

<p>1 Monday, 10 April 2017                  2 (10.30 am)                  3 Submissions by MR SMITH (continued)                  4 (10.30 am)                  5 LADY JUSTICE GLOSTER: Yes, Mr Smith.                  6 MR SMITH: Thank you. When we broke on Thursday, I was                  7 making submissions in relation to supplemental issue 1A                  8 and if I can perhaps just briefly recap where I had got                  9 to. The issue is whether a contractual rate which is                  10 applicable to a close out amount which arises after the                  11 commencement of the administration is a rate applicable                  12 within the meaning of rule 2.88(9). We've looked at the                  13 reasoning of Mr Justice David Richards on issue 4                  14 concerning a foreign judgment obtained post                  15 administration. In our submission, there's two key                  16 elements to that reasoning. Firstly, for these                  17 purposes, you're looking at the rights of the creditor                  18 at the commencement of the administration and secondly                  19 rights which are merely contingent at that date aren't                  20 sufficient to constitute a rate applicable.                  21 We looked then at Mr Justice Hildyard's reasoning on                  22 supplemental issue 1A. He concluded that a contractual                  23 right to interest on a close out amount is a rate                  24 applicable because it's in existence on the date of the                  25 administration as a contingent or future right and that</p> <p style="text-align: center;">Page 1</p>	<p>1 rights to interest which have a contractual basis and                  2 those which don't and which have some other legal basis.                  3 It seems in our submission rather unlikely that it was                  4 intended those sort of fine distinctions between the                  5 basis of the right should have been intended to form the                  6 basis for the application of rule 2.88(9).                  7 Now, in our submission the correct approach is                  8 a much simpler approach than that and that's simply to                  9 ask whether the words in rule 2.88(9), "the rate                  10 applicable to the debt apart from the administration",                  11 are capable of including rights to interest which are                  12 merely contingent as at the date of the administration.                  13 If they are, then in our submission all contingent                  14 rights qualify irrespective of the legal basis of such                  15 rights. It doesn't matter if they have a contractual                  16 basis or other legal basis. On the other hand, if                  17 contingent rights don't qualify for the purposes of rule                  18 2.88(9) because they're not "the rate applicable", then                  19 that equally applies to all contingent rights.                  20 Really, where we submit Mr Justice Hildyard fell                  21 into error was in creating a new distinction between                  22 contingent rights which have a contractual basis and                  23 those which don't, and we say that's inconsistent with                  24 Mr Justice David Richards and therefore it's also                  25 something for which one doesn't find any support in the</p> <p style="text-align: center;">Page 3</p>
<p>1 was paragraph 520 of his judgment. Our submission,                  2 which we made to your Lordships, is that is                  3 inconsistent, we would say, with Mr Justice David                  4 Richards' reasoning as he decided contingent rights                  5 weren't sufficient and indeed in the case of the foreign                  6 judgment creditor, it can be said that that creditor has                  7 a contingent right to interest at the date of the                  8 administration; nonetheless he held that wasn't                  9 sufficient.                  10 In our submission, the real effect of                  11 Mr Justice Hildyard's approach is to essentially say                  12 that a contingent right which arises out of a contract                  13 in place at the date of administration does count for                  14 the purposes of rule 2.88(9) but that a contingent right                  15 to interest which doesn't have a contractual foundation                  16 as at the date of commencement of the administration                  17 doesn't count.                  18 Now, the short point we make in relation to that is                  19 that distinction between the source of the contingent                  20 right to interest is not one which one finds any support                  21 in the rules itself. There's no basis for that in the                  22 wording of rule 2.88(9) and there's no other indication                  23 that the drafters of the rules intended there to be any                  24 such distinction. One asks oneself why as a matter of                  25 policy should there be a distinction between contingent</p> <p style="text-align: center;">Page 2</p>	<p>1 rules.                  2 So that's really the essence of our submission on                  3 this point. There's two further points I'd like to make                  4 by way of conclusion in support of what we've already                  5 said. The first point is that, in our submission, the                  6 distinction which Mr Justice Hildyard sought to draw                  7 between rights which have a contractual basis and those                  8 which don't is not something which in practice is likely                  9 to be as clear cut as the judge seemed to suggest. Now,                  10 one can think of a number of examples where there will                  11 be room for argument on this point. One obvious example                  12 is where a foreign judgment is obtained pursuant to                  13 a jurisdiction clause in a contract. If a contract is                  14 in place at the date of the administration, it provides                  15 for a claim to be brought in a particular jurisdiction;                  16 the foreign judgment is obtained subsequently pursuant                  17 to that clause. In that case it can be said, we                  18 suggest, that the source of the interest which applies                  19 to that judgment is in some sense at least in part the                  20 contract itself, because it's the contract which                  21 mandates the obtaining of the judgment in the particular                  22 jurisdiction.                  23 Now, that is even more the case where one's                  24 concerned say not with a foreign judgment but with                  25 an arbitration award obtained pursuant to an arbitration</p> <p style="text-align: center;">Page 4</p>

