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

CHANCERY DIVISION

COMPANIES COURT

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

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

BETWEEN

(1) ANTHONY VICTOR LOMAS

(2) STEVEN ANTHONY PEARSON

(3) PAUL DAVID COPLEY

(4) RUSSELL DOWNS

(5) JULIAN GUY PARR

(THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS INTERNATIONAL (EUROPE) (IN ADMINISTRATION))

Applicants

-and-

(1) BURLINGTON LOAN MANAGEMENT LIMITED

(2) CVI GVF (LUX) MASTER S.À.R.L

(3) HUTCHINSON INVESTORS, LLC

(4) WENTWORTH SONS SUB-DEBT S.À.R.L

(5) YORK GLOBAL FINANCE BDH, LLC

Respondents

WATERFALL II DIRECTIONS APPLICATION (PART A)

JOINT ADMINISTRATORS' SKELETON ARGUMENT FOR TRIAL

Contents **Page**

I	**INTRODUCTION**			4
	(1)	Context of the present application and the Administrators' role		4
	(2)	The Issues in the Application		9
II	**STATUTORY INTEREST**			10
	(1)	Issue 1		10
	(2)	Issue 2		13
		(a)	*Introduction*	13
		(b)	*Principles of statutory construction*	14
		(c)	*The meaning of Rule 2.88(7)*	17
		(d)	*The mode of calculation for which the SCG and York contend*	19
		(e)	*Repealed legislation and obsolete case law*	23
		(f)	*The default rule for the application of payments on account*	24
		(g)	*Bromley v Goodere*	24
		(h)	*Cases following Bromley v Goodere*	25
		(i)	*The Bankrupts (England) Act 1824 and the Bankrupts (England) Act 1825*	26
		(j)	*Bower v Marris*	26
		(k)	*The position in company liquidations in the nineteenth century*	28
		(l)	*Subsequent changes to the winding-up legislation*	30
		(m)	*The Bankruptcy Act 1883*	30
		(n)	*Bankruptcy Act 1914*	33
		(o)	*The position in company liquidations*	33
		(p)	*The Insolvency Act 1986*	34
		(q)	*Rule 2.88(7)*	36
		(r)	*The foreign authorities*	37
		(s)	*Conclusion*	38
	(2)	Issue 39		38
	(3)	Issues 3 and 5		41
		(a)	*The meaning of the words*	42
		(b)	*The mischief sought to be addressed*	43
		(c)	*The counter-arguments*	45
	(4)	Issue 4		47

(5) Issue 6 48
(6) Issues 7 and 8 50
(a) How this works in practice 52
(b) Purposive interpretation 54
(c) The wording of Rule 2.88(7) 57
(d) The wider statutory context – Rule 2.88(9) 58
(e) The words "in respect of the periods during which they have been outstanding" 59
(f) The notion of simultaneous realisation and distribution 62
(g) Contingent creditors – revaluation of claims on the basis of the hindsight principle 66
(h) Prospective creditors – supposed acceleration 67
III CURRENCY CONVERSION CLAIMS 67
(1) Issue 28 67
(2) Issue 29 74
(3) Issue 30 76
(4) Issues 31 and 32 77
(5) Issue 33 79
IV POST-ADMINISTRATION CONTRACTS 81
(1) Issue 37 81
(a) The context in which Issue 37 arises 81
(b) The Respondents' positions 83
(c) The Administrators' view 84
(d) Set-off 88

I. INTRODUCTION

1. These written submissions are filed on behalf of the joint administrators of Lehman Brothers International (Europe) (in Administration) (the "**Administrators**") ("**LBIE**"), pursuant to paragraph 21.2 of the directions given by the Honourable Mr Justice David Richards on 21 November 2014 (the "**November Directions Order**"), in respect of the trial provided for by paragraph 2 of the November Directions Order (the "**Part A Trial**").

(1) Context of the present application and the Administrators' role

2. LBIE was the principal trading company within the European Lehman Brothers group of companies and is an English unlimited company. LBIE entered administration on 15 September 2008 (the "**Administration Date**").

3. During the course of 2009, the Administrators applied under para 65(3) of Schedule B1 for permission to make a distribution to LBIE's unsecured creditors.

4. On 30 November 2009, Briggs J granted permission to the Administrators to make a distribution to LBIE's unsecured creditors.

5. The Administrators have since declared and paid the following dividends:

   (1) On 26 November 2012, the Administrators served a notice of declaration of a first interim dividend of 25.2 pence in the pound.

   (2) On 19 June 2013, the Administrators served a notice of declaration of a second interim dividend of 43.3 pence in the pound.

   (3) On 21 November 2013, the Administrators served a notice of declaration of a third interim dividend of 23.7 pence in the pound.

   (4) On 23 April 2014, the Administrators served a further notice of declaration of a fourth and final interim dividend of 7.8 pence in the pound.

6. The dividends paid (25.2 pence; 43.3 pence; 23.7 pence; and 7.8 pence) amount to 100 per cent by value of the principal amounts of the admitted claims.

7. Each of the notices in respect of the dividends stated:

> "*Please note that distributions may be categorised by the Joint Administrators to be payments of either principal or interest. In the absence of any such categorisation, distributions shall be payments first of principal and, to the extent that the principal has been paid in full, as payments of interest*".

8. In practice, the Administrators generally categorised payments expressly as payments of the principal amounts of the admitted claims.[1] For example, in respect of claims which were paid by way of a single cheque, the Administrators stated in the covering letters enclosing cheques for payment in relation to the admitted claim amounts:

> "*LBIE will consider statutory interest on the Admitted Claim Amount to cease to accrue from the Deemed Payment Date, such that you will not be entitled to (or given credit for) any statutory interest on the Admitted Claim Amount pursuant to Rules 2.88(7) or 2.88(9) (inclusive) of the Insolvency Rules 1986 or section 189 of the Insolvency Act 1986, from the Deemed Payment Date*".

9. In any event the Administrators have since the publication of the ninth progress report (i.e. 12 April 2013) (in which for the first time the illustrative outcome estimates indicated a potential surplus), anticipated the possibility of there being a surplus of assets remaining after paying 100 pence in the pound in respect of claims admitted for dividend (which they have now done) (the "**Surplus**"). The Administrators estimate that the Surplus may reach or exceed £7.39 billion and that at least £3.5 billion would be available to distribute in respect of claims to the Surplus by 31 December 2014[2].

10. Accordingly, in February 2013 the Administrators, together with the joint administrators of LBIE's immediate parent companies, LB Holdings Intermediate 2 Limited ("**LBHI2**") and Lehman Brothers Limited ("**LBL**"), issued an application for directions (the "**Waterfall Application**") as to (inter alia):

---

[1] As regards Issue 2, the Administrators reserve the right to argue in a higher court that the doctrine of appropriation is applicable and that the Administrators exercised a right of appropriation. However that is not an argument that the Administrators could (or intend to) pursue at first instance or in the Court of Appeal.

[2] See the Administrators' 12th progress report (15 March 2014 to 14 September 2014): AVL11, pp. 1-50.

(1) the relative priority for payment (in the event of a Surplus) of (a) interest on proved debts payable pursuant to Rule 2.88(7) ("**Statutory Interest**") and (b) amounts owing from LBIE to LBHI2 under one or more of certain subordinated loan agreements between LBIE and LBHI2 (the "**Sub-Debt**"); and

(2) whether or not, in the event of a Surplus, creditors of LBIE whose provable contractual or other claims are denominated in a foreign currency, the amount of which was converted into sterling as at the Administration Date under Rule 2.86(1), are entitled to claim against LBIE for any currency losses suffered by them as a result of a decline in value of sterling as against the original currency of the claim between the Administration Date and the date or dates of payment or payments of distributions to them in respect of their claims (a "**Currency Conversion Claim**") and where Currency Conversion Claims, if they exist, rank for payment in the event of a Surplus.

11. The Court subsequently determined the Waterfall Application and on 14 March 2014 it handed down its judgment in *Re Lehman Brothers International (Europe) (in Administration)* [2014] EWHC 704 (Ch) (the "**Waterfall Judgment**"). The Waterfall Judgment is now subject to an appeal to the Court of Appeal which has been listed to be heard from 23 to 27 March 2015. In the Waterfall Judgment it was held (inter alia): (a) that the Sub-Debt owed by LBIE to LBHI2 was subordinated to provable debts, Statutory Interest and non-provable liabilities; (b) that Currency Conversion Claims exist; and (c) that Currency Conversion Claims rank as non-provable claims.

12. The Administrators seek, by way of the present application (the "**Application**" or "**Waterfall II Application**"), the Court's determination of various further issues that arise as a result of the existence of a Surplus (and as a result of the Court's determination of various issues in the Waterfall Judgment). The context of the Application is (in broad terms) the Administrators' need to determine the true extent and correct mode of calculation of creditors' entitlements and, consequently, how much of the Surplus is to be paid to general unsecured creditors (and, conversely, how much of the Surplus will be available to distribute to LBIE's subordinated creditors and shareholders). The Administrators have concluded that, whilst there are funds available to distribute, they

will not be in a position to make a distribution in respect of the Surplus without the Court first determining the various issues arising on the Application[3].

13. The Respondents to the Application are broadly representative of certain, generally opposing, interests.[4] In particular the First to Third Respondents, referred to collectively as the Senior Creditor Group (the "**SCG**"), together hold (through their various affiliates) a substantial value of unsecured claims against LBIE (in excess of £2.75 billion according to the SCG's skeleton argument). By contrast, Wentworth owns the Sub-Debt and so its interest in the Surplus appears at first blush to be broadly aligned with the subordinated creditors, although it has also pooled a number of different investments including a significant proportion that are equivalent to those held by the SCG (with an interest in Currency Conversion Claims and Statutory Interest)[5].

14. However the Administrators are conscious that the Respondents have not been and will not be formally appointed as representative respondents. Further, the Respondents' respective financial interests in the Surplus (which appear complex) are not such that they will necessarily take, between them, all available positions or arguments on each Issue. On Issue 8, for example, the Administrators are alone in taking the position that the contractual due date is the correct answer (notwithstanding that one might expect, in light of Wentworth's position on Issue 7, that Wentworth would take this position on Issue 8).

15. As a result, the Administrators have adopted the following approach:

    (1) Where all the Respondents have taken the same position and the Administrators do not consider that there is an arguable position to the contrary, the Administrators do not seek to advance a contrary position and invite the Court to give directions in accordance with what has become an agreed position. This is the case in respect of Issues 1, 3, 5, 30 and (it would seem) 29. The Administrators indicated in their position paper (at [4.1]) that, where an Issue had effectively been agreed, they would give notice on the LBIE administration website of their intention to ask the Court to give directions in accordance with the agreed position. On 4 November

---

3 See Lomas 9, [36].
4 See Lomas 9, [16-20].
5 See Lomas 9, [16-21] and [33].

2014 the Administrators uploaded all of the Respondents' reply position papers on the LBIE administration website, noting that they were keen to ensure that creditors had "*the opportunity to identify to the Administrators any relevant positions or arguments not currently adopted by any party to the Application, so that they may consider whether those should be put before the Court*", and inviting any creditor that considered there to be relevant positions or arguments not currently before the Court to contact the Administrators[6]. More recently on 4 February 2015, the Administrators have posted on the LBIE administration website a list of agreed Issues, inviting creditors who disagreed with any of the agreed positions on these Issues to contact them[7]. On 6 February 2015, the Administrators posted a further notice on the LBE administration website noting in similar terms that Issue 29 appeared to have been agreed also[8].

(2) Where the Respondents have adopted a common position (or only one Respondent has taken any position), but the Administrators consider that there is a respectable argument which supports the contrary position, the Administrators set out the arguments in favour of that contrary position (whether or not the Administrators consider the position they are contending for to be the correct one), so as to ensure that the Court has the benefit of the competing arguments in determining the relevant issues. None of the Respondents is aligned with the Administrators, for example, on Issue 8.

(3) In relation to issues where all available positions have been taken by the Respondents but, as experienced insolvency practitioners, the Administrators consider that they should adopt a positive position (it being a matter of insolvency law and/or a matter relating to their knowledge and experience as Administrators of LBIE).

(4) Where the Administrators adopt a position in respect of an Issue which accords with that of one of the Respondents, but consider that that Respondent has not

[6] See http://www.pwc.co.uk/business-recovery/administrations/lehman/update-waterfall-ii-application-position-papers-and-further-evidence-4november-2014.jhtml.

[7] See http://www.pwc.co.uk/business-recovery/administrations/lehman/update-waterfall-ii-application-read-before-11-february-2015.jhtml.

[8] See http://www.pwc.co.uk/business-recovery/administrations/lehman/update-waterfall-ii-application-the-application-further-agreed-position-6-february-2015.jhtml

identified with sufficient clarity or particularity the arguments on which it will seek to support the position adopted, the Administrators set out those arguments that they consider the Court ought to have made to it, in order to ensure that the issue is fully argued.

(5) More generally, in relevant cases, the Administrators seek to provide the Court with further detail or context (including practical matters that arise with respect to those issues) with a view to identifying for the Court the nature of the directions required to give the Administrators practical assistance in distributing the Surplus. The Administrators have filed evidence in this regard (Lomas 10 and Lomas 11), to which reference is made in the paragraphs below.

(2) The Issues in the Application

16. For the purposes of this trial the Issues fall into the following categories:

(1) **Statutory Interest:** Issues 1 to 8 concern the meaning and effect of Rule 2.88(7) and (9) and the entitlement of unsecured creditors to interest out of the Surplus.

(2) **Statutory Interest and Currency Conversion Claims; Master Agreements and Currency Conversion Claims:** Issues 28 to 30 concern the extent to which (if at all) unsecured creditors' entitlement to interest out of the Surplus affects any non-provable Currency Conversion Claims. Issues 31 to 33 concern questions relating to agreements for the transfer of claims and the possibility of Currency Conversion Claims arising in this context.

(3) **Post-Administration Contracts:** Issue 37 concerns the calculation of claims to interest and non-provable claims in circumstances where a number of underlying claims have been admitted for a single claim amount. This is an Issue of particular practical importance from the Administrators' point of view.

(4) **Compensation:** Issue 39 raises the question whether creditors are entitled to any compensation for the time taken to satisfy their entitlements to interest under Rule 2.88(7) and (9), Currency Conversion Claims or other non-provable claims. Given

that there are points of thematic continuity between Issue 2 and Issue 39, these two issues are addressed sequentially in the submissions below.

II. STATUTORY INTEREST

(1) Issue 1

(1) Whether on the true construction of Rule 2.88(7) of the Rules, Statutory Interest is payable on a simple or compound basis where the rate applicable is the rate specified in section 17 of the Judgments Act 1838? If payable on a compound basis, with what frequency is it to be compounded?

17. The parties have reached an agreed position on Issue 1[9], namely that:

    (1) The rate of interest specified in section 17 of the Judgments Act 1838 (the "**Judgments Act**") (the "**Judgments Act Rate**") is a simple interest rate; and

    (2) Therefore the second half of the question does not arise.

18. As noted above the Administrators have notified creditors, by way of updates on the LBIE administration website, of their intention to invite the Court to give directions in accordance with what has become an agreed position. In the event, the Administrators have received no response to this notice from any creditor. The Administrators invite the Court to give directions accordingly.

19. The Administrators consider that the position agreed between the parties is correct for the following reasons (adopting the reasoning set out in Wentworth's first position paper, paragraphs 1 to 5):

    (1) Section 17(1) of the Judgments Act, as amended, provides that "*Every judgment debt shall carry interest at the rate of 8 pounds per centum per annum from such time as shall be prescribed by rules of court until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment.*"

[9] See Wentworth's first position paper, paragraphs 1 to 5; the SCG's first position paper, paragraph 1; York's first position paper, paragraph 12; and the Administrators' position paper, paragraphs 6 to 8.

(2) The Court has always interpreted this statutory provision as permitting simple interest only, on the basis that "*the primary purpose of an award of interest is to compensate the creditor for having been kept out of his money*", and that "*in the eyes of the law simple interest is generally regarded as adequate compensation*": *Novoship (UK) Ltd v Nikitin* [2014] EWCA Civ 908, *per* Longmore LJ at paragraphs [132] to [133], [140] to [141].

(3) This is confirmed by the approach of the Court to the substitution of an alternative rate of interest on judgments expressed in a foreign currency. In that case, section 44A of the Administration of Justice Act 1970 permits the Court to order that the interest rate applicable to the debt (being one to which section 17 of the Judgments Act applies) shall be "*such rate as the court thinks fit*". In *Slocom Trading Ltd v Tank Inc* [2013] EWHC 1201 (Ch), Roth J held that there was no basis under s.44A for imposing a compound rate of interest (paragraph [44]).

(4) Further, there is nothing in the context of Rule 2.88 which supports an argument that it is intended to impose a compound rate. Clear words are required in a statutory provision to give rise to an entitlement to compound interest: *Slocom Trading Ltd v Tatik Inc* [2013] EWHC 1201 (Ch) per Roth J at paragraph [44]. The reference in Rule 2.88 to the Judgments Act Rate does not suggest in any way that the Judgments Act Rate should be compounded. Nor is there any suggestion that Parliament, when enacting the right to Statutory Interest under Rule 2.88 intended to confer a right to compound interest (see in particular paragraphs 1363 to 1395 of the Cork Report).

20. Finally, on the basis that the agreed position above is correct, the Administrators concluded at paragraph 8 of their position paper that, for the purposes of determining creditors' entitlements in respect of Statutory Interest, the rate of 8% per annum be converted into a daily rate by dividing it by however many days there happen to be in a given calendar year.

21. The Administrators invited the Respondents, if they disagreed with this conclusion, to explain in their reply position papers why they disagreed with it. In the event, only Wentworth engaged with this point in its reply position paper, noting in its reply position paper that it considered the Administrators' conclusion to be correct (paragraph 2).

22. In its skeleton argument York has taken the position that the daily rate in respect of an annual rate of 8% simple interest is to be calculated invariably on the basis of a 365-day year (York skeleton, [23] to [26]). York has not adduced any authority directly on point. Instead it relies on two analogies, namely an article printed in the Law Society Gazette in respect of pre-judgment interest (at [24]), and the Bank of England's Non-Investment Products Code (November 2011) in respect of temporary loans (at [25]), both of which provide for a method of calculation of the daily rate of interest on the artificial basis of an immutable 365-day year.

