DAVID RICHARDS: I'm sorry, I'm being stupid. 2 Let's rephrase it. I think maybe I thought you were 3 making a different point. I am sorry. (Pause) 4 I see your point. I don't know. I see. I can see 5 that what you're -- are you leading to this submission, 6 that it creates considerable difficulties of 7 disaggregation if what is being set off is a bundle of 8 claims on the one side against the company's claims on 9 the other? 10 MR SMITH: Yes. 11 MR JUSTICE DAVID RICHARDS: It wouldn't be particularly 12 a problem, I don't think, if the only claim the creditor 13 had was a contingent claim which was greater than the 14 company's claim against him because his claim would 15 simply go down from 100 to 20, but 20 would still be 16 a contingent claim. 17 MR SMITH: Yes, that's right. 18 MR JUSTICE DAVID RICHARDS: But are you postulating where 19 you have a number of actual and contingent and future 20 claims, "What is the balance", you would say? 21 MR SMITH: There that's point but there's also another point 22 as well, which is that if the effect of set-off, where 23 there is a cross-claim, is to produce a net balance 24 which is due at the date of the administration, it would 25 seem slightly odd --</p> <p style="text-align: center;">Page 177</p>	<p>1 MR JUSTICE DAVID RICHARDS: But, I mean, I'm not sure 2 whether the word "due" here carries any greater 3 meaning -- maybe you say it does -- than being "the sums 4 for which" -- well, all claims contingent, actual, 5 contingent, ascertained, unascertained, and all the rest 6 of it, that each side has against the other. 7 MR SMITH: Yes. 8 MR JUSTICE DAVID RICHARDS: I mean, it's a compendious 9 phrase or word to describe that, isn't it? 10 MR SMITH: Yes. What we suggest is that, looking at the 11 operation of the rule, where it applies effectively is 12 to produce a net balance which we suggest is quite 13 plainly outstanding from the date of administration. 14 MR JUSTICE DAVID RICHARDS: I follow, yes. 15 MR SMITH: It would be slightly odd if that was the position 16 where there happened to be a cross-claim against 17 a creditor as compared with the position where it 18 wasn't. 19 MR JUSTICE DAVID RICHARDS: I mean, you would say, for 20 example, supposing the creditor has a contingent claim 21 against the company, the company has a presently payable 22 claim against the creditor, set-off is mandated there, 23 notwithstanding that as a matter of ordinary legal 24 language nothing is due from the company to the 25 contingent creditor.</p> <p style="text-align: center;">Page 179</p>
<p>1 MR JUSTICE DAVID RICHARDS: Hold on. So you're pointing to 2 which words when you say that? 3 MR SMITH: Well, primarily 2.85(8). So it produces 4 a balance -- 5 MR JUSTICE DAVID RICHARDS: Or 3 as well. 6 MR SMITH: Yes. Obviously the first sentence of 2 -- 7 MR JUSTICE DAVID RICHARDS: And 8, sorry, yes. (Pause) 8 MR SMITH: It's actually quite interesting to compare the 9 first sentence of 2.85(8) with the second sentence 10 because where the balance is owing -- where the net 11 balance is owing the other way, so in other words where 12 it's owing to the creditor, to the extent it is 13 contingent or future it effectively reverts back to its 14 contractual terms, about that isn't the position 15 where -- 16 MR JUSTICE DAVID RICHARDS: I see actually the 17 disaggregation is taken -- is actually addressed in 18 a way in sub-rule 8. 19 MR SMITH: In the second sentence. 20 MR JUSTICE DAVID RICHARDS: Exactly, or that part of it 21 which results from the contingent or prospective claim. 22 So maybe there's some apportionment that goes on. 23 MR SMITH: It is, but that's certainly the position where 24 you're dealing with the -- you're dealing with the sum 25 owed to the company.</p> <p style="text-align: center;">Page 178</p>	<p>1 MR SMITH: Exactly. The effect of it is to produce the net 2 balance which we submit is outstanding. 3 MR JUSTICE DAVID RICHARDS: Yes. 4 MR SMITH: So, my Lord, there is that -- that, we submit, 5 would be an odd result if there was a disparity between 6 the position where there was set-off and the position 7 where there wasn't. It's difficult to see what the 8 reason for that would be. 9 MR JUSTICE DAVID RICHARDS: Yes, I see. 10 MR SMITH: My Lord, that was all I was going to say about 11 set-off. 12 My Lord, there are then a few practical points. 