<p>1 clause in a contract and where the arbitration award                  2 carries interest. If you think about that case, as at                  3 the commencement of the administration, there's an                  4 arbitration clause in place and a binding contract                  5 between the parties which mandates the application of                  6 particular arbitration rules under which there's a right                  7 to interest on an award. In that case, in our                  8 submission, it would be strongly arguable that the basis                  9 of the subsequent right to interest is at least in part                  10 the contract itself. It's the contract which has                  11 ultimately mandated the application of the arbitration                  12 rules.</p> <p>13 So we submit the distinction Mr Justice Hildyard                  14 sought to draw is not one that's necessarily clear cut                  15 and that tends to reinforce the point that, as a matter                  16 of policy, the distinction which the legislature must                  17 have intended in rule 2.88(9) is a clearer one, simply                  18 between rights which are contingent and rights which                  19 aren't as at the date of the administration.</p> <p>20 The final point we would make on this concerns                  21 supplemental issue 1C which we touched on on Thursday.</p> <p>22 We say that we derive four(?) arguments --</p> <p>23 LORD JUSTICE PATTEN: Just remind me, what is --</p> <p>24 LADY JUSTICE GLOSTER: That's not under appeal though.</p> <p>25 MR SMITH: It's not under appeal, so it's not on the list of</p> <p style="text-align: center;">Page 5</p>	<p>1 or the zero rate. So he was saying where you've got                  2 a close out amount which only accrued due and payable                  3 post administration, in the period between the                  4 commencement of the administration and the accrual of                  5 the close out amount, which rate of interest do you                  6 apply? Is the contractual rate applied in due course or                  7 is it in effect a zero rate, which means the creditor                  8 reverts back to the ordinary 8 per cent judgment rate.</p> <p>9 If you look at how he dealt with that, paragraphs 32                  10 through to 34, and perhaps I could just invite you to                  11 read paragraphs 32 to 34, if I may.</p> <p>12 We rely in particular on the first three sentences                  13 of paragraph 34, because what the judge basically held                  14 is, until the contractual rate becomes payable, it is                  15 not a rate applicable within the meaning of rule                  16 2.88(9). He therefore said that in the period between                  17 the commencement of the administration and the accrual                  18 of the close out amount, the creditor could obtain no                  19 more than the judgment rate, the judgment (inaudible).</p> <p>20 But in our submission clearly his conclusion that, until                  21 the rate of interest became contractually payable it was                  22 not a rate applicable for the purposes of 2.88(9),                  23 applies equally to supplemental issue 1A, because that                  24 is concerned with exactly the same words in exactly the                  25 same rule and indeed this is, we submit, entirely</p> <p style="text-align: center;">Page 7</p>
<p>1 issues. I will show you in a moment where it appears in                  2 Mr Justice David Richards' judgment. We say we derive                  3 four(?) arguments on issue 1A in the way from which                  4 Mr Justice David Richards decided supplemental issue 1C                  5 and his reasoning underlying that decision. If I can                  6 just show you that quickly. It's in bundle A2, behind                  7 divider 1, and the relevant part of his judgment begins                  8 at page 7, paragraph 26.</p> <p>9 LORD JUSTICE BRIGGS: I'm sorry, which bundle are we in?</p> <p>10 MR SMITH: Bundle A2.</p> <p>11 LORD JUSTICE BRIGGS: A2. Yes, tab ...?</p> <p>12 MR SMITH: Behind divider 1, at page 7.</p> <p>13 LORD JUSTICE BRIGGS: I'm sorry, I misheard your page                  14 number. Thank you.</p> <p>15 MR SMITH: Page 7, paragraph 26.</p> <p>16 LORD JUSTICE BRIGGS: Yes.</p> <p>17 MR SMITH: Just note therefore the issue he was concerned                  18 with in relation to 1C, which was essentially a point                  19 concerning the calculation of interest. So where one's                  20 got a close out amount arising post administration,                  21 he was concerned with the way in which interest was                  22 calculated, and the question specifically he was                  23 addressing was whether "rate applicable" within the                  24 meaning of 2.88(9) includes only the rate of interest                  25 which is payable once the interest is actually running</p> <p style="text-align: center;">Page 6</p>	<p>1 consistent with Mr Justice David Richards' reasoning in                  2 relation to issue 4, that the contingent rate to                  3 interest does not qualify as a rate applicable for the                  4 purposes of rule 2.88(9). So we submit that is useful                  5 both in terms of what it says in its own right but also                  6 as an indication and further evidence of what                  7 Mr Justice David Richard was in fact holding when he                  8 decided issue 4.</p> <p>9 So those are our submissions on supplemental issue                  10 1A. I was going to turn, if I may, to the other issue                  11 which we have to address, which is supplemental issue 2                  12 and you'll find that on item 13 of the issues list and,                  13 as you'll see, this is the issue as to whether                  14 a currency conversion claim can arise from the discharge                  15 of a debt by way of set off under rule 2.85(3) of the                  16 rules and in particular whether such a claim can arise                  17 by way of set off as compared to payment by way of                  18 dividend.</p> <p>19 Now, on the basis of the decision of this court in                  20 Waterfall I, it's obviously common ground that                  21 a currency conversion claim can arise where a creditor's                  22 foreign currency claim has been paid by way of sterling                  23 dividend subject to anything the Supreme Court may say                  24 in due course and where the sterling dividends converted                  25 to the relevant foreign currency at the time of payment</p> <p style="text-align: center;">Page 8</p>