The Administrators consider that York is wrong and that, for the purposes of determining creditors' entitlements in respect of Statutory Interest, the rate of 8% per annum be converted into a daily rate by dividing it by however many days there happen to be in a given calendar year. In particular:

(1) The phrase "*per annum*" used in s. 17(1) of the Judgments Act is to be construed according to its natural meaning, which includes the feature that every year in four is a leap year. The fact that a year will contain either 365 days or 366 days, depending on whether or not it is a leap year, is prescribed by statute: see s.2 of the Calendar (New Style) Act 1750.

(2) The term "*per annum*" does not result in interest being available only for each whole year that elapses. Rather, interest is available for each whole year or part of a year. To calculate a part-year entitlement the annual rate must be converted into a daily rate by reference to the number of days in the year in question.

(3) Accordingly the phrase "*per annum*", as used in s.17(1) of the Judgments Act, is to be understood to refer to a period either of 365 days or of 366 days, depending on whether or not a particular year is a leap year.

(4) It follows that, for the purposes of determining creditors' entitlements in respect of Statutory Interest, the rate of 8% per annum is to be converted into a daily rate by dividing it by however many days there happen to be in a given calendar year.

(5) Finally, York's reliance upon the Bank of England's Non-Investment Products Code (November 2011) is misplaced since this Code relates to the standard practice for temporary loans and has no application to the correct construction of the meaning of the words "*per annum*" as used in s.17(1) of the Judgments Act. Similarly, York's reliance on the Law Society article is misplaced, both because the article is irrelevant and because it has no obvious legal basis or effect.

(2) Issue 2

(2) Whether on the true construction of Rule 2.88(7) of the Rules, Statutory Interest is calculated on the basis of allocating dividends:
(i) first to the payment of accrued Statutory Interest at the date of the relevant dividends and then in reduction of the principal;
(ii) first to the reduction of the principal and then to the payment of accrued Statutory Interest; or
(iii) on the basis of some other sequencing.

(a) Introduction

23. Issue 2 raises a question of statutory construction. In the Administrators' submission, the Court's task is to construe Rule 2.88(7) of the 1986 Rules.

24. Rule 2.88(7) provides:

> "[Any] *surplus remaining after payment of the debts proved shall, before being applied for any purpose, be applied in paying interest on those debts in respect of the periods during which they have been outstanding since the company entered administration*".

25. In the Administrators' submission, Rule 2.88(7) is a clear and unequivocal mandatory direction as to how the surplus is to be applied, which simply means what it says.

(1) The Rule proceeds on the basis that the debts proved have been paid.

(2) It is concerned with the surplus remaining after the payment of the debts proved.

(3) It proceeds on the basis that interest on the debts proved has not been paid.

(4) It directs that the surplus be applied in paying interest on the debts proved.

26. Wentworth adopts the same approach as the Administrators on this point.

27. However the SCG and York adopt a very different approach. Their analysis does not begin with the words of Rule 2.88(7). They do not invite the Court to begin by construing the words of the applicable statutory provision. Instead, the SCG's submissions start with the Bankrupts Act 1542 and the Bankrupts Act 1571 before moving to *Bromley v Goodere* (1743) 1 Atkyns 75 (a decision on the Bankrupts Act 1705) and *Bower v Marris* (1841) Craig & Phillips 351 (a decision on the Bankrupts (England) Act 1825). York adopts the same approach by beginning with *Bromley v Goodere* (1743) 1 Atkyns 75. They seek to use these and other old (and ultimately irrelevant) decisions in order to piece together an elaborate argument about dividends being "*notionally re-allocated*".

(b) Principles of statutory construction

28. The difference in approach between the Administrators and Wentworth on the one hand and the SCG and York on the other hand makes it necessary to identify the basic rules of statutory construction. The Administrators submit that:

(1) The 'golden rule' is that legislation should be construed in accordance with the intention of the legislature, as discerned from the words that have been used by the legislature in the statute itself: *Grey v Pearson* (1857) 6 HLC 61 at 106 per Lord Wensleydale; *Caledonian Railway v North British Railway* (1881) 6 App Cas 114 at 131 per Lord Blackburn.

(2) If the statute has a clear meaning, it must be applied. It is not legitimate to stretch the language of a rule beyond the fair and ordinary meaning of its language:

London & North Eastern Ry Co v Berriman [1946] 1 All ER 255 per Lord Macmillan at 260H.

(3) The court is therefore bound to give effect to the clear legislative language, even if the consequences in the instant case were not in the contemplation of the legislature: *Cox v Hakes* (1890) 15 App Cas 506 at 528 per Lord Herschell.

29. Where the legislation in question is not the first Act to have dealt with a particular topic or subject matter, the following additional rules apply:

(1) Where a statutory provision has been re-enacted in the same or materially the same wording, it is to be assumed that the legislature has not sought to change the law: *Gilbert v Gilbert* [1928] P 1 at 8 per Scrutton LJ; *R v Brixton Prison Governor, ex p De Demko* [1959] 1 QB 268 at 280-281 per Lord Evershed MR.

(2) Where words in an Act of Parliament have received a clear judicial interpretation, and the legislature has re-enacted the provision without any alteration to the words, the legislature must be taken to have used the words in question according to the meaning which the court has previously given to them: *Ex parte Campbell* (1870) LR 5 Ch 703 at 706 per James LJ; *Webb v Outrim* [1907] AC 81 at 89 per Lord Halsbury; *Barras v Aberdeen Steam Trawling and Fishing Company Limited* [1933] AC 402 at 411 per Viscount Buckmaster.

(3) However, where the court is concerned not with a straight consolidation, but with the replacement of previous legislation by a new self-contained statutory code, previous judicial decisions on the meaning of repealed legislation are not the correct starting point in the process of construction. Rather, when dealing with a self-contained statutory code, the correct approach is to look for an answer in the relevant provisions of the modern statutory law, in accordance with the 'golden rule': *Union Railways (North) Ltd v Kent County Council* [2009] EWCA Civ 363 at para 13 per Carnwarth LJ; *Scottish Widows plc v Commissioners for HM Revenue and Customs* [2011] UKSC 32 at para 15 per Lord Hope; *Farrell v Alexander* [1977] AC 59 at 73 per Lord Wilberforce.

(4) Recourse to the earlier legislative history and case law is not permitted in such a case, unless it is required in order to resolve real doubts or ambiguities: *Union Railways (North) Ltd v Kent County Council* [2009] EWCA Civ 363 at para 13 per Carnwarth LJ; *Scottish Widows plc v Commissioners for HM Revenue and Customs* [2011] UKSC 32 at para 15 per Lord Hope.

30. Lord Herschell identified the correct approach in a much-cited passage in his decision in *Bank of England v Vagliano Bros* [1891] AC 107 at 144-145:

> "*I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions ... I am of course far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate ... What, however, I am venturing to insist upon is, that the first step taken should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special ground*".

31. Lord Herschell's rule was cited with approval by the Privy Council in *Farquharson v R* [1973] AC 786. See also *R v Fulling* [1987] QB 426: "*The right approach is ... simply to examine the language of the relevant provision in its natural meaning and not to strain for an interpretation which either reasserts or alters the pre-existing law*".

32. Precisely the same principles apply to the construction of insolvency legislation: see, for example, in *Re A Debtor (1 of 1987)* [1989] 1 WLR 271 per Nicholls LJ at 276-277 ("*I do not think that on this the new bankruptcy code simply incorporates and adopts the same approach as the old code. The new code has made many changes in the law of bankruptcy, and the court's task, with regard to the new code, must be to construe the new statutory provisions in accordance with the ordinary canons of construction,*

unfettered by previous authorities"); *Smith v Braintree District Council* [1990] 2 AC 215 at 238 per Lord Jauncey ("*I feel justified in construing ... the Act of 1986 as a piece of new legislation without regard to 19th century authorities or similar provisions of repealed Bankruptcy Acts*").

33. See also *In re Wilcoxon, Ex parte Griffith* (1883) 23 Ch. D. 69 at 73 per Lindley LJ; *Re MC Bacon (No 1)* [1990] BCC 78 per Millett J; and *In re A Debtor (No 784 of 1991)* [1992] Ch 554 at 558–559 per Hoffmann J.

34. See also *Re Lehman Brothers International (Europe)* [2014] EWHC 704 (Ch), [2015] Ch. 1 at para 177 per David Richards J ("*Now that the rule is enacted in rule 2.88(1), it is the terms of the rule and nothing else which governs the circumstances in which a sum representing interest may be proved*").

(c) The meaning of Rule 2.88(7)

35. Rule 2.88(7) is a clear and mandatory direction as to how the surplus is to be applied. In circumstances where the debts proved have been paid, and a surplus remains after the payment of the debts proved, the surplus must be applied in paying interest on the debts proved before being applied for any other purpose.

36. Wentworth has already provided the Court with detailed submissions on the construction of Rule 2.88(7) and the Administrators do not intend to repeat what Wentworth has said.

37. However the Administrators emphasise four key points in respect of Rule 2.88(7):

    (1) Rule 2.88(7) proceeds on the basis that the debts proved have already been paid, whilst interest on those debts has not been paid. This premise is a reflection of the statutory waterfall (see *In re Nortel GmbH* [2014] AC 209 at para 39 per Lord Neuberger), in which liabilities at each level of priority must be paid in full before anything can be paid in respect of the claims at lower levels. Section 175(2)(a) of the Act provides that the preferential debts "*shall be paid in full*" before anything can be applied to discharge any of the lower-ranking liabilities of the company. Similarly Rule 2.69 of the Rules provides that the ordinary unsecured debts "*shall*

be paid in full". In insolvency legislation, the term "*paid in full*" means "*extinguished by payment in full*": see *In re Keet* [1905] 2 KB 666 at 673 per Vaughan Williams LJ. Rule 2.88(1) provides that post-administration interest is a non-provable debt; it does not qualify for a dividend. Statutory Interest ranks below preferential debts and ordinary unsecured debts.

(2) Rule 2.88(7) is concerned with the surplus remaining after the payment of the debts proved, i.e. the specific amount of money remaining in the estate after payment of the debts proved. Rule 2.88(7) does not provide any rights in respect of the application of any other sum of money or any other part of the estate. In particular, it does not provide creditors with any rights in respect of the notional re-allocation of the sums already paid in discharge of the debts proved.

(3) Rule 2.88(7) contains a mandatory direction (the word used is "*shall*") requiring that the surplus be applied in paying interest on the debts proved. The specific amount remaining in the estate after payment in full of the debts proved must therefore be applied for the purpose of paying interest. It cannot be used for any other purpose. In particular it cannot be applied to pay the principal sum of the debts proved.

(4) Rule 2.88(8) requires interest under Rule 2.88(7) to rank equally whether or not the debts on which it is payable rank equally. In other words, statutory interest is payable *pari passu* on the proved debts of preferential creditors and ordinary unsecured creditors.

38. The meaning of Rule 2.88(7) is therefore plain and unambiguous. This is not a provision of doubtful or ambiguous meaning and therefore there is no justification for examining the minutiae of repealed Bankruptcy Acts or old decisions on repealed provisions which do not exist in the same form in the modern insolvency code.

39. Rule 2.88(7) is not a re-enactment of section 132 of the Bankrupts (England) Act 1825, which was in force at the time of *Bower v Marris*. The presumption in cases like *Barras v Aberdeen Steam Trawling and Fishing Company Limited* [1933] AC 402 is therefore inapplicable. This is not a case of Parliament re-enacting the same legislative provision

with only immaterial changes: Rule 2.88(7) should be construed on its own terms without reference to the way in which different provisions have been held to operate.

(d) The mode of calculation for which the SCG and York contend

40. Relying principally on *Bower v Marris*, however, the SCG and York say that the dividends that have already been paid to each creditor should be notionally re-allocated to discharge the creditor's entitlement to Statutory Interest, leaving part of the principal amount of the creditor's admitted claim unpaid, and that the surplus should then be applied in paying the unpaid amounts of his debt proved.

41. In the Administrators' submission the approach for which the SCG and York contend is inconsistent with each of the four points set out at paragraph 37 above:

    (1) The approach for which the SCG and York contend assumes that the debts proved have not been paid. On their approach, it is statutory interest that has been paid, whilst the debts proved remain (in part at least) unpaid. This is inconsistent with the express premise of Rule 2.88(7). It is also inconsistent with the statutory waterfall, in that it reverses the required order of priority of payments. In particular it is inconsistent with the clear terms of Rule 2.69, which requires dividends on the ordinary unsecured debts to be applied in payment of those debts "*in full*" – i.e. to discharge and extinguish them – before any surplus is applied to discharge any lower-ranking liabilities.

    (2) The calculation for which the SCG and York contend is concerned with the application or "*notional re-allocation*" of the sums that have already paid in discharge of the debts proved. However Rule 2.88(7) is concerned solely with the application of the surplus remaining after the payment of the debts proved. It does not provide any rights in respect of the application or notional re-allocation of any other sum of money or any other part of the estate.

    (3) The approach for which the SCG and York contend requires the surplus to be applied to pay principal. This is plainly contrary to the clear words of Rule 2.88(7), which require the surplus to be applied to pay interest. The approach for which the

SCG and York contend is inconsistent with clear and unambiguous mandatory statutory words.

(4) The approach for which the SCG and York contend is inconsistent with the requirements of Rule 2.88(8). As a result of section 175 of the 1986 Act, the process of notional re-allocation operates to prevent the surplus from being applied *pari passu* between preferential and ordinary unsecured creditors. On the approach for which the SCG and York contend, it is impossible to comply both with section 175 and Rule 2.88(8).

42. By way of further explanation of this final point:

(1) Preferential debts must be paid in priority to ordinary unsecured debts (see section 175 of the Insolvency Act 1986 and para 65 of Schedule B1).

(2) However, statutory interest on preferential debts ranks *pari passu* with statutory interest on ordinary unsecured debts (see Rule 2.88(8) of the Rules).

(3) The statutory scheme therefore has the unusual feature that different categories of debt (as to principal) rank at different levels of the statutory waterfall whilst statutory interest must be paid *pari passu* on all proved debts, even where they rank at different levels.

(4) Applying the statutory waterfall in the manner for which the Administrators contend, there is no difficulty at all with the identification of the correct approach.

(5) Assume for the purpose of argument that:

(i) the realisations in the estate (after expenses) amount to £22 million;

(ii) preferential debts amount to £10 million;

(iii) there are no floating charges;

(iv) ordinary unsecured debts amount to £10 million; and

(v) interest at the rate of 8% since the commencement of the administration amounts to £8 million in total, of which £4 million relates to the preferential debts and £4 million relates to the ordinary unsecured debts.

(6) Applying the legislation in the manner for which the Administrators contend:

(i) The first £10 million of the distributions is to be applied in paying the preferential debts in full, in accordance with section 175.

(ii) Since there are no floating charges, the next £10 million is to be applied in paying the ordinary unsecured debts in full, in accordance with Rule 2.69.

(iii) There is then a surplus of £2 million after the payment in full of the debts proved. In accordance with Rule 2.88(7), that surplus is to be applied in paying statutory interest at the applicable rate (in this example, 8%).

(iv) However, the amount of the surplus is insufficient to pay interest at 8% in full, because £8 million would be required for that purpose, but only £2 million is available in the estate after payment of the debts proved.

(v) As a result of Rule 2.88(8), the surplus of £2 million after payment of ordinary unsecured debts must be applied to pay interest *pari passu* on all proved debts, whether they are preferential or ordinary unsecured debts.

(vi) Therefore a final dividend of 25p in the £ is payable in respect of statutory interest rateably to the preferential creditors and the ordinary unsecured creditors, who share *pari passu* in the surplus as required by Rule 2.88(8).

(7) At the end of these distributions, the preferential creditors have received a total of £11 million (being payment in full of the principal amount of the preferential debts with £1 million of Statutory Interest under Rule 2.88(7)) and the ordinary unsecured creditors have received a total of £11 million (being payment in full of

the principal amount of the ordinary unsecured debts with £1 million of Statutory Interest under Rule 2.88(7)). As required by section 175, the principal amount of the preferential debts has been paid before the money has been applied for any other purpose. Further, as required by Rule 2.88(8), the preferential creditors and the ordinary unsecured creditors have ranked equally in respect of the surplus remaining after payment of the debts proved, even though the debts on which such interest was paid did not rank equally.

(8) However an intractable problem arises when any attempt is made to distribute Statutory Interest on the basis of the mode of calculation contended for by the SCG and York:

(i) According to that mode of calculation, the dividend of £10 million which the preferential creditors have received so far must be re-allocated, so that the first £4 million is applied to pay statutory interest on the preferential debts whilst the next £6 million is applied to pay £6 million of the principal amount of the preferential debts. The balance of £4 million of the principal amount of the preferential debts remains outstanding.

(ii) According to section 175(1), the preferential debts must be paid in full before any further distributions can be made to the ordinary unsecured creditors. This means that the administrator must pay the full amount of the surplus of £2 million to the preferential creditors, in discharge of part of the outstanding balance of the principal amount of the preferential debts.

(iii) On this basis, the preferential creditors will receive the full amount of the surplus remaining after the debts proved. However this surplus is not sufficient to satisfy the whole of the principal amount of the preferential debts and, as far as the preferential creditors are concerned, £2 million of the principal amount of the preferential debts remains outstanding.

(iv) This result will be plainly contrary to Rule 2.88(8), which requires the surplus remaining after the payment of the debts proved to be applied in paying statutory interest *pari passu*, whether or not the debts on which it is

payable rank equally. The surplus of £2 million after payment of the debts proved has not been applied *pari passu*. Rather, it has been paid exclusively to the preferential creditors to discharge a further portion of the principal amount of the preferential debts, which is notionally deemed to be still outstanding.

(v) However, if, instead of paying it all to the preferential creditors, the administrator seeks to comply with 2.88(8) by distributing the surplus of £2 million rateably to the preferential creditors and the ordinary unsecured creditors, he will act in breach of section 175(1), which requires him to pay the principal amount of the preferential debts in full before applying any of the money in the estate for any other purpose.

(9) Consequently, on the approach for which the SCG and York contend, it is impossible to comply both with section 175 and Rule 2.88(8). One of those provisions has to be contravened.

43. In the Administrators' submission, the inevitable conclusion is that the mode of calculation contended for by the SCG and York does not apply to insolvency proceedings governed by the modern insolvency legislation. To apply that mode of calculation would lead to a breach of parts of the waterfall provided by the modern insolvency legislation.

(e) Repealed legislation and obsolete case law

44. As explained below, previous decisions on differently-worded repealed legislation are irrelevant to the task of construing Rule 2.88(7). The wording of the earlier legislation was different and therefore (unsurprisingly) the courts came to different conclusions. They did so against the background of: (a) a rather different understanding of the ordinary rules as to appropriation of payments; and (b) statutory provisions which did not identify the surplus as the specific fund out of which the payment of interest was to be applied.