13 Obviously Mr Dicker has again covered this area to some 14 extent. The operation of discounting does give rise, we 15 suggest, to some very serious oddities on the right 16 administrators' case. 17 If one takes, first of all, future debts, obviously 18 under rule 2.105 where it applies for the purposes of 19 calculating dividends debts would be discounted back. 20 On their case plainly they say statutory interest would 21 only run from the date when the debt fell due which 22 could be some time later. My Lord, that does, we 23 suggest, give rise do very obvious and real lacuna which 24 would result in prejudice. 25 Now, there clearly is what might be described as an</p> <p style="text-align: center;">Page 180</p>

<p>1 anomaly in the discounting rule where the future debt 2 falls due before the declaration of the dividend, but, 3 my Lord, in relation to that we simply make two points. 4 Firstly, that's a consequence of the way in which 5 the draughtsman has chosen to frame rule 2.105. It 6 doesn't really itself tell you what the meaning of 7 "outstanding" in rule 2.88(7) is. Primarily the meaning 8 of "outstanding" is derived from the way the scheme 9 operates. That the first point. 10 The second point is it's not a point which in my 11 submission really assists the joint administrators 12 because on their case there remains the lacuna the other 13 way. If they're right, that in relation to the creditor 14 who does have his debt discounted back, he doesn't get 15 statutory interest until the date on which the debt in 16 fact fell due. There is not a point which actually 17 helps them in the sense that they still on their case 18 have a very obvious and serious lacuna. 19 So far as contingent debts are concerned, I have 20 obviously explained the position in relation to that, 21 but if we're right as to how discounting works in 22 relation to contingent debts, obviously there would be 23 similar lacuna on the administrators' case, and indeed 24 that of Wentworth, in relation to contingent debts. 25 They would be discounted back, given a present value at</p> <p style="text-align: center;">Page 181</p>	<p>1 insolvent company, or it was within LBIE's power itself 2 to demand repayment of the loan. 3 MR JUSTICE DAVID RICHARDS: Sorry, just can we move back 4 a moment. Just tell me again the relationship between 5 the creditor and LBIE here? 6 MR SMITH: So this is a case where the creditor has posted 7 collateral with LBIE, so he's posted assets with LBIE as 8 collateral. 9 MR JUSTICE DAVID RICHARDS: For his loans -- sorry, for 10 lines, to what, that have been made to him? 11 MR SMITH: Yes, exactly. So on the one hand there's 12 provision of security, on the other hand there's lending 13 coming back. The creditor has a contingent right to get 14 his assets back once the secured lending has been 15 repaid, as one might -- 16 MR JUSTICE DAVID RICHARDS: But that's not a propriety 17 claim, as I understand it, is that right? It's a pure 18 creditor/debtor relationship? 19 MR SMITH: Yes. When I say "his assets", it's not meant in 20 the proprietary sense. 21 In the particular circumstances we're concerned with 22 here, there wasn't a close-out mechanism on LBIE's 23 insolvency so the only two ways the creditor could in 24 fact get his money back were either effectively to repay 25 LBIE and thereby increase his exposure --</p> <p style="text-align: center;">Page 183</p>
<p>1 the date of administration, but on their case statutory 2 interest wouldn't run until later. 3 There's just one other point I want to make to your 4 Lordship under this heading which touches a little on 5 the facts of this case. It relates to the position 6 where the occurrence of the contingency is under the 7 control of the officeholder itself. So this postulates 8 a situation where the ability to cause the contingency 9 to crystallise is within the power of the officeholder. 10 We deal with this in our reply skeleton argument. 11 Perhaps if I could invite your Lordship to turn that up 12 in bundle 6, tab 7, paragraph 57. 