<p>1 are insufficient to discharge the original foreign 2 currency debt in full. 3 The question which this issues raises is whether 4 that's also the case where the payment arises not by way 5 of dividend but by way of set off. We say it can and 6 essentially there's no difference in principle between 7 a situation where the foreign currency creditor receives 8 payment by dividend and where he receives it by way of 9 the set-off. 10 Now, just to remind ourselves very briefly of the 11 nature of the currency conversion claim, you will have 12 already seen this by reference to the judgment of the 13 Court of Appeal in Waterfall I, but essentially the 14 currency conversion claim is simply the creditor's 15 residual foreign currency claim to the extent it's not 16 actually been discharged by payment in the course of the 17 administration; and we know in the course of 18 an administration, indeed in the course of 19 a liquidation, for the purposes of proving, foreign 20 currency claims are converted to sterling at the date of 21 administration and where sterling has depreciated 22 between the date of administration and the date of 23 payment there will be an unsatisfied part of the original 24 foreign currency debt which the creditor is entitled to 25 recover as a non-provable claim.</p> <p style="text-align: center;">Page 9</p>	<p>1 administration, then there can't as a matter of logic 2 be a currency conversion claim. So that is the first 3 point. 4 You'll appreciate in practice there may be a 5 considerable period of time that has elapsed between the 6 date of commencement of the administration and the date 7 of the notice. In the case of LBIE, the administration 8 commenced on 15 September 2008 but the notice wasn't 9 given until December 2009, so there's a period of well 10 over a year in this case and there may be shorter or 11 longer periods in other cases. But we submit that, 12 where sterling has depreciated between the date of 13 commencement and the date of the notice, when we say set 14 off takes effect, then there will be a currency 15 conversion claim because the effect of the sterling set 16 off will not discharge all of the original foreign 17 currency claim and, if that's the position, the creditor 18 will have a currency conversion claim in exactly the 19 same way he would if he'd received payment by way of 20 sterling dividend instead of set off. 21 We've given what we hope is a fairly simple example 22 of how we submit it works in our skeleton argument, 23 which is in divider A2, bundle A2, behind divider 16, 24 paragraph 48 to 50, beginning of page 15 going through 25 to page 16.</p> <p style="text-align: center;">Page 11</p>
<p>1 Now, we say the position is essentially the same 2 where payment is made by way of set off rather than by 3 way of dividend. Set off is simply another form of 4 payment. For the purposes of set off, the creditor's 5 foreign currency claim is also converted to sterling at 6 the date of administration. Once set off comes into 7 effect, the sterling sums are then set against each 8 other and the creditor receives the benefit of 9 a sterling sum in payment of his claim and the 10 particular feature of administration which is key for 11 present purposes is, although the conversion of the 12 claims to sterling takes place by reference to the 13 exchange rate at the date of the administration, the 14 payment by way of set off, we submit, does not take 15 place until later, when the notice of an intention to 16 distribute is given converting the administration from 17 a normal administration into what's called 18 an distributing administration and -- 19 LADY JUSTICE GLOSTER: Is that common ground? 20 MR SMITH: No, that's one of the two points that's in 21 dispute on this issue. Absolutely. But we submit that 22 it takes place later and it's that key characteristic 23 which we submit is present which gives rise to the 24 currency conversion claim. If it's right that set off 25 takes effect on the date of the commencement of the</p> <p style="text-align: center;">Page 10</p>	<p>1 We started in paragraph 48 by giving the example 2 where the dividend's paid in cash. We've given the 3 example of a creditor who's owed \$100, the dividends 4 amounting to 100p in the pound are paid, but there was 5 a depreciation in sterling in the meantime and we say on 6 those facts that creditor has a currency conversion 7 claim for £5. 8 Then in paragraph 49 we've given the same example 9 but, rather than the creditor receiving cash dividends, 10 he receives a set-off, the benefit of a set-off, against 11 the sum which he owes to the company as at the date of 12 administration and, again, where there's a depreciation 13 in the value of sterling between the date of the 14 administration and the date of the notice, when we say 15 set off takes effect, we say, like in the case of the 16 cash dividend, he has a currency conversion claim for 17 £5. So broadly we equate the effect of a set off with 18 payment of a cash dividend. 19 Now, two points are taken against us by Wentworth 20 and the administrators. The first point is a point we 21 just touched on a moment ago, which is the argument that 22 actually insolvency set off in administration takes 23 effect at the date of commencement of the 24 administration. 25 LADY JUSTICE GLOSTER: Yes.</p> <p style="text-align: center;">Page 12</p>

<p>1 MR SMITH: Now, that's a point which none of the parties                  2 argued below in front of the judge, but which the judge                  3 himself developed and which formed the basis of his                  4 reasons for rejecting our argument. On this appeal,                  5 both my clients and the administrators say that the                  6 judge was wrong on this point. Wentworth I think now                  7 says that the judge was right on this point, although it                  8 didn't take the point itself below. So that's the first                  9 point.                  10 The second point which is taken against us is                  11 an argument that insolvency set off is substantive, so                  12 there's no room for a currency conversion claim. We'll                  13 have to come and explore what is meant by insolvency set                  14 off being substantive. But this was an argument which                  15 the judge himself was reluctant to accept because he                  16 thought it would lead to an unfair result. So it didn't                  17 form part of his conclusions but it's an argument which                  18 is advanced by both the administrators and Wentworth on                  19 this appeal through a respondent's notice.                  