(f) The default rule for the application of payments on account

45. At common law, as a default rule, ordinary payments on account are generally applied in discharge of interest, in order to preserve the interest-bearing principal.

46. Early examples of the application of this default rule include *Crisp v Bluck* (1673) Rep Temp Finch 89 and *Chase v Box* (1702) Freem Ch 261. The headnote of the report of the latter decision states: "*It was held, that if a man is indebted to another for principal and interest, and payeth money generally, that it shall be applied in the first place to sink the interest before any part of the principal shall be sunk*".

47. Although the juridical nature of the default rule was not fully understood at the time of *Bower v Marris* (see, for example, *Hassal v Smithers* (1809) 2 Ves Jun Supp 289), it became clear as a result of subsequent decisions that it is merely a presumption as to the creditor's intention which applies in the absence of any express appropriation by either party: see *Income Tax Comr v Maharajadhiraja of Darbhanga* (1933) LR 60 IA 146 at 157 per Lord Macmillan; *West Bromwich Building Society v Crammer* [2003] BPIR 783 at para 16 per Neuberger J. The debtor is entitled to stipulate that the payment is to be applied only in discharge of the principal; and a creditor who accepts a payment on such terms will be bound to apply the payment in the manner stipulated by the debtor: *Rai Bahadur Seth Nemichand v Seth Radha Kishen* (1922) LR 48 IA 150 per Lord Dunedin. The application of payments is not to be determined by any automatic or invariable rules of law: see *Cory Bros & Co Ltd v Owners of Turkish S.S. Mecca* [1897] AC 286 at 293 per Lord Macnaghten. However, those nuances became apparent in the late nineteenth century and subsequently. At the time of the decision in *Bower v Marris*, the default rule was thought to be fixed and immutable.

(g) *Bromley v Goodere*

48. Against this background, it is no surprise to find that Lord Hardwick LC applied the default rule in a bankruptcy context in *Bromley v Goodere* (1793) 1 Atkyns 75 by declaring that the dividends should be "*applied in the first place to keep down the interest, and afterwards in sinking the principal*" (at 81). The bankruptcy legislation in

force at the time of *Bromley v Goodere* contained nothing inconsistent with the default rule. There was no legislative direction for the payment of interest.

49. Although Lord Hardwick LC gave no reasons in *Bromley v Goodere* for adopting the mode of calculation for which the SCG and York now contend, it is not difficult to see why he should have resorted to the default rule in the absence of any legislation requiring a different result.

50. *Bromley v Goodere* is not an authority on the construction of Rule 2.88(7) (or any materially identical legislative provision) and it does not address the question of whether Rule 2.88(7) requires the application of the default rule to a solvent administration. (For the reasons set out above, Rule 2.88(7) does not require the application of the default rule; on the contrary, it provides for a different approach; and the application of the default rule to a solvent liquidation or administration would be plainly inconsistent with Rule 2.88(7). In particular, whereas Rule 2.88(7) contains a mandatory direction requiring the surplus to be applied in paying interest, the application of the default rule results in the surplus being applied to pay principal.)

51. In the Administrators' submission, the Order of Lord Hardwick in *Bromley v Goodere* is therefore inconsistent with Rule 2.88(7). As a result of the plain words of Rule 2.88(7), the Order of Lord Hardwick in *Bromley v Goodere* is not an Order that could be made today. However, at the time of *Bromley v Goodere*, there was nothing in the legislation that could be said to stand in the way of such an Order and there was therefore room for the default rule to be applied.

(h) Cases following *Bromley v Goodere*

52. Subsequent cases following *Bromley v Goodere* (which, like *Bromley v Goodere* itself, contain nothing in the way of reasoning) are to be explained on the same basis: see, for example, *Ex parte Morris* (1790) 1 Vesey Junior 132; *Ex parte Champion* (1792) 3 Bro CC 436; *Ex parte Mills* (1793) 2 Vesey Junior 295; *Butcher v Churchill* (1808) 14 Vesey Junior 567; *Ex parte Koch* (1813) 1 V & B 343. In the absence of any statutory direction requiring the surplus to be applied to pay interest, there was nothing to prevent the application of the ordinary default rule in these cases.

(i) The Bankrupts (England) Act 1824 and the Bankrupts (England) Act 1825

53. Section 129 of the 1824 Act contained the first express provision for statutory interest. It was worded very differently from Rule 2.88(7). It contained no mandatory direction requiring the surplus to be applied in the payment of interest. It provided merely for the payment of interest to be the precondition to the distribution of any surplus to the bankrupt ("*the Assignees shall not pay such Surplus* [to the Bankrupt] *until all Creditors who have proved under the Commission shall have received Interest*"). The precondition did not contain anything in the nature of a mandatory direction requiring the surplus remaining after the payment of debts proved to be applied in the payment of interest. In particular the express wording of section 129 of the 1824 Act did not preclude the application of the ordinary default rule (as it then stood).

54. Section 132 of the 1825 Act was in materially the same terms as section 129 of the 1824 Act. It provided for the payment of interest to be the precondition to the distribution of any surplus to the bankrupt ("*the Assignees shall not pay such Surplus* [to the Bankrupt] *until all Creditors who have proved under the Commission shall have received Interest*"). It was different in language and structure from Rule 2.88(7) and again it contained no mandatory direction requiring the surplus to be applied in the payment of interest.

(j) *Bower v Marris*

55. *Bower v Marris* is the first of the decisions on which the SCG and York rely which contains anything in the nature of reasons for the decision.

56. The first point to note about *Bower v Marris* is that the Lord Chancellor was not dealing with a case about the calculation of interest in a solvent bankruptcy. Rather, he was dealing with a claim against the estate of a solvent co-obligor. Therefore, whilst the Lord Chancellor did consider section 132 of the 1825 Act in the course of his judgment, his comments about the mode of calculation in a solvent bankruptcy were *obiter*.

57. As regards the Lord Chancellor's reasoning:

(1) Lord Cottenham's starting point was that the default rule (i.e. the rule that "*the amount is to be calculated by applying the amount … from time to time received in discharge of the interest then due, and the surplus, if any, in discharge, pro tanto of the principal*") was the ordinary mode of calculation that would have applied in the absence of bankruptcy proceedings (at 355).

(2) Lord Cottenham held that the default rule should continue to apply notwithstanding the debtor's bankruptcy and that the bankrupt's estate and any co-obligors would remain liable to the same extent as if there had never been any bankruptcy (although the bankrupt himself would be protected from any further claims by his certificate of discharge) (at 356-7).

(3) Turning to section 132 of the 1825 Act, Lord Cottenham said that, if the bankrupt's estate turned out to be solvent, the default rule should apply to the calculation of the creditor's entitlement to interest in the event of a surplus, because, if the default rule were not applicable in those circumstances, "[the] *creditor in that case will not have received interest upon his debt to the same extent as he would if there had been no bankruptcy, and yet the Act must have intended to place him in as favourable a situation*" (at 357).

58. As explained above, at the time of *Bower v Marris*, the default rule for the application of payments on account was considered to be a mandatory principle of law. It is now understood to be a mere presumption, which may be rebutted by evidence. As a result of this changing understanding of the true nature of the default rule, it is submitted that *Bower v Marris* would not be decided in the same way now if the point arose for the first time today in respect of legislation in materially the same terms as section 132 of the 1825 Act. It cannot be said that every creditor would invariably have refused to accept payments tendered by the debtor on condition that they be applied to discharge principal.

59. As regards Lord Cottenham's reasoning in *Bower v Marris*, however, the key point is that there was nothing in section 132 of the 1825 Act which was incompatible with the application of the default rule as understood at the time. In particular there was no

mandatory direction requiring the surplus to be applied in the payment of interest; rather, according to section 132, the payment of interest was simply a precondition to the distribution of the surplus to the bankrupt. In the absence of any legislation requiring a different result, Lord Cottenham simply fell back on the default rule. There was no wording in the 1825 Act that required him to conclude that the legislature had intended any other approach to be taken. *Bower v Marris* is not an authority relevant to the construction of Rule 2.88(7) and it does not assist in the determination of Issue 2.

60. Section 125 of the 1825 Act was re-enacted in materially identical terms in section 197 of the Bankruptcy Consolidation Act 1849. As the SCG recognise in para 88 of their skeleton argument, the re-enactment of the legislation in materially identical terms would have resulted in the continued application of *Bower v Marris* in bankruptcies governed by the 1849 Act: see *Barras v Aberdeen Steam Trawling and Fishing Company Limited* [1933] AC 402. However Rule 2.88(7) is not in materially identical terms. As the SCG tacitly accept (see paras 88 and 128 to 141 of their skeleton argument), the presumption in *Barras* ceases to apply when the legislature enacts differently-worded legislation which cannot be said to be a straight consolidation of earlier provisions.

(k) <u>The position in company liquidations in the nineteenth century</u>

61. The position in company liquidations in the nineteenth century was different from the position in bankruptcies. As the SCG accept in para 90 of their skeleton argument, the Companies Act 1862 left the legal rights of creditors unaffected. All claims were *prima facie* admissible to proof in the winding-up of a company. Section 158 of the Companies Act 1862 provided:

> "*In the event of any company being wound up under this Act, all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made, so far as is possible, of the value of all such debts or claims as may be subject to any contingency or sound only in damages, or for some other reason do not bear a certain value*".

62. The only qualification at this stage was the rule in *Humber Ironworks & Shipbuilding Co* (1869) LR 4 Ch App 643 that time should be considered to stop on the making of the winding-up order, unless the estate proved to be solvent, in which case time would be

deemed to have carried on. This rule was imported into early winding-up jurisprudence from the field of bankruptcy: see *Re Savin* (1871) LR 7 Ch App 760, in which James LJ said at 764 that "*the theory in bankruptcy is to stop all things at the date of the bankruptcy, and to divide the wreck of the man's property as it stood at that time*". Giffard LJ adopted this approach in *Humber Ironworks* at 647:

> "*I am of opinion that dividends ought to be paid on the debts as they stand at the date of the winding-up; for when the estate is insolvent this rule distributes the assets in the fairest way; and where the estate is solvent, it works with equal fairness, because, as soon as it is ascertained that there is a surplus, the creditor whose debt carries interest is remitted to his rights under his contract*".

63. As the SCG note in para 91 of their skeleton argument, there was no provision in the winding-up legislation at this stage for the payment of interest. As a result, only those creditors with a contractual right to interest could claim post-liquidation interest in the event of a surplus.

64. The state of the winding-up law at this time explains why the default rule was applied by the Courts in *Re Humber Ironworks & Shipbuilding Co* (1869) LR 4 Ch App 643, *Re Joint Stock Discount Company (No 1)* (1869) LR 5 Ch App 86, R*e Humber Ironworks & Shipbuilding Co (No 2)* (1869) LR 5 Ch App 88 and *Re Joint Stock Discount Company (No 2)* (1870) LR 10 Eq 11.

65. In short, in circumstances where creditors were remitted to their contractual rights in the event of a surplus in the liquidation, and in the absence of any legislative provision requiring a different result, the ordinary default rule, which would have applied in the absence of a winding-up, would be applicable to govern the calculation of creditors' entitlements. Creditors were remitted to the package of rights that would have applied in the absence of any liquidation, including the default rule.

66. None of the liquidation cases from 1869 and 1870 was concerned with the construction of Rule 2.88(7) or any materially identical provision. In particular, none of these cases considered whether a statute containing a mandatory direction requiring the surplus to be applied in the payment of interest could be construed to require the application of the

default rule. None of these cases had to address the question whether a statute containing such a direction would be inconsistent or incompatible with the default rule.

67. None of these cases is therefore authority of any type (whether binding or persuasive) on the question that this Court is now required to determine.

(l) Subsequent changes to the winding-up legislation

68. The scheme of the winding-up legislation applicable in the late nineteenth century was altered by section 10 of the Judicature Act 1875, which provided:

> "*In the winding up of any company ... whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to the debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt; and all persons who in any such case would be entitled to prove for and receive dividends out of ... the assets of any such company, may come in ... under the winding up of such company, and make such claims against the same as they may ... be entitled to by virtue of this Act*".

69. Under this provision, the bankruptcy rules applied only "*[in] the winding up of any company ... whose assets may prove to be insufficient*". Therefore, if the provable debts were paid in full, section 10 of the Judicature Act 1875 ceased to apply and creditors were remitted to their contractual rights in the manner described by Giffard LJ in *Humber Ironworks & Shipbuilding Co* (1869) LR 4 Ch App 643: see *Re Milan Tramways Company, Ex parte Theys* (1884) 25 Ch D 587 per the Earl of Selborne LC.

(m) The Bankruptcy Act 1883

70. Whilst the law of solvent liquidations remained wedded to the idea of remission to contractual rights, the law of solvent bankruptcies underwent a major change.

71. Section 197 of the Bankruptcy Consolidation Act 1849 was repealed. It was replaced by a new provision, section 40(5) of the Bankruptcy Act 1883, which was drafted in fundamentally different terms. Whereas section 197 of the 1849 Act had (like section 132

of the 1825 Act) contained no mandatory direction for the surplus to be applied in paying interest, section 40(5) of the 1883 Act contained (for the first time) precisely such a direction, in the following clear and unambiguous terms:

> "*If there is any surplus after payment of the foregoing debts, it shall be applied in the payment of interest from the date of the receiving order at the rate of four pounds per centum per annum on all debts proved in the bankruptcy*".

72. The new words in section 40(5) of the 1883 Act are clear and unequivocal: they say the surplus "*shall be applied in the payment of interest*". The surplus cannot be applied in any other way. In particular, it cannot be applied in paying principal.

73. The SCG seek to argue that section 40(5) of the 1883 Act was materially unchanged from section 197 of the 1849 Act (see para 95(1) of their skeleton argument), but this is wrong. Whereas the earlier provision contained no direction for the surplus to be applied in paying interest, section 40(5) of the 1883 Act did contain a clear and unequivocal direction for the surplus to be applied in paying interest.

74. The change in wording from the 1849 Act to the 1883 Act is therefore not the sort of straight consolidation to which the presumption in *Barras* is applicable: on the contrary, the legislature made a deliberate choice to use different words. If any presumption at all is to be applied, it must be that, by choosing to use materially different words, the legislature intended them to have a materially different meaning. If it had wanted the law to remain unchanged, it would have kept the same wording.

75. The effect of a direction for the surplus to be applied in paying interest is necessarily to exclude any rule of law that would otherwise require the surplus to be applied in paying principal. The adoption of the mandatory direction contained in section 40(5) of the 1883 Act therefore necessarily prevents the default rule from having any application to the calculation of creditors' entitlements to Statutory Interest. Parliament has said that the surplus is to be applied in a particular way; there is no scope for the application of a different rule of law that requires it to be applied in some different way.

76. After the enactment of the 1883 Act, the default rule was therefore inapplicable to the calculation of creditors' entitlements in solvent bankruptcies. The wording of the statute

had changed; and, as a result, the law had changed. It would not have been correct for any judge to construe section 40(5) of the 1883 Act in the way that Lord Cottenham had construed section 132 of the 1825 Act in *Bower v Marris*. In short, in 1841, when looking at the 1825 Act, which had contained no mandatory direction for the surplus to be applied in the payment of interest, Lord Cottenham, in seeking to identify the legislative intention as to how the surplus should be applied, had been able to conclude that it should be applied on the basis of the default rule, to discharge the outstanding principal debt following the re-allocation of prior payments. There was nothing in the 1825 Act to say otherwise. When looking at section 40(5) of the 1883 Act, however, and in seeking to discern the legislative intention as to how the surplus should be applied, the correct approach is necessarily very different. The starting point is the wording of the section, which says that the surplus "*shall be applied in the payment of interest*". That is the beginning and the end of the exercise of construction.

77. The consequence of this change in wording is potentially (although not necessarily) that the position of a creditor in a solvent bankruptcy will be different from the position that the creditor would have been in if there had never been any bankruptcy at all. It is presumably for this reason that the Administrators have been unable to find any English bankruptcy case subsequent to the enactment of the 1883 Act in which a court has applied the approach said by the SCG to be justified by *Bower v Marris*.

78. It is also possible to identify hypothetical circumstances in which the mandatory direction in section 40(5) of the 1883 Act could materially affect the pecuniary rights that creditors would otherwise have had. However there are many ways in which the rights of creditors and other parties may be affected as a result of insolvency proceedings, even where those insolvency proceedings eventually generate a surplus. For example, insolvency set-off and the rules in respect of disclaimer are applicable in solvent compulsory liquidations.

79. Furthermore, considerations of 'policy' (to which the SCG appeals) have no role in the court's task of construing the statute: the only relevant policy is the policy that is to be ascertained from the meaning of the words that the legislature has actually chosen to use: see *Hardy v Fothergill* (1888) 13 App Cas 351 at 358 per Lord Selborne ("*It is not, I conceive, for your Lordships or for any other Court to decide such a question as this*

under the influence of considerations of policy, except so far as that policy may be apparent from, or at least consistent with, the language of the legislature in the statute or statutes upon which the question depends").

(n) Bankruptcy Act 1914

80. Section 40(5) of the 1883 Act was re-enacted in materially the same language as section 33(8) of the Bankruptcy Act 1914. Section 33(8) of the 1914 Act contained the same direction for the surplus to be applied in the payment of interest and it therefore necessary excluded the default rule, which requires the surplus to be applied in the payment of principal.

(o) The position in company liquidations

81. Although the position in bankruptcies was changed in 1883 by the introduction of a mandatory requirement for the surplus to be applied in paying interest (which was re-enacted in the 1914 Act), there was no corresponding change to the law of company liquidations.

82. Section 158 of the Companies Act 1862 and section 10 of the Judicature Act 1875 were re-enacted in the same terms as sections 206 and 207 of the Companies Act 1908. Sections 206 and 207 of the Companies Act 1908 were then re-enacted as sections 261 and 262 of the Companies Act 1929, which were in the same terms, save that the latter applied only to England and omitted the former's references to Ireland. Sections 261 and 262 of the Companies Act 1929 were then re-enacted in the same terms as sections 316 and 317 of the Companies Act 1948.

83. In each of these Acts, the bankruptcy rules were applicable to the liquidations of insolvent companies. However, if the provable debts were paid in full, the bankruptcy rules would cease to apply and creditors would be remitted to their contractual rights: see *Re Fine Industrial Commodities Ltd* [1956] 1 Ch 256 and *Re Rolls-Royce Ltd* [1974] 3 All ER 646. See also *Re Lines Bros Ltd* [1983] 1 Ch 1 at 21 per Brightman LJ.