13 Now, my Lord, the point we make here is that on the 14 facts of this case there will be situations -- indeed 15 our claim is one of them -- where clients have posted 16 assets with LBIE as collateral, essentially as security 17 for lending, but there was no close-out mechanism on 18 LBIE's insolvency. Just for your Lordship's note, the 19 underlying evidence on this is Margaret Mauro's witness 20 statement at paragraph 13. 21 So because there was no close-out mechanism, there 22 were only two ways in which the position could be 23 crystallised. Either the client discharged the loan, 24 which would have made little commercial sense because it 25 would actually have involved giving more money to an</p> <p style="text-align: center;">Page 182</p>	<p>1 MR JUSTICE DAVID RICHARDS: Oh, because -- ah, yes, of 2 course, because his exposure is that they owe him the 3 securities or the value of the securities. 4 MR SMITH: Yes, exactly. 5 MR JUSTICE DAVID RICHARDS: I see. 6 MR SMITH: He has basically two choices. One is he either 7 repays the loan, thereby increasing his exposure to an 8 insolvent company, which would seem not to make too much 9 sense commercially, or the other way for it to be closed 10 out would be for LBIE to demand repayment itself, which 11 it could do in relation to the loan. 12 MR JUSTICE DAVID RICHARDS: Yes. 13 MR SMITH: So, my Lord, this is a case, we would suggest, 14 where in effect the ability to cause the contingency to 15 crystallise is actually within the control of the 16 insolvent company. 17 Now -- 18 MR JUSTICE DAVID RICHARDS: Well -- 19 MR SMITH: Because it can demand repayment and effectively 20 close-out the position. 21 MR JUSTICE DAVID RICHARDS: I mean, so could the 22 counterparty but it wouldn't be sensible to do so, is 23 that what you're saying? 24 MR SMITH: Well, the only way the counterparty could do it 25 is by actually repaying the loan so it would have to put</p> <p style="text-align: center;">Page 184</p>

<p>1 the money in.</p> <p>2 MR JUSTICE DAVID RICHARDS: Okay, yes.</p> <p>3 MR SMITH: Now, so this is an example of a situation which</p> <p>4 actually arises on the facts of this case where the</p> <p>5 ability to control the occurrence of the contingency is</p> <p>6 within the control of the officeholder. We do suggest</p> <p>7 it would be somewhat odd if statutory interest only ran</p> <p>8 from the date when the contingency --</p> <p>9 MR JUSTICE DAVID RICHARDS: I'm confused on your facts</p> <p>10 because surely there's mandatory insolvency set-off,</p> <p>11 isn't there?</p> <p>12 MR SMITH: Well, I'm not sure about that, my Lord.</p> <p>13 MR JUSTICE DAVID RICHARDS: There must be, mustn't there,</p> <p>14 because your counterparty owes money to LBIE and LBIE</p> <p>15 owes the value of the deposited securities, so you have</p> <p>16 two debts going each way.</p> <p>17 MR SMITH: Yes. I suppose the practical answer to that</p> <p>18 though is of course mandatory set-off is only going to</p> <p>19 kick in once you have the notice given, the notice to</p> <p>20 distribute.</p> <p>21 MR JUSTICE DAVID RICHARDS: That's true.</p> <p>22 MR SMITH: So in relation to the period before the notice is</p> <p>23 given there's no set-off.</p> <p>24 MR JUSTICE DAVID RICHARDS: No. That's true as well.</p> <p>25 MR SMITH: So I think your Lordship --</p> <p style="text-align: center;">Page 185</p>	<p>1 MR SMITH: By the time you get to here, by the time you get</p> <p>2 to 2.88, the notice will obviously have been given by</p> <p>3 that time.</p> <p>4 MR JUSTICE DAVID RICHARDS: Yes, exactly. So I'm just</p> <p>5 trying to work out whether the relevance of your example</p> <p>6 is because what we're talking about here is interest and</p> <p>7 that's what this debate is about.</p> <p>8 MR SMITH: We are, but it's in relation to the period before</p> <p>9 the notice is given --</p> <p>10 MR JUSTICE DAVID RICHARDS: Which notice?</p> <p>11 MR SMITH: The notice of intention to distribute.</p> <p>12 MR JUSTICE DAVID RICHARDS: Sorry, that was why I asked you</p> <p>13 the question I just did. If the effect of the giving of</p> <p>14 the notice is, as it is, to trigger insolvency set-off,</p> <p>15 then there is substituted for the existing proof,</p> <p>16 presumably, the net sum.</p> <p>17 MR SMITH: Yes. So --</p> <p>18 MR JUSTICE DAVID RICHARDS: -- as ab initio; yes?</p> <p>19 MR SMITH: Yes.</p> <p>20 MR JUSTICE DAVID RICHARDS: So interest could only be</p> <p>21 payable on the net sum. I have never thought about this</p> <p>22 before, I don't think, but that would seem logical.</p> <p>23 MR SMITH: I think that's right. If I'm right on my set-off</p> <p>24 point, which is that actually the effect of this where</p> <p>25 there's insolvency set-off in any case is to produce</p> <p style="text-align: center;">Page 187</p>