20 So those are the two points. I'm going to deal with                  21 those two points in turn, starting with what we've                  22 called the retrospectivity point, which is whether                  23 set-off has a retrospective effect back to the date of                  24 the administration.                  25 LADY JUSTICE GLOSTER: Where are we in your skeleton, just</p> <p style="text-align: center;">Page 13</p>	<p>1 administration.                  2 Now, just dealing with the retrospectivity point                  3 first. If I could just start by reminding you of the                  4 relevant provisions of the rules, because ultimately it                  5 is a point of construction of the insolvency rules.                  6 You'll find those in authorities bundle 4 and the first                  7 rule is behind divider 167.                  8 Now, this is the first rule of something called                  9 chapter 10 part 2 of the insolvency rules and                  10 essentially chapter 10 is the part of the rules that                  11 contains all the machinery for proving and establishing                  12 debts and so on, which applied in the case of                  13 a distributing administration, and these are broadly                  14 equivalent to the rules that one also finds in the case                  15 of liquidation. But you'll see from the opening words                  16 of sub-rule 1 it only applies where the administrator                  17 makes or proposes to make a distribution to any class of                  18 creditors. So these rules do not come into effect                  19 merely because an administration's been commenced. It                  20 will only come into effect subsequently where the                  21 administrator makes or proposes to make a distribution                  22 and that of course makes sense because, until the                  23 administrator reaches that time in the course of                  24 administration, he doesn't need these rules, the                  25 machinery, and indeed they may well be inappropriate.</p> <p style="text-align: center;">Page 15</p>
<p>1 so I can follow it? Which paragraph?                  2 MR SMITH: Bear with me.                  3 LADY JUSTICE GLOSTER: I mean, you've got us to 51.                  4 LORD JUSTICE BRIGGS: I can see you getting into it at 65.                  5 MR SMITH: Yes. I mean, really paragraph 40 as well, which                  6 we --                  7 LADY JUSTICE GLOSTER: 40?                  8 MR SMITH: Yes. We've set out in the early part of the                  9 skeleton some of the legal analysis which for present                  10 purposes the relevant section, picking it up at                  11 paragraph 36 and then through to between 40 and 45                  12 I think is the relevant legal analysis as to how we --                  13 LADY JUSTICE GLOSTER: What happens in a liquidation?                  14 I thought that there's an identity of dates in the                  15 liquidation for set off.                  16 MR SMITH: There is. There is. So this issue only arises                  17 in an administration because the particular feature of                  18 an administration is you have this two stage process                  19 where you have a commencement of administration but then                  20 it's only some way down the line, if at all, that it                  21 turns into what's called a distributing administration,                  22 which is a de facto liquidation.                  23 So you're right, the point doesn't arise in                  24 liquidation because in liquidation there's no two stages                  25 to the process. So it's a point that's particular to</p> <p style="text-align: center;">Page 14</p>	<p>1 Sub-rule 2, just running through them very quickly,                  2 you'll see that, where that happens, the administrator                  3 must give notice to the creditors of his intention to                  4 declare and distribute a dividend and that's provided                  5 for in rule 2.95, which is behind the divider 176.                  6 2.95, a notice of proposed distribution. Where                  7 an administrator is proposing to make a distribution to                  8 creditors, he should give 28 days notice of that fact                  9 and then the set-off rule, rule 2.85, which is behind                  10 divider 172, and there's a number of points which I need                  11 to draw to your attention is here.                  12 The first and perhaps foremost is sub-rule 1, which                  13 is that this rule only applies where the administrator,                  14 having been authorised to make a distribution, has,                  15 pursuant to the rule 2.95 which we've just been looking                  16 at, given notice that he intends to make it. So it only                  17 comes into effect at that time. Prior to that it has no                  18 effect whatsoever.                  19 If we go over the page, sub-rule 3 is, if you like,                  20 the key substantive provision, which provides that an                  21 account shall be taken as at the date of the notice of                  22 what is due from each party to the other in respect of                  23 the mutual dealings and the sum due from one party to be                  24 set against sums due from the other party.                  25 Then the definition of mutual dealings you see back</p> <p style="text-align: center;">Page 16</p>