84. As a consequence of the application of the concept of remission to contractual rights in a solvent liquidation under the 1908 Act, the 1929 Act and the 1948 Act, the default rule remained applicable in solvent liquidations governed by those enactments, as part of the package of rights to which the creditors were remitted.

85. Further, as a result of the disapplication of the bankruptcy rules in the event of a surplus in the liquidation, the 1883 Act's mandatory direction in respect of the application of the surplus to pay interest could never apply in a solvent liquidation.

86. The position was settled. By the time of *Re Lines Bros (No 2)* [1984] 1 Ch 483, the position in a solvent liquidation was so well understood that the application of the default rule was common ground among the members of the bar appearing before Mervyn Davies J. The effect of the statutory scheme for liquidations was that creditors with contractual rights to interest were remitted to their contractual rights in the event of a surplus, so that entitlements were calculated as if the liquidation had never occurred. On this basis, the ordinary default rule, which would have applied in the absence of a liquidation, was applicable in a solvent liquidation. Further, there was no mandatory direction of any type in the winding-up legislation that would require a different result.

(p) <u>The Insolvency Act 1986</u>

87. As the SCG observes in para 123(3) of its skeleton argument, the main recommendation of the Cork Committee in respect of Statutory Interest was that the law in solvent liquidations should be brought into line with the law in solvent bankruptcies. The Committee described the difference between bankruptcy and corporate insolvency as an anomaly and concluded that the same provisions should apply in both and that interest should be payable on debts in the same way in both.

88. As a result:

(1) section 33(8) of the Bankruptcy Act 1914 was replaced by section 328(4) of the Insolvency Act 1986, which contained the same mandatory direction in respect of the application of the surplus to pay interest; and

(2) a provision in materially the same terms was introduced in respect of company liquidations, in the form of section 189(2) of the Insolvency Act 1986.

89. Section 328(4) (which applied to solvent bankruptcies) provided:

> "*Any surplus remaining after the payment of the debts that are preferential or rank equally under subsection (3) shall be applied in paying interest on those debts in respect of the periods during which they have been outstanding since the commencement of the bankruptcy*".

90. Section 189(2) (which applied to solvent liquidations) provided:

> "*Any surplus remaining after the payment of the debts proved in a winding up shall, before being applied for any other purpose, be applied in paying interest on those debts in respect of the periods during which they have been outstanding since the company went into liquidation*".

91. As a result of the Cork Committee's recommendation, the mandatory direction that the surplus be applied in paying interest (rather than principal), which had formed part of the bankruptcy legislation since 1883, became part of the winding-up legislation. For the first time, the corporate liquidation regime was brought into line with the bankruptcy regime. The concept of 'remission to contractual rights' ceased to be the governing principle in a solvent liquidation; instead the process would continue to be governed by the statutory scheme (as was already the case in solvent bankruptcies).

92. The consequences of this change to the winding-up legislation were the same as the consequences for bankruptcies in 1883. As a result of the concept of remission to contractual rights, the default rule had been applicable in liquidations before 1986 and the surplus had been applied in payment of principal: *Re Lines Bros (No 2)* [1984] 1 Ch 483 seems to have been the final English example of this approach under the old law. As a result of the introduction of a mandatory direction requiring the surplus to be applied in the payment of interest, the default rule could no longer apply, as it was plainly not what the legislature's choice of words indicated its intention to be.

(q) Rule 2.88(7)

93. Rule 2.88(7) is the same as section 189(2) and 328(4). It contains a mandatory requirement for the surplus to be applied in paying interest (and not principal).

94. When the statutory provisions (ancient and modern) are examined, it becomes apparent that they fall naturally into two categories:

(1) First, there are those which do not contain any mandatory requirement for the surplus to be applied in paying interest (e.g. section 129 of the Bankruptcy Act 1824, section 132 of the Bankruptcy Act 1825, section 197 of the Bankruptcy Consolidation Act 1849, the Companies Act 1862, the Companies Act 1908, the Companies Act 1929 and the Companies Act 1948); and

(2) Secondly, there are those which contain a clear and unambiguous mandatory requirement for the surplus to be applied in paying interest (i.e. section 40(5) of the Bankruptcy Act 1883, section 33(8) of the Bankruptcy Act 1914, section 189(2) of the Insolvency Act 1986, section 328(4) of the Insolvency Act 1986 and Rule 2.88(7) of the Insolvency Rules 1986).

95. It is significant to note that all of the English authorities on which the SCG and York rely are authorities on the effect of legislation in the first category (i.e. legislation which contains no mandatory requirement for the surplus to be applied in paying interest): *Bower v Marris*, the *Humber Ironworks* cases, the *Joint Stock Discount* cases and the Mervyn Davies J decision in *Lines Bros* (where the point was common ground) are all cases on the construction of different provisions which contain no mandatory requirement as to how the surplus is to be applied.

96. None of the English authorities on which the SCG and York rely is concerned with the meaning of legislation in the second category (i.e. legislation which does contain a mandatory requirement for the surplus to be applied in paying interest).

(r) The foreign authorities

97. The distinction identified above is applicable to almost all of the foreign authorities on which the SCG and York rely. For example:

(1) *Re Langstaffe* [1851] OJ No 238 involved section 67 of the Provincial Bankruptcy Act, which was described by Esten V-C as being "*virtually the same rule as prevailed in England on the same subject previously to the passing of the* [Bankrupts (England) Act 1825]". Consequently it did not involve any statutory provision requiring the surplus to be applied to pay interest. Esten V-C had no reason not to apply the default rule. It is not a decision on the construction of a provision of the same type as Rule 2.88(7).

(2) *Gourlay v Watson* (1900) 2 CS (5th Series) 761 involved a statutory right of creditors to claim interest in the event of a surplus but the provision involved no clear or unequivocal mandatory direction of the type found in Rule 2.88(7).

(3) *Re Hibernian Transport Companies Ltd v Gordon* [1991] IR 271; [1994] IRML 48 involved section 86(1) of the Irish Bankruptcy Act 1988, which contained no mandatory requirement for the surplus to be applied in paying interest. The Irish courts therefore merely applied the default rule, as there was nothing to prevent the default rule from applying. This case is therefore not a decision on the construction of a provision of the same type as Rule 2.88(7).

(4) *Midland Montague Australia Ltd v Harkness* (1994) 14 ACSR 318 did not involve any statutory provision requiring the surplus to be applied to pay interest. It is not a decision on the construction of a provision like Rule 2.88(7).

(5) *Re Peregrine Investment Holdings Ltd* [2008] HKC 606 did not involve any statutory provision requiring the surplus to be applied to pay interest. The discussion of the English authorities shows that Chu J was merely applying the default rule. It is not a decision on the construction of Rule 2.88(7).

(6) *Ohio Savings Bank & Trust Co v Willys Corporation* (1925) 8 F 2d 463 did not involve any statutory provision requiring the surplus to be applied to pay interest. The decision of the Second Circuit Court of Appeal contains a lengthy citation of authorities in respect of the default rule. It is not a decision on a provision of the same type as Rule 2.88(7) and it has nothing to say about such provisions.

98. The principal exception to the above is *Attorney General of Canada v Confederation Trust* (2003) 65 OR (3d) 519, which turned on section 95(2) of the Winding-up and Restructuring Act, which provided that the surplus "*shall first be applied in payment of interest*". Blair J does not seem to have appreciated that a mandatory statutory direction requiring the surplus to be applied to pay interest was necessarily inconsistent with any default rule that would require it to be applied to pay principal. Instead he seemed to think that the statutory provision required the application of (and was therefore consistent with) the approach in *Bower v Marris*. This case is therefore of no persuasive value. *Canada (Attorney General) v Reliance Insurance Company* [2009] OJ No 3037, in which Campbell J merely followed Blair J's erroneous decision, is therefore wrong for the same reason and is of no persuasive value.

99. There is therefore nothing in any of the foreign decisions relied on by the SCG or York that would require Rule 2.88(7) to be construed other than in accordance with the meaning of its words.

(s) <u>Conclusion</u>

100. For these reasons, the Court's analysis of Issue 2 should begin and end with the meaning of the wording of Rule 2.88(7). This is a question of statutory construction. The previous English decisions turn on very differently-worded provisions which contain no mandatory direction and leave room for the default rule to apply. None of those authorities contains anything helpful on the construction of Rule 2.88(7).

(2) <u>Issue 39</u>

(39) Whether a creditor entitled to Statutory Interest, Currency Conversion Claims and/or other non-provable claims is entitled to any form of compensation for or in respect of the time taken for such claim to be discharged and, if so, whether such

compensation is taken into account as part of the correct methodology for calculating Statutory Interest and/or the distribution of the surplus, or should take the form of interest at the Judgments Act Rate, damages for loss, restitution or another form.

101. The Administrators submit that no ground for an award of interest is available in respect of Statutory Interest or Currency Conversion Claims or other non-provable liabilities. The Administrators disagree with the submissions that have been made by the SCG and York on this topic.

102. In its skeleton argument, Wentworth has provided a very full answer to the contentions advanced by the SCG and York. In these circumstances, in keeping with their role generally on this Application, the Administrators do not intend to duplicate Wentworth's submissions on this point.

103. There are two points which the Administrators wish to address.

104. First, the SCG suggests in paras 150 to 151 of its skeleton argument that the calculation of interest in the manner for which the Administrators and Wentworth contend would give rise to a non-provable claim for any additional amount to which creditors would have been entitled on the basis of the calculation in *Bower v Marris*.

105. The SCG's argument depends on the concept of 'remission to contractual rights'. It is suggested by the SCG that creditors entitled to contractual interest, who would have been entitled in the absence of insolvency proceedings to insist on the application of payments on account to pay down such contractual interest, have a non-provable claim for the difference between the interest to which they are entitled under the statutory scheme and the total amount that they could have claimed in the absence of insolvency proceedings.

106. The SCG's argument is therefore inapplicable to creditors who have no contractual right to interest. Without any right to interest outside the statutory scheme, there are no rights to which such creditors could be remitted.

107. In the Administrators' submission, the SCG's argument is wrong for two main reasons:

(1) As further developed by Wentworth, Rule 2.88 is a complete code in respect of post-administration interest, which displaces inconsistent rights that would have existed apart from the code.

(2) In any event, although in some cases the concept of 'remission to contractual rights' continues to give rise to non-provable claims (e.g. Currency Conversion Claims), the position in respect of contractual interest is different, because the application of dividends in accordance with the statutory scheme affects creditors' contractual rights to interest. When dividends are applied to pay the debts proved, the principal is discharged in part. Contractual interest will no longer continue to accrue on the part of the debt that has been paid. There is no contractual right to interest on principal that has been discharged.

108. Secondly the Administrators wish to address the suggestion by York that the Administrators are personally liable for acting in breach of statutory duty.

(1) York says at p.15 of its reply position paper that Rule 2.88(7) "*does create an obligation on the LBIE Administrators to pay post-administration interest*"

(2) Similarly York says in para 234(1) of its skeleton argument that it relies on a "*statutory duty on the administrator to apply the surplus in paying such interest*".

(3) York says at p.15 of its reply position paper that "*the breach of such obligation may give rise to a damages claim for the lost time value of money*".

(4) Similarly York refers at para 234(3) of its skeleton argument to a "*right to damages for breach of statutory duty in making late payment*".

109. York appears to be envisaging a damages claim against the Administrators personally for breach of a statutory duty. Indeed, if the obligation is an obligation "*on the LBIE Administrators*" (as York maintains), it is difficult to see how the supposed damages claim for breach could conceivably be made against anyone else.

110. The Administrators submit that the suggestion that there is any possibility of a claim against them in damages for the late payment of Statutory Interest or Currency Conversion Claims is misconceived. There are no grounds for such a claim:

(1) In order to succeed in a claim against the Administrators for damages for the tort of breach of statutory duty, York would have to show that the Administrators were under a statutory duty to pay the sums in question ***by a particular due date*** and that they acted in breach of statutory duty ***by failing to pay those sums by that due date***, resulting in York suffering additional losses that it would not have suffered if the Administrators had complied with their statutory duty by paying the sum in question on time. However, such a claim would be plainly unsustainable. The Administrators are not under any obligation to pay statutory interest or currency conversion claims by any particular date.

(2) The ability of creditors to apply for a monetary remedy in respect of late payment of distributions is governed solely by Rule 2.70(3), which makes clear that administrators may be ordered to pay interest on distributions only where they have been wrongly withholding the distributions in question. There are no grounds in the present case for the making of any order under Rule 2.70(3). The Administrators are keen to distribute the remaining sums in the estate, but the unresolved issues in respect of creditors' entitlements thereto prevent them from making any distribution. As explained in para 36 of Lomas 9, "[the] *Joint Administrators have concluded that, whilst there are funds available to distribute, they will not be in a position to make a distribution in respect of the Surplus absent resolution of the issues in the Application*".

(3) Issues 3 and 5

(3) Whether the words "the rate applicable to the debt apart from the administration" in Rule 2.88(9) of the Rules refer:
(i) only to a numerical percentage rate of interest; or
(ii) also to a mode of calculating the rate at which interest accrues on a debt, including compounding of interest, such that where a creditor has a right … to be paid compound interest, whether under an Original Contract or otherwise, the creditor is entitled to compound interest under Rule 2.88(7).

(5) Whether, for the purposes of establishing, as required under Rule 2.88(9) of the Rules, "whichever is the greater of the rate specified under paragraph (6) and the rate applicable to the debt apart from the administration", the comparison required is of:
(i) the total amounts of interest that would be payable under Rule 2.88(7) based on each method of calculation; or
(ii) only the numerical rates themselves,
and in either case, how the total amount of interest is calculated when the "rate applicable to the debt apart from the administration" varies from time to time.

111. As a result of a late concession made by Wentworth, it is now common ground that option (ii) of Issue 3 is correct and that option (i) of Issue 5 is correct. The Court is therefore invited to make a declaration which reflects that position.

112. Whilst the Administrators are generally seeking to ensure that all points which are properly arguable are put before the Court, the Administrators have concluded that the arguments previously advanced by Wentworth are not properly arguable, and therefore the Administrators will not be seeking to argue the points originally made by Wentworth.

113. However, in circumstances where the Administrators invite the Court to rule on this issue (with brief reasons), the Administrators consider that it is important to set out below (i) the reasons why the parties are right to have reached this consensus and (ii) the answers to the arguments that Wentworth was formerly making. In addition the Court has the benefit of Wentworth's position paper, in which Wentworth set out in some detail the arguments that it has recently abandoned. Accordingly it is anticipated that the Court will have sufficient materials to consider the point properly.

114. Additionally, the Administrators have published a notice on their the LBIE administration website to inform creditors that the parties are now in agreement in respect of Issues 3 and 5, in case any creditor wishes to advance that argument. At as the date of this Skeleton Argument, no creditor has expressed any wish to do so.

(a) <u>The meaning of the words</u>

115. As a matter of construction, the word "*rate*" is apt to include every factor that determines the total amount of money that is payable by way of interest for a particular period of

time, including the numerical percentage and the way in which that numerical percentage is to be applied (i.e. simple or compound).

116. In terms of the linguistic meaning, a rate is an amount or level of payment determined in accordance with some rule or basis. When applied to interest, it describes the amount or level at which interest accrues. Compound interest accrues at an exponential rate. The fact that the rate is an exponential one does not prevent it from being a "*rate*" for these purposes.

(b) The mischief sought to be addressed

117. This conclusion is supported by the history of the law on interest in solvent liquidations and the identification of the mischief that the legislature sought to address.

118. The mischief arising from the law as it stood was that a creditor with no underlying entitlement to interest had no basis in a solvent liquidation for seeking any compensation for being kept out of his money during the liquidation. The courts considered this result to be unfair: see *Re Fine Industrial Commodities Ltd* [1956] 1 Ch 256 at 263 per Vaisey J and *Re Rolls-Royce Ltd* [1974] 3 All ER 646 at 1591 per Pennucuick J. This state of affairs was particularly egregious where the liquidation had been prolonged by the liquidators' efforts to take steps to generate additional recoveries. In such a case, the surplus arising from the liquidators' efforts would be payable to the shareholders, whilst many creditors who had waited patiently for their money would have no right to compensation for the delay in payment of their debts.

119. This issue was considered by the Cork Committee:

    (1) The Cork Committee set out the position as it stood and explained that interest was payable from surplus assets in a bankruptcy (para 1383) but that "[there] *is no similar provision in the winding-up code*" (para 1384).

    (2) The Cork Committee agreed that it was unfair for a creditor with no underlying entitlement to interest to have no basis in a solvent liquidation for seeking any compensation for being kept out of his money during the liquidation:

> "*This means that the creditor who is entitled to interest on the debt for which he has proved may recover the interest accruing after the presentation of the winding up petition as if there had been no winding up at all. On the other hand,* ***the creditor who is not entitled to interest at the commencement of insolvency proceedings has no means of recovering interest at a later stage even though the company may be in a position to pay***" (emphasis added).

(3) The Cork Committee concluded at para 1386 that this mischief should be remedied by the Legislature:

> "*Our attention has been drawn to this anomaly between the two insolvency codes by a number of bodies, including the Association of British Chambers of Commerce, who suggest that there should be a common code of rules for situations which occur both in personal insolvency and in winding up proceedings and that, in particular, interest should be payable on debts in the same way in both administrations.* ***We agree***" (emphasis added).

120. This recommendation was adopted and implemented by Parliament: see section 189 of the Insolvency Act 1986, which applies in liquidations; and section 328 of the Insolvency Act 1986, which applies in bankruptcies.

121. The approach taken by these provisions was made applicable to distributing administrations by Rule 2.88 of the Insolvency Rules 1986 (as amended).

122. When seen against the background of the legislative history and the recommendations of the Cork Committee, it is submitted that the legislative intention is clear:

(1) The mischief that the legislature sought to remedy was the fact that creditors with no underlying basis for claiming interest had no right to claim any interest from the surplus as compensation for the late payment of their debts.

(2) The solution adopted by Legislature to deal with this mischief was to provide all creditors with a guaranteed minimum of interest at the Judgments Act Rate.

123. In the Administrators' submission, the new right to interest should be construed to be co-extensive with the mischief that the Legislature intended to prevent.[10] Consequently, the provisions for Statutory Interest should be construed to provide all creditors with a guaranteed minimum of interest at the Judgments Act Rate; they should not be construed to prejudice creditors who, but for the insolvency process, would be entitled to interest at a higher rate. There is no basis for suggesting that Parliament was seeking to deprive creditors with a contractual or other right to compound interest from receiving Statutory Interest calculated on a compound basis in the event of a surplus.