<p>1 MR JUSTICE DAVID RICHARDS: What's the impact of that</p> <p>2 though?</p> <p>3 MR SMITH: Your Lordship's point is probably correct so far</p> <p>4 as the position once the notice is given. Prior to</p> <p>5 that, it doesn't seem to me there would be set-off.</p> <p>6 Now, the short point is that this is simply an</p> <p>7 example of where the ability to control the occurrence</p> <p>8 of the contingency is within the power of the</p> <p>9 officeholder. In this sort of case, if statutory</p> <p>10 interest only runs from the date when the contingency</p> <p>11 crystallises, one is in the rather odd situation that</p> <p>12 the administrator can effectively prevent the accrual of</p> <p>13 statutory interest by delaying the crystallisation of</p> <p>14 the contingency. We suggest that would be a rather odd</p> <p>15 situation.</p> <p>16 MR JUSTICE DAVID RICHARDS: Tell me actually, as a matter of</p> <p>17 interest, how does rule 2.88 -- the interest rule --</p> <p>18 operate in respect of debts which become the subject of</p> <p>19 set-off once a notice of distribution is given? I mean,</p> <p>20 one would have thought that, insofar as any interest is</p> <p>21 going to be payable, it is only going to be in respect</p> <p>22 of the balance, is that right?</p> <p>23 MR SMITH: Yes, I would have thought that's right.</p> <p>24 MR JUSTICE DAVID RICHARDS: I'm not sure how that all fits</p> <p>25 together.</p> <p style="text-align: center;">Page 186</p>	<p>1 a net balance which is outstanding at the date the</p> <p>2 administration --</p> <p>3 MR JUSTICE DAVID RICHARDS: Yes, one way or the other.</p> <p>4 MR SMITH: I agree this point doesn't arise on that</p> <p>5 hypothesis, if am right on that. Now, it does arise, if</p> <p>6 it's said I'm wrong about that, and for any reason</p> <p>7 you're looking at the underlying position and that if</p> <p>8 there is a situation where effectively the underlying</p> <p>9 claims remain for the purposes of statutory interest and</p> <p>10 the administrator is able to control --</p> <p>11 MR JUSTICE DAVID RICHARDS: I'm not sure anyone has, you</p> <p>12 know, thought of broaching that argument on this</p> <p>13 application.</p> <p>14 MR SMITH: No. Certainly I think where we get to is, so far</p> <p>15 as set-off is concerned, certainly my position is that</p> <p>16 where that does happen one does have the net balance and</p> <p>17 certainly interest would accrue on that --</p> <p>18 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>19 MR SMITH: -- from the date of commencement of the</p> <p>20 administration.</p> <p>21 My Lord, then the final point is that in our</p> <p>22 submission the administrators' argument in relation to</p> <p>23 future debts and contingent debts and Wentworth's</p> <p>24 argument in relation to contingent debts necessarily</p> <p>25 implies that there was a change in the law in 1986,</p> <p style="text-align: center;">Page 188</p>

<p>1 a substantive change in the law.                  2 Your Lordship obviously knows the relevant words "in                  3 respect of the periods during which they have been                  4 outstanding" appeared for the first time in the 1986                  5 rules. Prior to that, there was no express provision                  6 for statutory interest in liquidation, but there was                  7 provision in bankruptcy in section 33(8) of the                  8 Bankruptcy Act 1914 which simply provided --                  9 MR JUSTICE DAVID RICHARDS: Is this the 4 per cent?                  10 MR SMITH: It is, yes. It simply provided that interest                  11 would be paid from the date of the receiving order.                  12 MR JUSTICE DAVID RICHARDS: Yes.                  13 MR SMITH: So it simply said the surplus shall be applied in                  14 payment of interest from the date of the receiving order                  15 on all debts proved in the bankruptcy.                  