<p>1 in sub-rule 2.                  2 Going back to sub-rule 3, it applies to debts which                  3 a creditor is able to prove. We know the provable debt                  4 is quantified as at the date of the administration,                  5 which is the cut off date for these purposes, and you'll                  6 see that in addition to that, in sub-rule 2, there's                  7 specific exclusion of certain debts. Those include, for                  8 example, in sub-rule 2, paragraph (e), any debt which                  9 has been acquired by way of assignment where the                  10 agreement was entered into after the company entered                  11 into administration.                  12 Just looking back at sub-rule 3, which is the                  13 provision providing for the account to be taken, and the                  14 account shall be taken as at the date of the notice of                  15 what is due from each party to the other in respect of                  16 the mutual dealings. So it only applies in respect of                  17 debts which remain due as at the date of the notice. So                  18 if, for example, there was a debt which was provable by                  19 reference to the commencement of the administration                  20 which had ceased to be due by the date of the notice,                  21 then that wouldn't fall to be taken into account as part                  22 of the set-off mechanism.                  23 LORD JUSTICE BRIGGS: One reason for that might be that it                  24 was in the interests of the administration before it                  25 became a distributing administration for it to be paid.</p> <p style="text-align: center;">Page 17</p>	<p>1 First, when a company goes into administration,                  2 insolvency set-off does not come into effect.                  3 Insolvency set-off will only come in effect when                  4 a notice under Rule 2.95 is given, and by reason of sub                  5 rules 1 and 3, insolvency set-off takes effect as at                  6 that date, in other words as at that date of the notice.                  7 It takes effect by reference to debts arising out of                  8 mutual dealings which are provable by reference to the                  9 date of commencement of the administration but excluding                  10 the debts which are excluded from set-off by reason of                  11 Rule 2.85(2) and also debts which are no longer due by                  12 the time one gets to the notice.                  13 The fact that the debts which go into the set-off                  14 account are debts for which the creditor is entitled to                  15 submit a proof and are quantified by reference to the                  16 date of commencement of the administration does not, in                  17 our submission, mean that set-off takes effect at that                  18 date.                  19 Just to think of an example, it would be entirely                  20 possible for a contract to provide that set-off takes                  21 effect on a particular date by reference to debts which                  22 are quantified at some earlier date. And in our                  23 submission that is essentially the effect of the rule                  24 here that takes effect on the date of the notice but by                  25 reference to the debts quantified as at the date of</p> <p style="text-align: center;">Page 19</p>
<p>1 MR SMITH: Because it may well be a trading                  2 administration --                  3 LORD JUSTICE BRIGGS: Yes, exactly.                  4 MR SMITH: Absolutely, absolutely.                  5 And then just to pick up the rest of the provisions                  6 which are relevant, sub-rule 4 was a new provision which                  7 was introduced in April 2005 which allowed for the first                  8 time contingent or future debts owed to the insolvent                  9 company to be included in the set-off account. We're                  10 going to come back to that because that's relevant in                  11 dealing with one of the other submissions my learned                  12 friends make.                  13 Then sub rules 5 through to 7 I think we can skip                  14 over. Then sub-rule 8 is also important because, if                  15 you like, that's the conclusory rule and provides if the                  16 effect of the set-off is that there is an account owed                  17 to the creditor, then that's provable in the                  18 administration. If on the other hand the balance ends                  19 up being owed the other way, then it is to be paid by                  20 the creditor to the administrator, unless it is only                  21 payable on a contingency or in the future, in which case                  22 it only becomes payable as and when that debt becomes                  23 due and payable.                  24 In our submission, the effect of the scheme under                  25 that rule is relatively clear and straightforward.</p> <p style="text-align: center;">Page 18</p>	<p>1 commencement of the administration.                  2 Just very quickly, in our submission, our analysis                  3 is consistent with the way in which the rule has been                  4 analysed in the textbooks, I am going to show you two                  5 examples.                  6 Firstly, Derham on the Law of Set-Off, authorities                  7 bundle 5, behind tab 201, and it is paragraph 6.124.                  8 LADY JUSTICE GLOSTER: What was the paragraph number?                  9 MR SMITH: 6.124, under the heading "Administration":                  10 "The Insolvency Rules 1986, r.2.85 permits set-off                  11 in the case of a company which has entered                  12 administration in circumstances where the administrator                  13 being authorised to make a distribution ...(Reading to                  14 the words)... intention to do so under Rule 2.95."                  15 And then just picking it up:                  16 "The use of the present tense in Rule 2.85(3) ('is                  17 due') suggests that the cross-claims retain their                  18 separate identities until the date of the notice                  19 referred to ... consequently, set-offs would be taken to                  20 have occurred automatically on that date rather than the                  21 date that the company entered administration."                  22 There's a similar paragraph over the page at 6.154.                  23 He says in the second sentence:                  24 "In that situation, it would appear that set-offs                  25 occur on the date that the administrator gave notice</p> <p style="text-align: center;">Page 20</p>