124. Consequently, the "*rate applicable to the debt apart from administration*" in Rule 2.88(9) is the whole amount of post-administration interest, taking into account every factor that determines the total amount of money that is payable by way of interest, including the numerical percentage and the way in which that numerical percentage is to be applied (i.e. simple or compound). The payment of Statutory Interest at that rate mirrors the superior underlying contractual or other rights of those creditors who are the recipients of Statutory Interest calculated on that basis.

(c) The counter-arguments

125. Wentworth had contended in its position papers that the word "*rate*" means simply the numerical percentage. Wentworth contended that there is no basis in Rule 2.88(9) for considering or applying any other factor that may have a bearing on the total amount of interest that would accrue under a contract over a particular period of time. In this way, Wentworth's original approach ignored the amount of interest that accrues under a contract over a period and focused exclusively on a single component of that calculation.

126. According to Wentworth, prior to it conceding the point, the creditors' entitlement to interest will depend on the language that happens to have been used in the contract to describe that entitlement.

[10] See, for example, *R v Allen* (1872) LR 1 CCR 367 at 375 per Cockburn CJ ("*where the language will admit of it, a statutory enactment shall be so construed as to make the remedy co-extensive with the mischief it is intended to prevent*"); *Farley v Bonham* (1861) 2 John. & H. 177 1t 181 per Sir Page Wood V-C ("*the remedy given by statute must be taken to be coextensive with the mischief to be remedied*"); and *Pacific Steam Navigation Company v Lewis* (1847) 16 M. & W. 783 at 792 per Pollock CB ("*I think that great injustice would be done, unless the Courts, in their administration of the law, should make the remedy co-extensive with the mischief intended to be prevented*").

(1) If the contract provides for the creditor to receive simple interest at 15% per annum for nine years, the creditor will be entitled to receive Statutory Interest in the sum of £135,000 in the event of a surplus.

(2) However, if the contract provides for the creditor to receive compound interest at 10% per annum with annual compounding, giving rise to a contractual entitlement to £135,000 over the nine year period, Wentworth maintained that Rule 2.88(9) restricts that creditor to simple interest at the numerical percentage rate of 10% per annum, i.e. a total of only £90,000 over the nine year period.

127. In the Administrators' submission, Wentworth's original approach is illogical and Wentworth was right to abandon it. There is no reason for thinking that Parliament would wish to prejudice a creditor whose entitlement to interest was at a compound rate. Further, where the numerical percentage of compound interest is higher than the Judgments Act Rate, Wentworth's original approach results in the creditor receiving a sum by way of interest that is 'neither one thing nor the other': it is neither the Judgments Act minimum amount nor the full contractual entitlement; rather, it is an unprincipled middle ground with no foundation in logic or law.

128. Wentworth contended that Rule 2.88(9) requires a comparison of 'like with like' and that, since the rate under the Judgments Act is a rate of simple interest, the "*rate applicable to the debt apart from administration*" must also be a rate of simple interest: see para 22 of Wentworth's position paper. There is nothing in this submission. The correct approach ***does*** involve a comparison of 'like with like': the amount of money produced by the Judgments Act Rate is to be compared with the amount of money produced by the contractual entitlement to interest.

129. Secondly, Wentworth said that, where a statute grants a right to interest, it will ordinarily be assumed to be referring to simple interest. However, Rule 2.88(9) refers expressly to the rate applicable to the debt apart from the administration: a phrase which refers the reader to the contractual provisions that would apply but for the administration. Those contractual provisions may or may not provide for simple interest. The statute is

therefore not to be taken to be referring to simple interest; rather, the statute is plainly referring to whatever interest is allowed by the contract.

130. Thirdly, Wentworth said that Rule 2.88(7) provides for Statutory Interest to be paid only on "*those debts*" (i.e. the debts proved) and that compound interest is inconsistent with this approach, because it involves the payment of 'interest on interest'. This is the wrong approach. Compound interest is still interest at a particular rate on the debt. The concept of compound interest means only that the rate of growth is exponential. But an exponential rate is still a rate in respect of a debt.

131. As regards the sub-issues identified in paragraph 31 of the Administrators' position paper, it appears that the SCG and Wentworth have adopted contrary positions and that they are advancing the available arguments: see paragraphs 187 to 193 of the SCG's skeleton argument and paragraphs 121 to 123 of Wentworth's skeleton argument. In keeping with the Administrators' approach, the Administrators do not duplicate any of the submissions that have been made.

132. As regards the sub-issue identified in para 40 of the Joint Administrators' Position Paper, the parties are agreed that the disaggregated approach is correct: see paras 250 to 253 of the SCG's skeleton argument and para 138 of Wentworth's skeleton argument. The Administrators agree with this analysis and invite the Court to rule accordingly.

(4) <u>Issue 4</u>

(4) Whether the words "the rate applicable to the debt apart from the administration" in Rule 2.88(9) are apt to include (and, if so, in what circumstances) a foreign judgment rate of interest or other statutory interest rate.

133. The Administrators consider that, in their skeleton arguments, the Respondents have taken all available arguments on this issue. In these circumstances, the Administrators do not intend to advance any arguments on Issue 4.

(5) Issue 6

(6) Whether, for the purposes of establishing, as required under Rule 2.88(9) of the Rules, "whichever is the greater of the rate specified under paragraph (6) and the rate applicable to the debt apart from the administration", the amount of interest to be calculated based on the latter is calculated from:
(i) the Date of Administration;
(ii) the date on which the debt became due; or
(iii) another date.

134. Issue 6 is concerned with the calculation of the "*rate applicable to the debt apart from the administration*". The question is whether, when calculating the rate applicable to the debt apart from the administration, the start date is: (i) the Date of Administration; (ii) the date on which the debt became due; or (iii) another date.

135. The Administrators submit that, in practice, the answer will often be option (ii), i.e. that the rate applicable apart from the administration will fall to be calculated from the date on which the debt became due.

136. However, strictly speaking, option (iii) is correct, because the start date for calculating the rate applicable apart from the administration will not always or invariably be the date on which the debt became due. Rather, the start date for calculating the rate applicable apart from the administration will depend on the terms on which interest would have been payable apart from the administration.

137. In the Administrators' submission, the start date for the calculation of the amount of the interest applicable to the debt apart from the administration is the date on which the creditor would have first become entitled to such interest apart from the administration.

138. This is a fact-specific issue. The precise start date for the calculation of the amount of the interest applicable to the debt apart from the administration will therefore vary from case to case, depending on the facts. Whilst the start date for interest apart from the administration will often be the due date, this will not invariably be the case.

139. As regards the general principle:

(1) In order to calculate the amount of interest that would have been payable on the debt but for the administration, it is necessary to consider the state of affairs that would have come into existence but for the administration.

(2) Consequently, where the creditor's contractual rights would have entitled him to interest at a particular rate apart from the administration, it will be necessary to consider the terms of the contract in order to identify the date on which interest would have begun to accrue under that contract apart from the administration. The answer in such a case will therefore depend on the terms of the contract.

140. In the Administrators' submission, the correct approach is clear from Rule 2.88(1), which provides: "*Where a debt proved in the administration bears interest, that debt is provable as part of the debt except insofar as it is* ***payable in respect of any period after the company entered administration***" (emphasis added).

(1) Rule 2.88(1) takes away the creditors' existing rights to interest that is "*payable in respect of any period after the company entered administration*".

(2) In the event of a surplus, however, Rule 2.88(7) replaces those rights, subject to the guaranteed minimum amount of interest at the Judgments Act Rate.

(3) Rule 2.88(9) makes clear that the highest rate payable under Rule 2.88(7) is the rate that would have been applicable to the debt apart from the administration.

(4) Consequently, for the purpose of calculating the rate applicable to the debt apart from the administration, the debts have been "*outstanding*" during the periods in which interest was "*payable*" on them for the purposes of Rule 2.88(1).

141. Where the creditor has a right to interest apart from the administration at a rate greater than the Judgments Act Rate, Rule 2.88(7) is therefore the counterpoint to Rule 2.88(1): the interest that the former gives back in the event of the surplus is a replacement for the

interest that was rendered non-provable by Rule 2.88(1) and the start dates for the calculation of interest are therefore the same in both cases.

(6) <u>Issues 7 and 8</u>

(7) Whether Statutory Interest is payable in respect of an admitted provable debt which was a contingent debt as at the Date of Administration from:
(i) the Date of Administration;
(ii) the date on which the contingent debt ceased to be a contingent debt (including in circumstances where the contract was "closed out" after LBIE entered administration); or
(iii) another date,
having regard to whether:
(i) the contingent debt remained contingent at the time of the payment of:
a. the final dividend; or
b. Statutory Interest; and / or
(ii) (to the extent applicable) the Joint Administrators revised their previous estimate of the contingent debt by reference to the occurrence of the contingency or contingencies to which the debt was subject.

(8) Whether Statutory Interest is payable in respect of an admitted provable debt which was a future debt as at the Date of Administration from:
(i) the Date of Administration;
(ii) the date on which the future debt ceased to be a future debt; or
(iii) another date,
having regard to whether the future debt remained a future debt at the time of the payment of:
(i) the final dividend; or
(ii) Statutory Interest.

142. Issue 7 relates to the start date for contingent claims. Issue 8 relates to the start date for prospective claims. Many of the points relating to Issue 7 and Issue 8 are related or overlapping and therefore the Administrators address these two issues together. Further, a distinction must be drawn between Statutory Interest at the rate applicable to the debt apart from the administration and Statutory interest at the Judgments Act Rate:

    (1) The Administrators' submissions in respect of Statutory Interest ***at the rate applicable to the debt apart from the administration*** have been set out above. The start date for the rate applicable apart from the administration will depend on the terms on which interest would have been payable apart from the administration. The position is the same whether the debt was actual or prospective or contingent

at the commencement of the administration. The Administrators submit that the terms governing the payment of interest on the debt apart from the administration must be considered in order to ascertain the correct answer.

(2) As regards Statutory Interest ***at the Judgments Act Rate***, however, the Administrators submit that option (ii) of Issue 7 is correct and that option (ii) of Issue 8 is correct. In summary of the Administrators' position:

(i) Where the relevant rate of interest under Rule 2.88(7) is the Judgments Act Rate, the period in which the debt has been "*outstanding*" since the commencement of the administration is the period of time since the creditor could first have commenced proceedings against the debtor (but for the administration) to obtain a money judgment.

(ii) Further, Statutory Interest is compensation payable to a creditor for being kept out of his money. Where the debt is contingent or prospective, (i) the creditor could not sue for a judgment to obtain a right to interest at the Judgments Act Rate and (ii) the creditor is not being kept out of his money by reason of the administration, because the debt is not due.

(iii) The reasons for the payment of Statutory Interest at the Judgments Act Rate are therefore inapplicable to contingent and prospective debts, unless and until they become actual debts, which could be demanded and sued for.

143. Whilst Wentworth is aligned with the Administrators in respect of Issue 7, it is opposed to the Administrators on Issue 8. No party is aligned with the Administrators on Issue 8.

144. Further, in the course of addressing the position in respect of contingent debts in the context of Issue 7, Wentworth has not addressed any arguments that would or might be equally applicable to prospective debts in the context of Issue 8.

145. In these circumstances, the Administrators consider it appropriate for them to make full submissions to the Court on Issues 7 and 8 in a manner which presents a consistent and coherent answer which is applicable to both contingent debts and prospective debts.

(a) How this works in practice

146. A debt which is contingent or future as at the commencement of the administration may cease to be contingent or future as at the time a dividend is paid on it. The Administrators consider that the correct approach to the quantification of the creditor's proof for dividend purposes and the correct approach to the payment of Statutory Interest to such creditors are separate and distinct questions.

147. Where a creditor has a debt which is *contingent* as at the administration date:

(1) If the debt remains contingent as at the date on which a dividend is paid, the dividend paid to that creditor will be payable on the estimated value of its contingent claim as is required by Rule 2.81.

(2) Because the claim remains contingent, the debt is not "outstanding" and the creditor has not, at the date of payment, been kept out of its money. Accordingly, no Statutory Interest is payable to that creditor. Were Statutory Interest to be paid to the creditor, it would receive a windfall.

(3) If, before the dividend is paid, the contingency has fallen in and the debt has become an actual debt, the creditor will be entitled to receive dividends calculated on the actual value of its claim (as is required by the application of the hindsight principle).

(4) Because the creditor has been kept out of its money from the date on which the contingency fell in, it is entitled to Statutory Interest from that time, being the time at which the debt became "outstanding".

148. This approach is consistent both with what is fair and with the wording of Rule 2.88(7) (as to which, see below).

149. An issue has arisen as to whether or not, in relation to contingent debts, the administrator is required to apply a discount for futurity (i.e. a discount reflecting the time value of money) when estimating the value of the debt under Rule 2.81. As to this:

(1) In the case of a contingent creditor whose debt becomes an actual debt prior to the payment of a dividend, that creditor is entitled, as a result of the application of the hindsight principle, to have his proof admitted in the full amount of the claim[11]. When the administrator pays the creditor a dividend, there is no warrant, and no need, to discount the value of the claim to reflect the time value of money because the debt is due at the time the dividend is paid. Equally, however, there is no warrant to pay Statutory Interest to the creditor for the period before the debt became an actual debt because, until then, the creditor was not being kept out of its money.

(2) Even if a discount is to be applied in the case of a contingent debt which remains contingent at the time a dividend is paid on it, the discount merely reflects the fact that the creditor is receiving a dividend on its contingent claim sooner than it would be receiving payment were the company not in administration. The purpose of the discount would be to avoid the contingent creditor from gaining an advantage over a creditor with a current debt. Even if applied, to ensure a fair *pari passu* distribution of the estate, the making of such discount would not warrant the contingent creditor from receiving compensation for being kept out of his money (i.e. Statutory Interest) because the debt remains contingent and the creditor has not been kept out of its money. In fact, the contingency may never fall in[12].

---

11 See *Stein v Blake* [1996] 1 AC 243 at 252E-253B, especially: "*If by that time the contingency has occurred and the claim has been quantified, then that is the amount which is treated as having been due at the bankruptcy date.*" and *Re Storm Funding Limited* [2014] Bus LR 454 at [70]: "*In an administration, the value of this contingent claim must be estimated in accordance with rule 2.81 of the Insolvency Rules 1986 and any such estimate may be revised by reference to any change in circumstances or information becoming available. An obvious change in circumstances would be the issue of a contribution notice and, applying the hindsight principle,* ***the value put on the liability would be revised to the actual liability arising under the contribution notice***." (emphasis added).

12 In practice, the Administrators have not admitted any contingent debts on an estimated basis and have instead waited for the relevant contingency to occur before admitting a claim.

150. Where a creditor has a debt which is a *future* debt as at the administration date:

(1) If the debt has not fallen due as at the date on which a dividend is paid, the dividend paid to that creditor will be discounted in accordance with Rule 2.105. This reflects the fact that the creditor is being paid before it is entitled to be paid and a *pari passu* distribution requires its claim to be discounted so that the future creditor does not do better than the creditors with actual claims.

(2) Because the claim remains a future debt, the debt is not "outstanding" and the creditor has not, at the date of payment, been kept out of its money. Accordingly, no Statutory Interest is payable to that creditor. Were statutory interest to be paid to the creditor, it would receive a windfall.

(3) If, before the dividend is paid, the debt has fallen due, Rule 2.105 does not apply and the creditor will be entitled to receive a dividend calculated on the actual value of the debt, without discount. This mirrors the position of the contingent creditor whose debt has become an actual debt prior to the payment of the dividend. By the time the dividend is paid, the creditor is in the same position as those of the creditors which were owed actual, current debts at the commencement of the administration.

(4) Because the creditor has been kept out of its money from the date on which the debt became payable, it is entitled to Statutory Interest from that time, being the time at which the debt became "outstanding". If Statutory Interest were payable from the commencement of the administration, the future creditor would receive a windfall.

(b) Purposive interpretation

151. As regards the purpose of Statutory Interest:

(1) The purpose of Statutory Interest is to compensate the creditor for being kept out of his money during the period of the administration.

(2) However, where a debt has not been payable during the period of the administration, the creditor has not been kept out of his money.

(3) For example, where the debt was a contingent debt during the period of the administration, the contingent creditor has not been kept out of his money by reason of the administration; on the contrary, he has received a dividend in respect of the estimated value of his claim, which he would not have received but for the administration, and to that extent has benefitted from the administration.

(4) Similarly, where the debt was a prospective debt during the period of the administration, the prospective creditor has not been kept out of his money by reason of the administration; on the contrary, he has received a dividend in respect of the discounted value of his claim, which he would not have received but for the administration.

(5) Consequently, in the case of contingent and prospective creditors, who have not been kept out of their money, there is no policy justification for awarding Statutory Interest to them from the commencement of the administration.

152. As regards the choice of the Judgments Act Rate:

(1) The purpose of Statutory Interest at the Judgments Act Rate is to provide the creditors with a guaranteed minimum entitlement to the amount of interest that they could have obtained by commencing proceedings and obtaining judgment – a right that has been denied to them as a result of the administration.

(2) See, in this regard, *Re Lehman Brothers International (Europe)* [2014] EWHC 704 (Ch) at para 163: "*The justification for statutory interest, even in those cases where the debts do not already carry a right to interest, is that the creditors are prevented by the liquidation regime from obtaining judgment against the company which would then carry interest at judgment rate*".

(3) However this consideration does not apply to contingent and prospective creditors, who could not have taken any steps to obtain interest at the Judgments Act Rate in the absence of the administration.

(4) As regards contingent creditors:

(i) In the absence of the administration, a creditor whose debt was merely contingent could not have commenced proceedings for a money judgment unless and until the relevant contingency had actually occurred.

(ii) It would therefore be wrong to say that the appointment of the Administrators deprived the contingent creditor of his right to take steps to obtain interest at the Judgments Act Rate.

(iii) Rather, in a hypothetical world in which the Administrators had never been appointed, a contingent creditor would not have had any such right until the occurrence of the relevant contingency.

(5) As regards prospective creditors:

(i) Similarly, in the absence of the administration, a creditor whose debt was merely prospective could not have commenced proceedings for a money judgment unless and until the liability had become due and payable.

(ii) It would therefore be wrong to say that the appointment of the Administrators deprived the prospective creditor of his right to take steps to obtain interest at the Judgments Act Rate.

(iii) Rather, in a hypothetical world in which the Administrators had never been appointed, a prospective creditor would not have had any such right until the liability had become due and payable.