16 Now, contingent debts were provable in the                  17 bankruptcy. That was section 33. Indeed, your Lordship                  18 I think asked the question earlier, that change was                  19 effected in --                  20 MR JUSTICE DAVID RICHARDS: I think this is a point that                  21 Mr Dicker made and he referred me to the paragraph in                  22 his skeleton where he had set out the successive                  23 provisions in the rules. Is that the point you're                  24 making?                  25 MR SMITH: It is, my Lord. So you have the pretty clear</p> <p style="text-align: center;">Page 189</p>	<p>1 MR ZACAROLI: On this side. Then there's a question of                  2 reply.                  3 MR JUSTICE DAVID RICHARDS: What is then left? Let me                  4 just --                  5 MR ZACAROLI: Issues 28 to 30, which I anticipate being                  6 relatively short compared with what has gone before, and                  7 I think all that's left after that for determination on                  8 this application is 37, which I don't think there's any                  9 issue on between the parties but my learned friend                  10 Mr Trower wishes to explain, I think, the complications                  11 there.                  12 MR JUSTICE DAVID RICHARDS: All right. Is it possible to                  13 sit at 10 o'clock tomorrow morning? Is that a problem                  14 for anyone? We'll sit again at 10 o'clock tomorrow                  15 morning.                  16 Thank you all very much.                  17 (4.25 pm)                  18 (The court adjourned until                  19 10.00 am on Thursday, 26 February 2015)</p> <p style="text-align: center;">Page 191</p>
<p>1 position in the 1914 Act and you have the pretty clear                  2 position all the way up to that. There's no suggestion                  3 then in the Cork Report that there was any reason to                  4 change the position.                  5 MR JUSTICE DAVID RICHARDS: Yes. So these provisions are                  6 mirrored in bankruptcy in the Act so then you're saying,                  7 well, apparently by a sidewind this change has been                  8 effected.                  9 MR SMITH: Yes.                  10 MR JUSTICE DAVID RICHARDS: To which the answer may come                  11 from the other side, "Well, it clearly is a new regime".                  12 MR SMITH: Possibly. My Lord, we suggest perhaps the more                  13 likely explanation for the addition of that language is                  14 the fact it was merely making clear the end period in                  15 which interest ceased to run, rather than seeking to                  16 define a new start date in which interest did run.                  17 I apologise, I've slightly overrun, my Lord, but                  18 that's all we have to say on this.                  19 MR JUSTICE DAVID RICHARDS: Thank you very much, Mr Smith.                  20 How does everyone think we're doing on timing?                  21 Let's see what we've got to cover still.                  22 MR ZACAROLI: My Lord, after a quick word with Mr Trower,                  23 between us we will certainly be finished by lunchtime.                  24 I don't --                  25 MR JUSTICE DAVID RICHARDS: On this issue?</p> <p style="text-align: center;">Page 190</p>	<p style="text-align: center;">INDEX</p> <p>1                  2 Submissions by MR ZACAROLI .....1                  3 Submissions by MR TROWER .....41                  4 Reply submissions by MR DICKER .....44                  5 Submissions by MR DICKER .....66                  6 Submissions by MR SMITH .....150                  7                  8                  9                  10                  11                  12                  13                  14                  15                  16                  17                  18                  19                  20                  21                  22                  23                  24                  25</p> <p style="text-align: center;">Page 192</p>



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