<p>1 ... (Reading to the words)... proposed to make  2 a distribution to creditors."  3 (Pause).  4 And then if I could also show you Lightman &amp; Moss  5 where there's some passages to --  6 LADY JUSTICE GLOSTER: So is the rest of the text with you?  7 MR SMITH: I believe so.  8 LADY JUSTICE GLOSTER: To the end of that paragraph?  9 MR SMITH: Yes.  10 Yes, so he makes the point that the date of the  11 set-off and the date of the conversion of foreign  12 currency debts is actually different because the date of  13 conversion is at the date of the commencement of the  14 administration and the date of the set-off is the date  15 when the notice is given under Rule 2.95.  16 LORD JUSTICE BRIGGS: Well, going on to page 343 --  17 MR SMITH: Yes.  18 LORD JUSTICE BRIGGS: -- he says the same principle applies  19 for the purposes of a set-off to any foreign currency  20 claim on the other side of the account --  21 MR SMITH: I'm sorry, I am not quite following where  22 your Lordship is reading.  23 LORD JUSTICE BRIGGS: I'm at 6.154.  24 MR SMITH: Yes.  25 LORD JUSTICE BRIGGS: Over the page.</p> <p style="text-align: center;">Page 21</p>	<p>1 implicit in what he's saying?  2 MR SMITH: Well, in our submission not, because on that  3 analysis, the creditor does in not fact receive the  4 payment through the set-off until the notice is served.  5 He doesn't in fact get paid through the set-off until  6 the notice is given. But if you look at what in fact --  7 LORD JUSTICE BRIGGS: But he gets paid it against a claim  8 which is converted to sterling at the same, brackets,  9 cut-off date.  10 MR SMITH: Yes.  11 LORD JUSTICE BRIGGS: So even though it happens later, why  12 does it make any difference to the figures?  13 MR SMITH: Well, it is the fact it is converted to sterling  14 as at that date which allows the potential for  15 a currency conversion claim, because the whole situation  16 here in the case of a creditor with a foreign currency  17 claim against him is that it is converted to sterling as  18 at the date of the administration, but it's not in fact  19 paid by way of set-off until the date of the notice.  20 And in our submission, what matters for the purposes of  21 a currency conversion claim is that there's a potential  22 for depreciation of sterling between the date of  23 commencement of the administration and the date of the  24 notice.  25 Your Lordship's point I think is to say: well is</p> <p style="text-align: center;">Page 23</p>
<p>1 MR SMITH: Yes.  2 LORD JUSTICE BRIGGS: And he says:  3 "Pursuant to r.2.85(6), the same principle applies  4 for the purpose of a set-off of any foreign currency  5 claim on the other side of the account."  6 MR SMITH: Yes.  7 LORD JUSTICE BRIGGS: What's the principle he's applying?  8 MR SMITH: He's talking about the conversion of the foreign  9 currency debt to sterling by reference to the exchange  10 rate applying as at the date of the administration.  11 LORD JUSTICE BRIGGS: Yes.  12 MR SMITH: So he's saying, as we know, so far as the  13 creditors' claim against the company is concerned, you  14 convert that to sterling as at the administration date  15 in the same way you do when you prove. On the other  16 side of the account, the machinery in the rules says you  17 convert the outgoing claim against the creditor --  18 LORD JUSTICE BRIGGS: As at the same date?  19 MR SMITH: -- as at the same date, absolutely.  20 LORD JUSTICE BRIGGS: But does it mean by implication that  21 therefore because you're using the cut-off date for your  22 currency conversion, you can't generate a currency  23 conversion claim between the two dates?  24 MR SMITH: Well, we submit not --  25 LORD JUSTICE BRIGGS: He doesn't spell that out, but is that</p> <p style="text-align: center;">Page 22</p>	<p>1 that impliedly excluding a currency conversion claim --  2 LORD JUSTICE BRIGGS: Not in terms. I am saying: look at  3 set-off, say that the company is owed something by the  4 creditor in dollars --  5 MR SMITH: Yes.  6 LORD JUSTICE BRIGGS: -- and the company owes the creditor  7 something in dollars --  8 MR SMITH: Yes.  9 LORD JUSTICE BRIGGS: -- even if the set-off occurs on the  10 notice date, he seems to be saying nonetheless you do  11 any necessary currency conversion by reference to the  12 conversion rates at the cut-off date.  13 MR SMITH: Yes.  14 LORD JUSTICE BRIGGS: So notionally you convert them both  15 into sterling for the purposes of an account on  16 a set-off date, but at historic conversion rates.  17 MR SMITH: Yes, absolutely. I mean, that's --  18 LORD JUSTICE BRIGGS: How can you ever generate -- are you  19 saying that it is the use of the historic conversion  20 rate that generates the currency conversion claim?  21 MR SMITH: Yes. And because there's a gap between the date  22 of the commencement of the administration and the date  23 when we say the creditor in fact receives payment, which  24 we say is the date when the set-off takes place. That's  25 why the point that is critical for present purposes is</p> <p style="text-align: center;">Page 24</p>

<p>1 the retrospectivity of the set-off point. Because if                  2 we're wrong naturally it all takes effect on the date of                  3 the commencement of the administration, well clearly                  4 there is no currency conversion claim. If on the other                  5 hand we're right and it takes effect as at the date of                  6 the notice, then in our submission, there is.                  7 So that's what Mr Derham says about the timing of                  8 the set-off. There's some similar passages in Lightman                  9 &amp; Moss behind divider 206, which I might just run                  10 through quickly so you've got the references. It is                  11 first of all paragraph 20-020.                  12 LADY JUSTICE GLOSTER: 20 or 22?                  13 MR SMITH: 22-020. It's the first page of the text in the                  14 tab immediately behind the frontispiece and the second                  15 paragraph within that section:                  16 "The set-off is self-executing and operates                  17 automatically from the date on which the rule requires                  18 the account to be taken, i.e. the commencement of the                  19 bankruptcy ...(Reading to the words)... the date the                  20 company goes into liquidation in the case of Rule 4.90                  21 and the date of the notice of distribution to creditors                  22 in the case of Rule 2.85."                  23 And then over to page 591, section 22-032, just                  24 picking it up the first full paragraph at the top of                  25 page 591:</p> <p style="text-align: center;">Page 25</p>	<p>1 set-off rights in that period. And as we'll see in                  2 a moment, that's one of the reasons why insolvency                  3 set-off only takes effect as at the date of the notice.                  4 And then 22-038 on page 595, what's explained here in                  5 a little more detail is the distinction between what's                  6 called the cut-off date in administration and what's                  7 called the set-off date, and those are explained on                  8 page 596. But essentially, in administration there's                  9 a difference between the cut-off date, which is the date                  10 of the commencement of the administration broadly, where                  11 the claims which go into the account are established.                  12 Then against sub-paragraph 2:                  13 "The set-off date is the date on which the account                  14 of what due from each party to the other in respect of                  15 mutual dealings is to be taken and the sums due from one                  16 party to be set off against the sums due from the                  17 other."                  18 And then skipping the next sentence:                  19 "In the case of an administration, the set-off date                  20 is the date on which having obtained the leave of the                  21 court, the administrator gives notice under Rule 2.95 it                  22 is proposing to make a distribution."                  23 So again, it is the date of the notice.                  24 On to page 597, 22-039 explains why there is that                  25 difference in the case of administration, and that's the</p> <p style="text-align: center;">Page 27</p>