(c) The wording of Rule 2.88(7)

153. The periods for which statutory interest is payable under Rule 2.88(7) are those which commence after (a) the company entered administration and (b) the debt became outstanding. The wording of the Rule contemplates that these can be separate moments in time, both of which must have happened for an entitlement to statutory interest at the Judgments Act Rate to arise. The first of these moments in time is self-explanatory. The second is the one in respect of which the parties' arguments are focussed. The key word in this regard is "*outstanding*".

154. The meaning of the word "*outstanding*" depends on the context:

(1) In some cases, the word "*outstanding*" will mean "*due and payable*". For example, when it is said that an invoice is outstanding, the speaker means to say that the invoice is due and payable and that it has not been paid.

(2) In other cases, the word "*outstanding*" may mean "*due*" or even "*potentially due*": see, for example, *Paterson v Crystal Palace FC (2000) Ltd* [2004] EWHC 2113 (Ch) at paras 33 to 34, aff'd [2005] EWCA Civ 180 at paras 52 to 53.

155. The fact that "*outstanding*" may mean "*potentially due*" in some contexts does not mean that it must have the same meaning in every context – still less that it must have such a meaning in Rule 2.88(7). The Court must consider the context of Rule 2.88(7) in order to identify the meaning of the words that have been used in that provision. The context of the word in Rule 2.88(7) is very different from the context in *Paterson v Crystal Palace*, which was not concerned with Statutory Interest (and did not even relate to a question of statutory interpretation, but instead involved a clause in a business sale agreement identifying the assets that had been sold to the purchaser).

156. In the context of Rule 2.88(7), the word "*outstanding*" has been used to describe the period of time for which interest is payable on the debt at the Judgments Act Rate. A debt is therefore "*outstanding*" for these purposes if it is a debt of the type which could be said to attract an entitlement to interest at the Judgments Act Rate.

157. A contingent debt could not be said to be a debt of a type that qualifies for interest at the Judgments Act Rate. Similarly a prospective debt, which is not yet payable and cannot be demanded or sued for, is not a debt of a type that qualifies for interest at the Judgments Act Rate. When the word "*outstanding*" is construed in context, contingent and prospective debts are therefore not outstanding for these purposes.

(d) The wider statutory context – Rule 2.88(9)

158. Furthermore, Rule 2.88(7) does not exist in isolation. Rather, it must be construed in tandem with Rule 2.88(9), which identifies the applicable rate for the purposes of Rule 2.88(7). Rule 2.88(7) and Rule 2.88(9) should therefore be construed together.

159. In the Administrators' submission, Rule 2.88(7) and Rule 2.88(9) together mean that the surplus must be applied in paying interest on each debt (a) at whichever is the greater of the Judgments Act Rate and the rate applicable to the debt apart from the administration and (b) in respect of the period during which the debt has been outstanding since the company entered administration.

160. Further, the word "*outstanding*" must have the same meaning in Rule 2.88(7) whichever of the two rates specified in Rule 2.88(9) is applicable.

161. Dealing with the meaning of "*outstanding*" where the rate for the purposes of Rule 2.88(7) is the "*rate applicable to the debt apart from the administration*":

(1) As explained above, the "*rate applicable to the debt apart from the administration*" is the rate of return (as an amount over time) to which the creditor would have become entitled in the absence of the administration.

(2) Further, the amount of money to which the creditor would have become entitled by way of interest in the absence of the administration will depend on the terms and legal incidents of the creditor's claim in the absence of the administration.

(3) Therefore, where the relevant rate under Rule 2.88(9) is the rate applicable apart from the administration, the period in which the debt has been "*outstanding*" for

the purposes of Rule 2.88(7) is the period since the date on which the creditor could first have sought interest at that rate apart from the administration.

162. Since the word "*outstanding*" in Rule 2.88(7) must have the same meaning whichever of the two rates specified in Rule 2.88(9) is applicable, the meaning of "*outstanding*" must be the same where the relevant rate is the Judgments Act Rate.

163. Consequently, where the relevant rate under Rule 2.88(9) is the Judgments Act Rate, the period in which the debt has been "*outstanding*" for the purposes of Rule 2.88(7) will be the period since the date on which the creditor could first have sought interest at that rate apart from the administration – i.e. the period since the date on which the creditor was first entitled (but for the administration) to seek a money judgment.

164. In the Administrators' submission:

(1) A contingent creditor is unable to seek a money judgment until the relevant contingency has occurred. In the counterfactual scenario postulated by Rule 2.88(7), the Judgments Act Rate has no potential application until that date.

(2) A prospective creditor is unable to seek a money judgment until the debt has become payable. In the counterfactual scenario postulated by Rule 2.88(7), the Judgments Act Rate has no potential application until that date.

(e) <u>The words "*in respect of the periods during which they have been outstanding*"</u>

165. The SCG and York invite the Court to delete or ignore the words "*in respect of the periods during which they have been outstanding*" in Rule 2.88(7):

(1) They say that every provable debt (whether actual or prospective or contingent) becomes outstanding immediately upon the appointment of the Administrators.

(2) They say that the period during which "*those debts*" have been "*outstanding*" is therefore the period since the company entered administration.

(3) On this basis, the SCG and York submit that Rule 2.88(7) entitles all creditors (including prospective creditors and contingent creditors) to claim "*interest on those debts … since the company entered administration*".

(4) Therefore, according to the SCG and York, the Court should simply delete or ignore the words "*in respect of the periods during which they have been outstanding*" and construe Rule 2.88(7) as if they formed no part of it.

166. In the Administrators' submission, it would be wrong to delete or ignore the words "*in respect of the periods during which they have been outstanding*" in Rule 2.88(7):

(1) The Court is not at liberty to treat words in a statute as mere tautology or surplusage unless they are wholly meaningless.

(2) On the presumption that Parliament does nothing in vain, the Court must instead endeavour to give significance to every word.

(3) Therefore, when a word or phrase appears in a statute, the Court will presume that it was put there for a purpose and must not be disregarded.

(4) In *Quebec Railway, Light, Heat and Power Co. Ltd. v. Vandry* [1920] A.C. 662, for example, Lord Sumner held at 676: "*Secondly, there is no reason why the usual rule should not apply to this as to other statutes—namely, that effect must be given, if possible, to all the words used for the legislature is deemed not to waste its words or to say anything in vain*". See also *Enmore Estates Ltd. v. Darsan* [1970] A.C. 497 at 506 per Lord Sumner.

167. Further, in cases where the legislature has intended to refer simply to the period since the commencement of the insolvency proceedings, it has always done so in clear terms. For example, Rule 2.88(1) refers to the "*period after the company entered administration*". If the draftsman had intended to say in Rule 2.88(7) that statutory interest would be payable to prospective and contingent creditors from the date of the company's entry into administration, then nothing would have been easier than for him to say so. He would not

have needed to use (and would not have used) the words "*in respect of the periods during which they have been outstanding*" in Rule 2.88(7).

168. In this regard it is relevant to compare Rule 2.88(7) with other statutory provisions in respect of interest in the event of a surplus in insolvency proceedings:

(1) Section 40(5) of the Bankruptcy Act 1883 provided: "*If there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest* ***from the date of the receiving order*** *at the rate of four pounds per centum per annum on all debts proved in the bankruptcy*" (emphasis added).

(2) Section 33(8) of the Bankruptcy Act 1914 provided: "*If there is any surplus after payment of the foregoing debts, it shall be applied in payment of* ***interest from the date of the receiving order*** *at the rate of four pounds per centum per annum on all debts proved in the bankruptcy*" (emphasis added).

169. By contrast:

(1) Section 189(2) of the Insolvency Act 1986 provides: "*Any surplus remaining after the payment of the debts proved in a winding up shall, before being applied for any other purpose, be applied in paying* ***interest on those debts in respect of the periods during which they have been outstanding since the company went into liquidation***" (emphasis added).

(2) Section 328(4) of the Insolvency Act 1986 provides: "*Any surplus remaining after the payment of the debts that are preferential or rank equally under subsection (3) shall be applied in paying* ***interest on those debts in respect of the periods during which they have been outstanding since the commencement of the bankruptcy***" (emphasis added).

(3) Rule 2.88(7) of the Insolvency Rules 1986 provides: "[Any] *surplus remaining after payment of the debts proved shall, before being applied for any purpose, be applied in paying* ***interest on those debts in respect of the periods during which***

they have been outstanding ***since the company entered administration***" (emphasis added).

170. The addition of the words "*in respect of the periods during which they have been outstanding*" was therefore a deliberate legislative choice which was intended to add something to the rest of the words in each of these provisions.

171. In the Administrators' submission, the deliberate inclusion of these additional words in all three contexts shows that:

(1) The draftsman did not mean to say "*interest from the commencement of the winding-up*" in section 189(2) of the Insolvency Act 1986;

(2) The draftsman did not mean to say "*interest from the commencement of the bankruptcy*" in section 328(4) of the Insolvency Act 1986; and

(3) The draftsman did not mean to say "*interest from the commencement of the administration*" in Rule 2.88(7).

(f) The notion of simultaneous realisation and distribution

172. In support of its suggestion that Statutory Interest at the Judgments Act Rate begins to accrue on prospective and contingent debts from the commencement of the administration, York appeals to the notion of simultaneous realisation and distribution. See in particular paras 133 to 147 of York's skeleton argument.

173. The notion of simultaneous realisation and distribution is a legal metaphor that has been used by the Courts to describe the basis on which a *pari passu* distribution is to be achieved in an insolvent liquidation. As Lord Hoffmann said in *Wight v Eckhardt Marine GmbH* [2004] 1 A.C. 147 at para 29: "*The image of collecting and uno flatu distributing the assets of the company on the day of the winding up order is a vivid one, but the courts apply it to give effect to the underlying purpose of fair distribution between creditors pari passu and not as a rigid rule*".

174. In the Administrators' submission:

(1) The notion of simultaneous realisation and distribution must be treated with care. It should not be thought to express a literal truth. As Hoffmann J (as he then was) said in *In re K. (Enduring Powers of Attorney)* [1988] Ch. 310 at 314, "*there are dangers in reasoning from the metaphor as if it expressed a literal truth rather than from the underlying principle which the metaphor encapsulates*".

(2) The notion of simultaneous realisation and distribution should not be applied outside its original context. As Hoffmann J said in *Spiro v Glencrown Properties Ltd* [1991] Ch 537 at 543: "*Such metaphors can be vivid and illuminating but prove a trap for the unwary if pressed beyond their original context*".

175. The legal metaphor of simultaneous realisation and distribution has been applied where the assets are insufficient to pay the liabilities in full. In those circumstances, the metaphor has assisted by explaining – vividly – how the aim of a *pari passu* distribution is to be achieved. By way of example:

(1) The metaphor was used in *Re Humber Ironworks & Shipbuilding Co* (1869) LR Ch App 643, in which Selwyn LJ held that post-liquidation interest was not provable in an insolvent liquidation, saying at 646-647: "*I think the tree must lie as it falls; that it must be ascertained what are the debts as they exist at the date of the winding-up, and that all the dividends in the case of an insolvent estate must be declared in respect of the debts so ascertained*" (see also Giffard L.J. at 647).

(2) The metaphor was used again in *Re General Rolling Stock Co, Joint Stock Discount Co's Claim* (1872) 7 Ch App 646 (which involved another insolvent liquidation) to explain why the expiry of a limitation period after the making of the winding-up order would not prevent a creditor from claiming a proportionate share of the assets *pari passu*. James LJ held at 648-649: "*A duty ... [is] imposed upon the Court, to take care that the assets of the company shall be applied in discharge of its liabilities. What liabilities? All the liabilities of the company existing at the time when the winding-up order was made*".

(3) The metaphor was used again in *In re European Assurance Society Arbitration (Wallberg's case)* (1872) 17 S.J. 69 at 70, in which Lord Westbury held that policies and annuities ought to be valued at the date of the winding-up order.

(4) The metaphor was employed again in *Re Dynamics Corporation of America* [1976] 1 W.L.R. 757 at 675 (which involved another insolvent liquidation) to explain why foreign currency claims had to be converted into sterling at the exchange rate prevailing at the commencement of the winding-up, in order to achieve a rateable distribution of the assets to the creditors.

(5) The metaphor was used again in *Re Lines Bros Ltd* [1983] Ch 1 to explain why foreign currency claims had to be converted into sterling at the exchange rate at the start of the winding-up, in order to achieve a rateable distribution. However Brightman LJ made clear at 20 that the metaphor of simultaneous realisation and distribution ceases to be relevant when the provable debts have been paid in full. In that eventuality, post-liquidation interest, which the metaphor barred from proof when the estate was insolvent, would become claimable: "[Once] *the provable debts have been satisfied in full, so that the company has in that sense a surplus of assets, the duty of the liquidator is to discharge the contractual indebtedness of the company in respect of such debts to the extent that the contractual indebtedness exceeds the provable indebtedness ... It is on that principle that a creditor may claim post-liquidation interest. He does this on the basis that obligations under the contract are not necessarily discharged despite the fact that all provable debts have been paid at 100 pence in the pound*".

(6) The metaphor was used again in *Re Islington Metal & Plating Works Ltd* [1983] 3 All ER 218, in which Harman J held that tort claims which had not been liquidated by the commencement of the winding-up were not provable. He said at 221 that "*the theory of all liquidations is that the liquidation and the distribution are to be treated as notionally simultaneous*". Again in this example it is clear however that the metaphor ceases to be relevant in the event of a surplus, when the non-provable tort claims must be paid ahead of the shareholders: see *In re T&N Ltd* [2005] EWHC 2870 (Ch) at para 107 ("*It would indeed be extraordinary if a company's assets could be, and were required to be, distributed to shareholders without*

paying tort claims which had accrued since the liquidation date, or other claims not provable in a liquidation, such as costs incurred in litigation against the company before the liquidation date but not then the subject of an order. In my judgment, this is not the position").

176. In the Administrators' submission:

(1) The metaphor of simultaneous realisation and distribution is merely a metaphor. It is not a literal truth and it should be treated with caution.

(2) In reality, as Lord Hoffmann said in *Stein v Blake* [1996] 1 AC 243 at 252, "*the scene does not freeze at the date of the winding-up order*".

(3) However the metaphor has been used by the courts as a metaphor to explain how the assets should be distributed *pari passu* in an insolvent liquidation.

(4) According to the metaphor, the clock stops at the commencement of an insolvent liquidation and creditors prove for the value of their claims at that time.

(5) One consequence of the metaphor is that post-liquidation interest is not provable in an insolvent liquidation: see *Humber Ironworks*.

177. Consequently:

(1) The metaphor ceases to have any relevance in the event of a surplus.

(2) In the event of a surplus, the non-provable claims, which the metaphor barred from proof, become payable in priority to the shareholders.

(3) In particular, as a result of the irrelevance of the metaphor in the event of a surplus, post-liquidation interest and currency conversion claims become payable.

178. The Administrators would therefore adopt the way in which the SCG puts the point in para 207 of its skeleton argument: "*The notional distribution of assets and assessment of*

claims as at the date of the Administration is a fiction employed for the purposes of collective enforcement ... Once all provable debts have been paid, the fiction becomes irrelevant". The fiction has no relevance to the payment of Statutory Interest.

179. In any event:

(1) According to the metaphor, the clock stops at the commencement of the liquidation and post-liquidation interest cannot accrue.

(2) As a consequence, whatever legitimate uses the metaphor may have in other contexts, the metaphor cannot govern the distribution of post-liquidation interest.

(g) Contingent creditors – revaluation of claims on the basis of the hindsight principle

180. In the Administrators' submission, the process of revaluing a contingent claim upon the occurrence of the relevant contingency (i.e. the hindsight principle) does not affect the start date for Statutory Interest at the Judgments Act Rate on contingent claims.

181. The hindsight principle relates solely to the value of the proof at the commencement of the winding-up or administration: see *Wight v Eckhardt Marine GmbH* [2004] 1 A.C. 147. The hindsight principle does not affect the date on which the debt in question would have become payable so as to attract a right to interest apart from the administration. The question "How much was this claim worth at the commencement of the administration" is different from the question "When would this debt have become payable so as to attract a right to interest apart from the administration?"

182. The occurrence of the contingency enables the office-holder to put a more accurate value on the contingent claim at the commencement of the administration: see *In re MF Global UK Ltd* [2013] EWHC 92 (Ch) at para 54. It does not mean that the claim was payable in full at the commencement of the administration; plainly it was not. It only became payable so as to attract a right to interest on the occurrence of the contingency.

(h) Prospective creditors – supposed acceleration

183. Wentworth contends that "[as] a result of the insolvency the future debt is accelerated and treated as payable at the Date of Administration". In support of this proposition Wentworth cites *Hodson v Tea Company* (1880) 14 Ch D 859 and *Wallace v Universal Automatic Machine Co* [1894] 2 Ch 547. However both of those cases related to secured debt. The secured creditors stood outside the winding-up. Kay LJ held in the *Wallace* case: "*It is material to observe that it is not a question of proof in the winding-up, but of realization of the security*". It was concluded in both decisions that it was an implied term of the security that the security would be enforceable immediately to secure payment of the sums due on the making of a winding-up order. That has no bearing on the position of unsecured prospective creditors in an administration.

III. CURRENCY CONVERSION CLAIMS

(1) Issue 28

(28) Whether, and if so how, the calculation of a Currency Conversion Claim should take into account the Statutory Interest paid to the relevant creditor by the Joint Administrators.

184. The Administrators consider that the calculation of a Currency Conversion Claim should not be adjusted to take into account Statutory Interest paid to the relevant creditor by the Administrators.

185. The Respondents' respective positions on Issue 28 are as follows:

(1) The SCG (whose submissions support the Administrators' position) consider that: (a) a creditor who has a Currency Conversion Claim in respect of principal is not required to give credit against that Currency Conversion Claim for principal for any post-insolvency interest received; but (b) a creditor who, outside of insolvency, has a right to post-insolvency interest denominated in a foreign currency, which right is not fully satisfied by Rules 2.88(7) and 2.88(8), will have a Currency Conversion Claim in respect of interest (see SCG skeleton, [348]).

(2) Wentworth considers that a creditor who has a Currency Conversion Claim in respect of principal should give credit for any post-insolvency interest received, on the basis that a creditor has only one claim in an administration which is calculated based on a comparison between: (a) the amount of principal and interest at the contractual rate, in the relevant foreign currency; and (b) all distributions received from the insolvency estate, whether by way of dividend or Statutory Interest (see Wentworth skeleton, [181]).

(3) York's primary position, subject to the outcome of Issue 4, is aligned with Wentworth. However York's secondary position (which it will take if it loses on Issue 4) is aligned with the SCG (see York skeleton, [219]).

186. Contrary to the positions taken by Wentworth and York, the Administrators consider that the calculation of a Currency Conversion Claim should not take into account the Statutory Interest paid to the relevant creditor by the Administrators.

187. The basis on which a Currency Conversion Claim arises is as follows:

(1) Prior to the insolvency the creditor was entitled to be paid in a foreign currency. This entitlement included the right, if the debt were enforced by action, to obtain a judgment expressed in the foreign currency and to execute against assets in England in a sum of sterling representing the judgment debt converted into sterling at the prevailing exchange rate on the date of execution. See *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443.

(2) In circumstances where the company enters into administration the value of such a foreign currency claim is converted for the purposes of proving, i.e. for the purposes of valuing the creditor's admitted proof of debt, as at the date of the company's entry into administration. This is provided by Rule 2.86(1), which makes it clear that a foreign currency debt is to be converted into sterling "*for the purposes of proving…*" and, by implication, for this purpose only (the same expression is used in the context of liquidation in Rule 4.91(1)).

(3) The function of the proving process is to arrive at a value for each creditor's debt so as to ensure that distribution of the insolvent estate is on a *pari passu* basis. The requirement to convert all claims into sterling as at the same date is fundamental to the *pari passu* principle: "*It is only in this way that a rateable, or pari passu, distribution of the available property can be achieved, and it is, as I see it, axiomatic that the claims of creditors amongst whom the division is to be effected must all be crystallised at the same time… for otherwise one is not comparing like with like…*" (*Dynamics Corpn* [1976] 1 WLR 757, 764 per Oliver J; cited by the Privy Council in *Wight v Eckhardt Marine GmbH* [2004] 1 AC 147, at [28]).

(4) In circumstances where the administrators pay 100 pence in the pound of the creditor's proved debt, but the sterling amount thus paid – when converted into the relevant foreign currency on the date or dates when such payment or payments is or are made – amounts to less than 100% of the amount of the underlying debt expressed in the foreign currency, it can be seen that a shortfall is still owing to the creditor.

(5) In circumstances such as these, where proved debts are paid 100 pence in the pound and the company's estate runs a surplus after payment in full of proved debts and Statutory Interest, a Currency Conversion Claim (ranking as a non-provable debt) arises on the basis that, in such circumstances, the claims of justice underpinning the decision in *Miliangos* (which are in abeyance so long as the estate remains insolvent) re-assert themselves when the estate runs a surplus: see *Re Lehman Brothers International (Europe) (in administration)* [2014] EWHC 704 (Ch), at [90].

(6) The principle underpinning the *Miliangos* decision is that a foreign currency debtor should not be entitled to impose on the foreign currency creditor the risk of a fall in the value of sterling. This principle has no role to play in the distribution of the assets of an insolvent company, since it would have the effect of imposing on sterling creditors (rather than the defaulting company) the risk of a fall in the value of sterling. However, the principle becomes applicable where the company's estate runs a surplus since in these circumstances the foreign currency creditors are no longer in competition with the company's sterling creditors. See *In re Lines Bros*

Ltd [1983] Ch 1, 16 per Brightman LJ; *Re Lehman Brothers International (Europe) (in administration)* [2014] EWHC 704 (Ch), at [98].

188. A Currency Conversion Claim is concerned with the enforcement of a creditor's entitlement to payment of principal, to the extent that this entitlement has not been satisfied in full by the payment of 100 pence in the pound of its proved debt.

189. The company's liability to pay Statutory Interest, which ranks above non-provable claims like a Currency Conversion Claim, is distinct from a Currency Conversion Claim and serves distinct purposes. The purposes of Statutory Interest are: (i) to compensate all creditors for being kept out of their money during the administration; and (ii) to ensure that creditors whose debts carry interest are not made worse off by the Insolvency Act reforms[13].

190. In light of this clear distinction between the company's liability for Currency Conversion Claims and the company's liability to pay Statutory Interest (in terms of their respective bases and purposes), the Administrators consider that the calculation of a Currency Conversion Claim should not be adjusted to take into account the Statutory Interest paid to the relevant creditor by the Administrators.

191. Wentworth's position on Issue 28 stands or falls on its contention that a creditor has a single claim referable to the amount of principal and interest at the contractual rate in the relevant foreign currency (Wentworth skeleton, [181]).

192. However, Wentworth's contention that a creditor has a single claim is incorrect. This is shown by the fact that where a foreign currency creditor's debt did not carry interest it nonetheless has the right to Statutory Interest at the Judgments Act Rate as a consequence of Rule 2.88(7) and (9). The basis of the creditor's right to Statutory Interest (i.e. statute) is extrinsic to the underlying foreign currency debt (i.e. contract), notwithstanding that such Statutory Interest is calculated with reference to the proved debt.

---

[13] Rule 2.88(9) is directed towards this purpose by preserving the position of those creditors whose debts bore interest and whose rights to such interest were recognised prior to the Insolvency Act reforms. See *Re Fine Industrial Commodities Ltd* [1956] Ch 256, 260; and *Re Rolls-Royce Ltd* [1974] 1 WLR 1584.

193. Wentworth asserts (on a damages analysis based on the concept of "mitigation in fact") that the calculation of a Currency Conversion Claim must take into account "*the benefits that arise out of the consequences of the breach*", which may include the payment of Statutory Interest (or Statutory Interest at a rate) that would otherwise not be paid (Wentworth skeleton, [209]).

194. However, Wentworth's assertion is wrong for two reasons.

195. First, on a proper analysis it is the breach of contract rather than the statutory scheme which in each case causes the claimant's loss (indeed, the damages claim might already have arisen prior to the company's insolvency). In any event, the creditor's right to be paid Statutory Interest is free-standing. The payment of Statutory Interest merely discharges the company's obligation under Rule 2.88(7). Indeed, whilst the Administrators recognise that there are conceptual differences between a debt claim and a damages claim[14], these differences are not relevant to the analysis of Issue 28.

196. Secondly, Wentworth's assertion is wrong because its consequences are inconsistent with the purposes of Statutory Interest and fail to give full effect to Rule 2.88. In particular:

(1) On Wentworth's analysis a creditor would effectively receive no compensation for being kept out of its money during the administration in circumstances where (for example): (i) it has a foreign currency claim with no contractual entitlement to interest; and (ii) the quantum of Statutory Interest received by the creditor equals or exceeds (upon being converted into the foreign currency as at the date of payment) the difference between the sterling amount paid in respect of the proved debt and the quantum of the underlying claim in the foreign currency as at the date of payment of that sterling amount.

[14] In the law of contract there is an important distinction between a claim for payment of a debt and a claim for damages for breach of contract: see *Chitty on Contracts*, at §26-008. A debt claim is for a definite sum of money fixed by the agreement of the parties to be payable in certain circumstances; a damages claim arises from a party breaching his contractual obligations in some way other than failing to pay a debt. A debt claimant does not need to quantify his claim in the same way as a damages claimant: the former is required only to prove the existence of the condition precedent to payment; the latter is required to prove both the other party's breach and his own actual loss.

(2) Wentworth has asserted that "*it would be absurd*" to regard such a creditor as having a Currency Conversion Claim (see paragraph 141 of its position paper). However it is not absurd for a creditor to be entitled to payment in full of its underlying debt and to compensation for delay in payment of that underlying debt. This outcome is no more absurd than in the case of a sterling creditor whose debt did not carry interest but who receives payment of his debt in full plus Statutory Interest on that debt. In both cases the creditor receives more than he would have been entitled to receive absent the company's insolvency.

(3) Indeed, if and to the extent that the currency conversion claimant were required to treat payment of Statutory Interest as reducing its Currency Conversion Claim, the result would be that it would, in effect, receive less Statutory Interest than those creditors who had no Currency Conversion Claim (because the dividends they had received were sufficient to discharge their contractual debt). There is no justification for that result.

197. It is noted that the Court in *Re Lehman Brothers International (Europe) (in administration)* [2014] EWHC 704 (Ch), at [99], indicated (without deciding the point) that a foreign currency creditor "*might have to give credit* [for the purposes of calculating a Currency Conversion Claim] *for the benefits which he has received under the insolvency regime*", in circumstances where his debt is a contractual payment due in the future and carrying a low contractual rate of interest which: (i) is converted into sterling pursuant to Rule 2.86(1); (ii) is discounted by the statutory 5% rate (which may be a significantly more advantageous discount than the real market discount rate calculated by reference to the contractual interest rate); and (iii) attracts Statutory Interest at the rate of 8%.

198. As to this:

(1) It is arguable that a foreign currency creditor with a prospective claim which is subject to a 5% discount for the purposes of proving (pursuant to Rule 2.105), in circumstances where the real market discount rate applicable at the relevant time would have been less advantageous to the creditor than the statutory discount rate, would have to give credit (in terms of the value placed on the Currency

Conversion Claim) for the benefit conferred on it by the insolvency regime in this respect.

(2) This is because the effect of Rule 2.105 in these circumstances is to permit the creditor to prove for a <u>principal</u> sum greater than that to which its underlying contractual rights would entitle it to receive. A Currency Conversion Claim concerns the enforcement of a creditor's entitlement to payment of principal. Accordingly, it is arguable that where a creditor incurs a loss pursuant to Rule 2.86(1) which is diminished or extinguished by a gain pursuant to Rule 2.105, then the loss and gain should both be taken into account in calculating the creditor's residual underlying claim to principal (and, therefore, its Currency Conversion Claim).

(3) However, whilst Statutory Interest might be characterised as a "*benefit… received under the insolvency regime*" (*Re Lehman Brothers International (Europe) (in administration)* [2014] EWHC 704 (Ch), at [99]), it is a benefit received by all creditors and it amounts to statutory compensation for them having been kept out of their money during the administration process. Payment of Statutory Interest (whether at or above any contractual rate) is also an obligation of the company in administration. Further and in any event, the Administrators' position (as set out above) is that a creditor with a future debt that has been discounted pursuant to Rule 2.105 is not entitled to Statutory Interest. This is because Statutory Interest is only available to a creditor whose prospective debt has fallen due before the dividend is paid.

(4) Further, the company's liability for principal and its liability for Statutory Interest are separate and distinct. A foreign currency creditor whose debt carried no interest but who received 8% Statutory Interest pursuant to Rule 2.88 should not be required to give credit for such a "gain" for the purposes of calculating a Currency Conversion Claim. This is because the creditor's "gain" and its "loss" relate to separate and distinct liabilities (i.e. interest and principal respectively).

199. For these reasons, a payment of Statutory Interest does not reduce the amount of a Currency Conversion Claim based on the receipt, by way of dividends, of less than the

creditor's contract debt. Such payments simply discharge a separate and distinct statutory liability.

200. The Administrators note the SCG's contention that a Currency Conversion Claim can arise where: (a) a creditor has a right, outside of the insolvency, to post-insolvency interest on its claim denominated in a foreign currency; (b) the creditor receives payment of interest in sterling in accordance with IR 2.88(7) and (9) converted using the exchange rate at the date of commencement of the insolvency; and (c) the total amount of such payment is insufficient, when converted into the foreign currency at the date of receipt, to satisfy the foreign currency amount to which the creditor is otherwise entitled in respect of post-insolvency interest (SCG skeleton, [377]). The Administrators consider that the SCG's submissions on this point are correct.

(2) <u>Issue 29</u>

(29) Whether there exists a non-provable claim against LBIE where the total amount of interest received by a creditor applying the Judgments Act Rate on a sterling admitted claim, when converted into the relevant foreign currency on the date of payment, is less than the amount of interest which would accrue applying the Judgments Act Rate to the original foreign currency claim.

201. The Administrators consider that no Currency Conversion Claim exists where the total amount of interest received by a creditor applying the Judgments Act Rate on a sterling admitted claim, when converted into the relevant foreign currency on the date of payment, is less than the amount of interest which would accrue applying the Judgments Act Rate to the original foreign currency claim.

202. The Respondents' positions on Issue 29 are broadly as follows:

(1) Wentworth considers that no Currency Conversion Claim arises in the circumstances envisaged by Issue 29 on two alternative bases: (a) primarily, on the basis that if it its position on Issue 28 is correct then Issue 29 simply does not arise; (b) alternatively, on the basis that the creditor would never have been entitled to receive interest at the Judgments Act Rate on its foreign currency debt

in the absence of "*co-incidence that the creditor had a contractual entitlement to be paid interest at the Judgments Act Rate*" (Wentworth skeleton, [217]).

(2) The SCG's position is consistent with the Administrators' position (and with Wentworth's basis (b), as set out above). The SCG contend that a Currency Conversion Claim arises in the circumstances envisaged by Issue 29, but only where "*the creditor is, apart from the administration, entitled to interest in a foreign currency on his claim at the Judgments Act rate*", and noting that "*it is a separate question* [i.e. Issue 4] *as to whether… a creditor with a claim denominated in a foreign currency may be entitled, apart from the insolvency, to interest at the Judgments Act rate*" (SCG skeleton, [395]).

(3) York's position is put on broadly the same basis as the SCG's (York skeleton, [221]).

203. Accordingly, although the Administrators set out their reasons for their position on Issue 29 below, it now appears that all parties are agreed on what the answer to Issue 29 is (if not agreed entirely on what the correct basis for that answer is).

204. The principle underpinning a Currency Conversion Claim, as set out in detail at paragraph 187 above, is that a foreign currency claimant retains the right to enforce (as a non-provable claim) that part of its contractual right to payment which has not been extinguished by the sterling payment of 100 pence in the pound of the proved debt. The measure of this residual contractual right to payment can be expressed as the difference between: (i) the foreign currency value of the sterling payment of 100 pence in the pound of the proved debt (as at the date of that payment or those payments); and (ii) the value of the foreign currency claim expressed in that foreign currency.

205. This principle cannot apply in the context of the question posed in Issue 29 (assuming that the Judgments Act Rate is not "*the rate applicable to the debt apart from the administration*" for the purposes of Rule 2.88(9)):

(1) The creditor would not have been entitled to receive interest at a rate of 8% on its original claim (unless, contrary to the premise of the question, this had been

specified in the relevant contract). Rather the entitlement to receive Statutory Interest arises as a function of the statutory scheme.

(2) Therefore it cannot be said that there is any residual contractual (or other) right in respect of which a Currency Conversion Claim might arise.

(3) Nor could such a creditor assert that it had suffered loss as a result of the 8% Statutory Interest being payable only on a sterling (rather than foreign currency) amount, since such an assertion is predicated on the counterfactual proposition that, absent LBIE's entry into administration, the creditor would have been entitled to 8% interest during the relevant period on the principal amount expressed in the foreign currency.

206. The SCG contend that a Currency Conversion Claim may arise where: (i) the Judgments Act Rate is the rate applicable to a foreign currency claim apart from the administration; and (ii) the amount of interest that the creditor would have been entitled to receive applying the Judgments Act Rate to the foreign currency claim is greater than the amount of Statutory Interest to which it is entitled by applying the Judgments Act Rate to the sterling admitted claim (paragraph 29 of the SCG's position paper). The Administrators consider that this contention is correct.

(3) <u>Issue 30</u>

(30) Whether there exists a non-provable claim against LBIE where the total amount of interest received by a creditor applying a "rate applicable to the debt apart from the administration" on a sterling admitted claim, when converted into the relevant foreign currency on the date of payment, is less than the amount of interest which would accrue applying the "rate applicable to the debt apart from the administration" to the original foreign currency claim.

207. The parties have reached an agreed position on this Issue, namely that a non-provable claim akin to a Currency Conversion Claim does exist in the relevant circumstances. It is to be noted, however, that Wentworth's position on Issue 30 is subject to its contention that the Currency Conversion Claim which arises is not a "*separate claim but is subsumed within the CCC*" (Wentworth skeleton, [220]).

208. As noted above the Administrators have notified creditors, by way of updates on the LBIE administration website, of their intention to invite the Court to give directions in respect of Issue 30 in accordance with what has become an agreed position. In the event, the Administrators have received no response to this notice from any creditor. Accordingly, the Administrators invite the Court to determine Issue 30 by answering it in the affirmative.

209. The Administrators identified, at paragraph 129 of their position paper, a potential variation of Issue 30, and invited the Respondents to set out their position in relation to it. This variation of Issue 30 concerns where the total amount of interest received by a creditor on a sterling admitted claim, when converted into the relevant foreign currency on the date (or dates) of payment, will be less than the amount of interest which would have accrued applying the "*rate applicable to the debt apart from the administration*" to the original foreign currency claim, whether the interest in fact received was at a "*rate applicable to the debt apart from the administration*" or at the Judgments Act Rate.

210. The SCG have indicated in their skeleton argument their view that a Currency Conversion Claim would arise in such circumstances (at [392]), as has York in its skeleton argument [224]). Wentworth has not expressly addressed the point either in their reply position paper or in their skeleton argument. The existence of a Currency Conversion Claim in the circumstances envisaged by the "variation" identified by the Administrators is consistent with Wentworth's positions on Issues 28 to 29, although it would probably consider that the claim is not a separate one but subsumed into the creditor's overall Currency Conversion Claim. The Administrators find it difficult to see how an alternative position to that adopted by the SCG and York could properly be argued in light of the agreed position on Issue 30. In the circumstances, the Court is invited to give directions that a Currency Conversion Claim arises in the relevant circumstances.

(4) <u>Issues 31 and 32</u>

(31) Whether:
(i)in relation to a GMSLA for which the "Base Currency" is a currency other than sterling, a Currency Conversion Claim can arise in respect of the "Base Currency" if

the schedule to that agreement states that paragraph 10 of that agreement will only apply if LBIE's counterparty is the "Defaulting Party";
(ii) in relation to a GMRA for which the "Base Currency" (as distinct from the "Contractual Currency") is a currency other than sterling, a Currency Conversion Claim can arise in respect of the "Base Currency" if the schedule to that agreement states that paragraph 10 of that agreement will only apply if LBIE's counterparty is the "Defaulting Party"; and
(iii) in relation to other master agreements, a Currency Conversion Claim can arise if the relevant contractual terms state that the termination and close-out netting provisions which would result in a payment obligation in a non-sterling currency by one party to the other do not apply other than upon the default of LBIE's counterparty.

(32) If the answer to question 31 (i), (ii) and/or (iii) is in the negative, whether a Currency Conversion Claim can arise (and if so in what circumstances) in respect of such a GMSLA, GMRA or other master agreements.