<p>1 "The wording of Rule 2.85 is amended and follows                  2 very closely the wording of 4.90 so it is likely that                  3 the case law regarding liquidation set-off, including                  4 its mandatory and automatic effect, will apply equally                  5 to administration set-off. Hence the principles set out                  6 above, including those in relation to contingent and                  7 future claims, will apply in relation to administration                  8 set-off just as they apply to liquidation set-off.                  9 There is a key difference, however ...(Reading to the                  10 words)... The meaning of this expression is considered                  11 below. Until this point in time, a creditor will only                  12 be able to exercise a right of set-off if another form                  13 of set-off is available."                  14 LADY JUSTICE GLOSTER: What does that mean?                  15 MR SMITH: That means if the creditor has got, for example,                  16 a contractual right to set-off under his agreement or if                  17 indeed there is some sort of multilateral netting                  18 provision in place, and indeed this is a point I'm going                  19 to come to, but a key reason why insolvency set-off only                  20 takes effect as at the date of the notice is to allow                  21 creditors to exercise their normal contractual rights in                  22 the intervening period.                  23 So if, for example, you've got a trading                  24 administration, there's no reason why a creditor                  25 shouldn't be able to exercise his ordinary contractual</p> <p style="text-align: center;">Page 26</p>	<p>1 point I was just touching on a moment ago, which is the                  2 need to allow creditors in the period up until one has                  3 a distributing administration to exercise their normal                  4 contractual rights, which may include rights to                  5 contractual set-off, may include rights to multilateral                  6 set-off and netting. And if one has a trading                  7 administration, there's no reason why a creditor can't                  8 exercise those rights. And it was for that reason why                  9 a deliberate policy choice was made only to apply                  10 set-off in administration as at the date of the notice.                  11 And they make the point there in 22-041 that                  12 actually that means in practice that up until you get                  13 a Rule 2.95 notice:                  14 "Creditors can continue to exercise non-insolvency                  15 set-off rights, such as contractual, transaction or                  16 independent set-off."                  17 So there's a distinct two parts to the process: the                  18 non-distributing administration and the distributing                  19 administration, and it is only when you get to the                  20 latter that insolvency set-off comes into effect.                  21 The judge's analysis on this point was contained in                  22 paragraphs 42 to 45 of his judgment on the supplemental                  23 issues. I'm in bundle A2, behind divider 1, at tab 12.                  24 LORD JUSTICE BRIGGS: The judge had to go on purely written                  25 submissions, did he?</p> <p style="text-align: center;">Page 28</p>

<p>1 MR SMITH: He did, yes.</p> <p>2 LORD JUSTICE BRIGGS: None of this had arisen during the</p> <p>3 main hearing.</p> <p>4 MR SMITH: No. No, we didn't have a hearing on supplemental</p> <p>5 issue 2, and as I said, this particular point about the</p> <p>6 retrospective nature of set-off is a point the judge</p> <p>7 himself came up with. So he didn't have any submissions</p> <p>8 at all, written or oral, on this point.</p> <p>9 As I say, he dealt with it in his judgment behind</p> <p>10 divider 1 of bundle A2, the relevant part begins at</p> <p>11 paragraph 42. He says at paragraph 42 the flaw in our</p> <p>12 argument is to say that because the account for the</p> <p>13 purposes of set-off is taken as at the date on which the</p> <p>14 notice of an intention to make a distribution is given,</p> <p>15 that is the date on which the creditors' claim is to the</p> <p>16 extent of the set-off discharged:</p> <p>17 "If that were the case, there would be something to</p> <p>18 be said ...(Reading to the words)... payment of</p> <p>19 a dividend. It might be said that the creditor was</p> <p>20 receiving satisfaction in a devalued currency and</p> <p>21 therefore not receiving its full contractual</p> <p>22 entitlement."</p> <p>23 And that is indeed our argument.</p> <p>24 But then you'll see the essence of his reasoning is</p> <p>25 really then in the first sentence of paragraph 44</p> <p style="text-align: center;">Page 29</p>	<p>1 says it has retrospective effect. Indeed, that would be</p> <p>2 a somewhat odd position because if it has been</p> <p>3 specifically decided that set-off should take effect as</p> <p>4 at the date of the notice not at the date of the</p> <p>5 administration, why would it then be decided that</p> <p>6 actually it should have a retrospective effect?</p> <p>7 If that had been the intention, why not simply</p> <p>8 provide the set-off to have effect as at the</p> <p>9 commencement of the administration? So that's the first</p> <p>10 point. There's really no support for the judge's</p> <p>11 interpretation in the language of the rule.</p> <p>12 The judge's main point is his paragraph 45 point,</p> <p>13 which he says arises out of the fact that statutory</p> <p>14 interest on the resulting net balance following set-off</p> <p>15 runs from the date of the administration and not the</p> <p>16 date of the notice.</p> <p>17 In our submission, that's a non sequitur. The fact</p> <p>18 that statutory interest on the net balance resulting</p> <p>19 from set-off runs from the date of administration merely</p> <p>20 reflects the fact that the claims for the purposes of</p> <p>21 insolvency set-off are quantified as at the date of</p> <p>22 administration, and they thereby necessarily produce</p> <p>23 a net balance quantified as at that date.</p> <p>24 So if the claims that go into the set-off account</p> <p>25 are quantified as at the date of administration, they</p> <p style="text-align: center;">Page 31</p>