211. In their position paper (paragraphs 131 to 134) the Administrators refrained from taking a position in relation to Issues 31 and 32 for the time being (whilst reserving their right to do so at a later stage), on the following basis:

(1) Issues 31 and 32 are highly fact-specific;

(2) It was not clear from their first position papers whether the SCG and Wentworth were referring to the same or different agreements (with the SCG not referring to any particular master agreements and with Wentworth referring only to a particular kind of GMSLA, a PB and an MLA, as defined by Wentworth);

(3) Accordingly the Administrators considered it preferable to suggest that the Respondents agree on which particular master agreements they consider Issues 31 and 32 go to (noting in particular the reference to "*other master agreements*" in Issue 31(iii)).

212. Following the filing of the Respondents' skeleton arguments, it is now clear that:

(1) As regards Issue 31 Wentworth contends that, under the netting and payment provisions of the GMSLA, the MLA and the PB, LBIE's counterparty has no entitlement to be paid in any foreign currency, and thus can have no Currency Conversion Claim (Wentworth skeleton, [229]). As regards Issue 32 Wentworth

now accepts that the question is a fact sensitive one to be determined on a case by case basis, and that it is not one which is capable of resolution at a general level on the Waterfall II Application (at [233]).

(2) By contrast the SCG's position on Issue 31, as developed in its skeleton argument, is that: (a) whether a debt or damages are payable in a foreign currency is a question of fact to be determined on a case-by-case basis (at [407]); (b) Issues 31 and 32 cannot be determined exclusively with reference to the three agreements that Wentworth has identified (at [412]); and (c) in any event, Wentworth's construction of these three agreements is incorrect (at [414]).

(3) York takes no position on Issues 31 and 32.

213. In light of the skeleton arguments filed by the SCG and Wentworth, and considering it likely that Issue 31 will be fully argued by those parties which have a real financial interest in taking the relevant positions, the Administrators continue to refrain from taking a positive position on Issue 31 (whilst reserving their right to do so should this become necessary).

214. Given Wentworth's acceptance that Issue 32 is not capable of resolution at a general level on the Waterfall II Application, the Administrators consider that it would be appropriate for the Court to proceed on the basis that it is no longer required to determine Issue 32.

(5) <u>Issue 33</u>

(33) Whether a Currency Conversion Claim can be established by a creditor where the creditor's right is derived from a transfer (whether or not by way of legal assignment) by LBIE's original counterparty (or any assignee of the original counterparty) which only transferred:
(i) the provable debt;
(ii) the right to receive a dividend on the provable debt; or
(iii) the Agreed Claim Amount defined as a numerical amount in a CDD
and if not, whether either the original counterparty or the assignee is capable of having a valid Currency Conversion Claim.

215. Issue 33 was introduced into the Application on the basis that Wentworth had identified it as a potential issue which might require the Court's determination.

216. In their position paper the Administrators invited the Respondents to file evidence of transfer agreements with the features outlined in Issue 33 so that the parties can consider their positions and the Court may give a direction which best assists the Administrators in distributing the Surplus (at [137]). In its reply position paper Wentworth noted that it was exploring ways to provide a sample agreement that falls within the parameters of Issue 33 (at [62]). However, to date Wentworth has not produced any such agreements.

217. By way of a letter addressed to the other parties' solicitors on 28 January 2015, Wentworth's solicitors indicated Wentworth's preference for Issue 33 to be considered within Part B of the Waterfall II Application (i.e. the trial provided by paragraph 8 of the Court's directions order dated 21 November 2014), on the basis that Issue 33 raises questions closely related to the waiver questions raised by Issues 34 and 35.

218. The SCG's solicitors, by way of a letter dated 30 January 2015, indicated that they did not agree with Wentworth's proposed approach and noted that, given that Wentworth have not produced to the other parties any contracts to which Issue 33 can be said to be relevant, the proper course is for the Issue to be removed from the Application altogether.

219. The Administrators are content, in principle, for Issue 33 to be considered within Part B of the Waterfall II Application, if this remains Wentworth's preference. However, the Administrators consider that it may be appropriate, if Wentworth has not been able to produce any agreements relevant to Issue 33 in advance of the case management conference in advance of the Part B trial (which has now been listed for 9 March 2015), for the Administrators at this case management conference to suggest to the Court that Issue 33 be removed from the Application.

IV. <u>POST-ADMINISTRATION CONTRACTS</u>

(1) <u>Issue 37</u>

How are claims to be calculated where a CDD (or any other agreement) pursuant to which an unsecured claim is agreed or admitted) compromises a number of claims, with differing rates of interest applicable or in different currencies, without indicating how the agreed or admitted claim amount in the CDD (or any other agreement) derives from and relates to those underlying claims?

(a) <u>The context in which Issue 37 arises</u>

220. Issue 37 is one of considerable practical importance for the Administrators, since the issue arises in a significant number of cases.

221. In broad terms, Issue 37 arises where a creditor and LBIE entered into a CDD (or other agreement with similar effect) and:

(1) The CDD compromised a number of underlying claims (as set out in the creditor's proof of debt);

(2) The amount of the claim admitted by the CDD (the "**Agreed Claim**") was <u>lower</u> than the total value of the underlying claims asserted by the creditor; and

(3) The CDD did not record the extent to which and how the agreed claim set out in the CDD derived from the underlying claims.

222. For the avoidance of doubt the Administrators consider that, where the amount of the Agreed Claim contained in the CDD was <u>identical</u> to the total amount of the claims in the corresponding proof of debt, then the basic principle should be that the Agreed Claim amount is to be disaggregated (for the purposes of calculating the creditor's entitlement to Statutory Interest and Currency Conversion Claims) with reference to the claims set out in the proof of debt. See paragraphs [430] to [433] of the SCG's skeleton argument, with which the Administrators broadly agree.

223. The rest of these submissions on Issue 37 proceed on the assumption that the claim admitted by the CDD was lower than the total value of the underlying claims asserted by the creditor.

224. The Administrators, having filed their position paper, filed further evidence in order to illustrate the contexts in which the issue has arisen so as to assist the Court in determining Issue 37.

225. This further evidence is set out in Section K of Lomas 11, which supplements the evidence at Section D of Lomas 10 relating to CDDs generally. The Administrators' evidence as to the contextual matters relevant to the guidance required from the Court in respect of Issue 37 can be summarised as follows:

(1) CDDs provide for a single Agreed Claim which is admitted for dividends in the Administration (Lomas 10, Section D).

(2) In the vast majority of cases where a CDD agreed and/or compromised a number of underlying claims, LBIE and the creditor did not expressly agree how the Agreed Claim related to and derived from such underlying claims (Lomas 11, paragraph 68).

(3) The Agreed Claim contained in a CDD may reflect either: (i) the creditor's claims as set out in its proof of debt (a "**PoD**" and the "**PoD View**"); or (ii) the Administrators' view of the claims as informed primarily by LBIE's books and records and by its valuation of the underlying claims on the relevant dates (the "**House View**"); or (iii) a compromise between the two (Lomas 11, paragraph 70).

(4) In the course of Project Canada (Lomas 10, paragraphs 42 to 46; Lomas 11, paragraph 72.1), the Administrators made offers to relevant creditors of whichever was the lower of the House View and the "clean" PoD View. The "clean" PoD View was the PoD View amended (if required) by the Administrators to correct obvious errors and to remove non-provable amounts.

(5) Similarly, as part of the subsequent Project Alaska (Lomas 11, paragraph 72.2), which was a bilateral claims agreement process between LBIE and individual creditors involving further analysis by the Administrators of the "clean" PoD View and supporting documents and information, the Administrators made offers to creditors on the basis of the House View as adjusted (if necessary) by reference to further information provided by the creditor.

226. Accordingly the "Agreed Claim" amount contained in any given CDD always reflected an analysis on the part of the Administrators as to what should be admitted. For the avoidance of doubt, and in response to the SCG's comments at paragraphs [436] and [440(2)] of their skeleton argument, the Administrators have always adopted a rational and considered process when deciding whether to agree a creditor's claim in full or to admit it in a lesser amount. However, in light of the complex approach adopted by the Administrators in agreeing Agreed Claim amounts for the purposes of concluding CDDs with creditors (as set out in the previous paragraph), any given Agreed Claim amount may have reflected either: (a) the "clean" PoD View (which would equal the PoD View where no adjustments were made); or (b) the House View (as adjusted if necessary following receipt of evidence from the creditor).

(b) The Respondents' positions

227. The Respondents' position papers were not altogether clear as to what their positions were in relation to Issue 37 (or their reasons for taking them). Accordingly, by a letter addressed to the Respondents' solicitors dated 28 January 2015, the Administrators' solicitors emphasised the importance of Issue 37 for the Administrators and set out a number of possible methodologies that could be adopted by them when calculating a creditor's entitlement in respect of Statutory Interest and Currency Conversion Claims in the circumstances envisaged by Issue 37.

228. The Respondents' positions, as regards how an Agreed Claim amount which is lower than the PoD View is to be disaggregated for the purposes of calculating the creditor's Statutory Interest and Currency Conversion Claim entitlements, appear to be as follows:

(1) The SCG contends that: (a) any agreement between the creditor and the Administrators as to which claims (and in which proportions) the Agreed Claim amount reflects must prevail (at [435]); (b) where there was no such agreement the Agreed Claim amount is to be disaggregated by reference to all available relevant information, including the Administrators' records and working papers, as to what the Administrators did in fact admit from the creditor's PoD (at [437]); and (c) where it is impossible to ascertain from all available information what the Administrators did in fact admit, then it is to be assumed that the parties intended for the compromise to be borne *pro rata* among all such disputed claims (at [439]).

(2) Wentworth takes the position that, in circumstances where it is not possible to ascertain how the agreed or admitted amount in the CDD (or other agreement) derives from and relates to the underlying claims, the claims are to be calculated on a pro rata basis by reference to the underlying claims. However, Wentworth has not yet developed any reasons in support of this position.

(3) York takes no position on Issue 37.

(c) <u>The Administrators' view</u>

229. The Administrators broadly agree with the SCG's position, subject to the analysis below.

230. First, it is correct that, where (on an objective analysis) the Administrators and a creditor have agreed which of the latter's underlying claims are admitted under a CDD (and in which proportion), this agreement prevails. As to this:

(1) It is trite law (but see *Smith v Hughes* (1871) L.R. 6 Q.B. 597, 607) that in determining whether the parties to a contract have reached a consensus *ad idem* the Court applies an objective test. As Lord Clarke has said in the Supreme Court decision *RTS Flexible Systems Ltd v. Molkerei Alois Muller GmbH* [2010] 1 WLR 753, at paragraph [45], summarising the principles applied by the Court in determining whether the parties have reached agreement:

> "*The general principles are not in doubt. Whether there was a binding contract between the parties and if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement*."

(2) The Administrators consider that where the Administrators and a creditor can be said (on an objective analysis, in the sense summarised by Lord Clarke in *RTS Flexible Systems Ltd v. Molkerei Alois Muller GmbH* [2010] 1 WLR 753, at paragraph [45]) to have agreed that a CDD will admit to proof elements of a PoD in particular stipulated proportions (whether on the PoD View, the House View, or on some other basis), then this agreement will govern the analysis as to how the Agreed Claim amount has been derived from the PoD for the purposes of Issue 37.

231. Secondly, the Administrators agree with the SCG that, where there was no such agreement between the Administrators and the creditor, the Agreed Claim amount is to be disaggregated by reference to all available relevant information, including the Administrators' records and working papers, as to what the Administrators did in fact admit from the creditor's PoD. The basis on which the Administrators did in fact agree to admit an Agreed Claim in a particular sum varied from CDD to CDD, but in any given case it would have been on one of the bases identified in paragraph 225 above. The Administrators consider that the basis on which they did in fact admit the creditor's claim in any given case should be the basis on which the Agreed Claim amount is to be disaggregated (and as such no pro-rating would be required).

232. Thirdly, although the Administrators consider that they will have sufficiently clear records to determine the precise basis on which the Agreed Claim was admitted by them in every case, it would assist to have the Court's guidance as to how the Administrators should proceed in circumstances (should they arise) where it is not entirely clear from the Administrators' records on what basis the Administrators did in fact admit an Agreed

Claim in a particular amount. In these circumstances, the Administrators consider that the Agreed Claim amount is to be disaggregated *pro rata* by reference to the underlying claims set out in the "clean" PoD View. As to this:

(1) There is no authority directly on point. However, the decision of Walton J in *Re Unit 2 Windows Ltd (in Liquidation)* [1985] 1 WLR 1383 provides some support by analogy. In that case the Judge had to decide whether or not, for the purposes of section 31 of the Bankruptcy Act 1914 (the bankruptcy set-off provision under that Act[15]), credits should be set off rateably (or on some other basis) between preferential and non-preferential parts of a debt (in this case the Crown's debt).

(2) Walton J departed from Buckley J's decision in *In re E.J. Morel (1934) Ltd* [1962] Ch. 21, 34, where it had been held that the balance from such a set-off was non-preferential only (save to the extent that the credit was insufficient to discharge the preferential claim in full)[16]. Buckley J had stated that his solution was "*reasonable*", whereas Walton J's view was that the question was not whether the solution was "*reasonable*" (which "*depends upon the view point of the person considering it*"), but whether the solution was consistent with the terms of section 31 of the 1914 Act, which was entirely silent on this point and which cannot therefore be construed as giving the company the right of appropriation (*per* Walton J, p.1391C-D). The logic of Walton J's reasoning is that, absent any such right of appropriation, the set-off took effect rateably as between the preferential and non-preferential components of the Crown's claim:

[15] Section 31 of the Bankruptcy Act 1914 (as it was enacted at the time of Walton J's decision), incorporated into the statutory regime for liquidation by way of section 612 of the Companies Act 1985, provided as follows: "*Where there have been mutual credits, mutual debts or other mutual dealings, between a debtor against whom a receiving order shall be made under this Act and any other person proving or claiming to prove a debt under the receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively; but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a debtor in any case where he had, at the time of giving credit to the debtor, notice of an act of bankruptcy committed by the debtor and available against him*". Cf. now IR 4.90 (for liquidation); IR 2.85 (for administration).

[16] Walton J's decision in *Re Unit 2 Windows Ltd* was followed by the Supreme Court of New South Wales in *New Cap Reinsurance v Faraday Underwriting* [2003] NSWSC 842, paragraph [65]. A different approach was taken in the Scottish decision *Turner v Inland Revenue Commissioners* [1993] BCC 299 (Court of Session, Outer House), but this is explicable in light of the differences of Scottish insolvency law from English insolvency law.

"*equality, proportionate equality, is in the circumstances of the relevant section, equity*" (p.1391).

(3) It is submitted that Walton J's reasoning in *Re Unit 2 Windows Ltd (in Liquidation)*, applying the maxim that "*equity is equality*", provides some support by analogy for the contention that, for the purposes of Issue 37, an Agreed Claim (which cannot be disaggregated on any other basis) is to be prorated with reference to the underlying claims (i.e. with reference to the PoD View).

(4) Plainly, there are differences between Issue 37 and the issue in *Re Unit 2 Windows Ltd (in Liquidation)*. However, the relevant analogy is that, in both cases, two or more claims with distinct characteristics are eroded by a mechanism (the statutory set-off provision on the one hand, a CDD on the other) which is silent as to the proportions in which those claims are to be eroded.

(5) The point of principle underlying the decision in *Re Unit 2 Windows Ltd (in Liquidation)* is that, where a creditor's claims are eroded by a mechanism which is silent as to the proportions in which they are to be eroded (in that case the statutory set-off provision), it would be inequitable for this silence to work either in the creditor's favour (as would be the case if the non-preferential claim were set-off in full and the preferential claim only in part) or in the company's favour (as would be the case if the preferential claim were set-off in full and the non-preferential claim only in part). Similarly, where a CDD is silent as to the proportions in which it serves to admit a creditor's underlying claims, the principle established in *Re Unit 2 Windows Ltd (in Liquidation)* suggests that it would be inequitable for the CDD's silence to have the effect of advantaging either the creditor (as would be the case if, for example, the creditor's higher interest claim were admitted in full and its lower interest claim only in part) or the company (as would be the case if the creditor's lower interest claim were admitted in full and its higher interest claim only in part).

(d) <u>Set-off</u>

233. Finally, in circumstances where prior to the conclusion of the CDD either the Administrators or the creditor have asserted that LBIE has a claim in a particular amount against the creditor such that the creditor's multiple claims will be set-off against it under Rule 2.85 (see Lomas 11, paragraph 74.1), then a discrete question arises as to how and in what proportions the creditor's claims are to be set-off against LBIE's claim.

234. It might be argued that set-off should be primarily (and to the extent possible, solely) between like claims, for example that a US$ claim by LBIE against a creditor is to be set-off against a US$ claim by that creditor against LBIE and (and that set-off should not touch a sterling claim by that creditor against LBIE unless and until the US$ claim is exhausted).

235. However, the Administrators consider that the principle established in *Re Unit 2 Windows Ltd (in Liquidation)* will apply in these circumstances, such that the set-off is taken as having occurred on a *pro rata* basis against each of the creditor's underlying claims. Regardless of any argument that it might be "*reasonable*" that like claims by and against LBIE (for example two US$ claims) should be set off against each other, the logic of *Re Unit 2 Windows Ltd (in Liquidation)*[17] indicates that set-off is to be taken as occurring on a *pro rata* basis.

236. The effect of the reasoning in the previous paragraph is illustrated by the following simple example:

(1) A creditor has claim A in the sum of £100 (carrying 10% interest) and claim B in the sum of £100 (carrying 5% interest), as against a claim by LBIE against the creditor for £100; and

(2) The Agreed Claim amount provided by the CDD is in the net sum of £100; then

---

[17] See especially Walton J in *Re Unit 2 Windows Ltd (in Liquidation)*, at p.1391C-D: "*The question, however, is not whether it is a reasonable solution – reasonableness often depends upon the point of view of the person considering it… It surely is whether it is consistent with the terms of the section which is entirely silent on the point, and which therefore cannot properly be construed, in effect, as giving the company the right of appropriation.*"

(3) The correct disaggregation of the Agreed Claim amount (on the basis of a pro rata discount of both claim A and claim B) will be as follows:

a) Claim A (carrying 10% interest) is admitted at £50; and

b) Claim B (carrying Judgments Act Rate interest) is admitted at £50.

237. The SCG appears to agree with the Administrators' approach to this extent.

238. The Administrators consider that the SCG's submission at paragraph [443] of their skeleton argument is based on a false premise and is therefore wrong. In particular the SCG's submission is predicated on the assumption that some CDDs were entered into before the notice of a proposed distribution was given under Rule 2.95. However, no such CDDs were entered into prior to the notice of proposed distribution being given.

William Trower QC

Daniel Bayfield

Stephen Robins

Alexander Riddiford

South Square

Gray's Inn

London WC1R 5HP

Tel: 020 7696 9900

9 February 2015