<p>1 because he says:</p> <p>2 "Although the entire machinery ...(Reading to the</p> <p>3 words)... brought into operation by the giving of</p> <p>4 a notice ... has a retrospective effect ..."</p> <p>5 And then as support for that conclusion, really the</p> <p>6 only point he gives is the point at paragraph 45. He</p> <p>7 says:</p> <p>8 "That the legislative intention is that the</p> <p>9 discharge by way of set-off should operate as at the</p> <p>10 date of administration is shown by the fact that</p> <p>11 statutory interest runs only on the balance at the</p> <p>12 set-off. If the discharge were intended to take effect</p> <p>13 only at a later date, interest would logically run until</p> <p>14 that date as it does in the case of proved debts on</p> <p>15 which dividends are paid."</p> <p>16 Then he comes on to the point about the substantive</p> <p>17 effect of set-off, which we will come to.</p> <p>18 Just dealing with that quickly, the first point we'd</p> <p>19 make is there's no support in the language of Rule 2.85</p> <p>20 for the conclusion it has retrospective effect. That's</p> <p>21 not what it says, in our submission, and on the</p> <p>22 contrary, the clear effect of the scheme is that set-off</p> <p>23 takes effect at the date of the notice by reference to</p> <p>24 the debts quantified as at the date of the</p> <p>25 administration, and there's nothing in the rule which</p> <p style="text-align: center;">Page 30</p>	<p>1 are necessarily producing a net balance by reference to</p> <p>2 that date and it is logical for interest to run on that</p> <p>3 net balance as from the date of administration. That's</p> <p>4 all to do with the quantum of the claims going into the</p> <p>5 account, it is not telling you when the set-off actually</p> <p>6 takes effect.</p> <p>7 LORD JUSTICE BRIGGS: It also tells you from when you get</p> <p>8 the interest.</p> <p>9 MR SMITH: It does, yes.</p> <p>10 LORD JUSTICE BRIGGS: Which is the administration date.</p> <p>11 MR SMITH: It is. But the judge took from that that that</p> <p>12 must mean that the set-off itself only takes effect as</p> <p>13 at the date of the administration and not as at the date</p> <p>14 of the notice. But in our submission, the two don't</p> <p>15 follow, because the fact that interest runs on the</p> <p>16 balance from the date of administration merely reflects</p> <p>17 the fact that the claims that go into the account are</p> <p>18 quantified as at the date of the administration. So</p> <p>19 when you do the accounts --</p> <p>20 LORD JUSTICE BRIGGS: Why should mere quantification by</p> <p>21 reference to historical exchange rates affect the date</p> <p>22 from which interest should run once the set-off has</p> <p>23 occurred?</p> <p>24 MR SMITH: Because it's not an exchange rate point. Where</p> <p>25 you put the claims into the account, you're only putting</p> <p style="text-align: center;">Page 32</p>



<p>1 in the claims which are provable, so you're excluding                  2 post-administration interest under Rule 2.88, you can't                  3 prove the post-administration interest. So when you put                  4 the claims into the account, you are simply proving for                  5 a claim with interest accrued as up to the date of                  6 administration. And when you take the account as at the                  7 date of the notice, that's the claim that goes into it.                  8 That is necessarily producing a net balance                  9 quantified by reference to the same date, and the fact                  10 that interest then runs from the date of the                  11 administration merely reflects that is how the claim is                  12 being quantified. It doesn't tell you that the set-off                  13 takes effect on the date of the administration rather                  14 than on the date of the notice.                  15 So in our submission, that is a non sequitur and one                  16 can't take from that point that the set-off itself is                  17 somehow intended to have retrospective effect. It is                  18 confusing the question of the timing of the effect of                  19 the set-off with the quantification of the claims that                  20 go into the account.                  21 The other point we've made finally on the first                  22 issue, the retrospectivity issue, is that the judge's                  23 analysis appears to be inconsistent with his own                  24 conclusions in another case called HMRC v The Football                  25 League, which you will see in authorities bundle 3</p> <p style="text-align: center;">Page 33</p>	<p>1 principle came into play.                  2 LORD JUSTICE BRIGGS: Yes.                  3 MR SMITH: And in particular was it at the date of                  4 commencement of the administration or was it only when                  5 the date of notice to distribute was given? He held                  6 that the pari passu principle only came into play in                  7 an administration when the Rule 2.95 notice was given,                  8 and not at the commencement. And in support of that                  9 conclusion, he cited the fact that insolvency set-off in                  10 administration only takes effect as at the date of the                  11 notice.                  12 You see that firstly at paragraph 84, page 1561 --                  13 LORD JUSTICE BRIGGS: Sorry, paragraph?                  14 MR SMITH: Paragraph 84 on page 1561. It is really the                  15 penultimate and final lines of that paragraph:                  16 "The ascertainment of provable debts is at the date                  17 when the company entered administration ..."                  18 Which is true. And then:                  19 "However, the set-off of mutual debts is as at the                  20 date on which the administrator gives notice that he                  21 proposes to make a distribution: Rule 2.85."                  22 And then to similar effect, over the page,                  23 paragraphs 89 and 90:                  24 "In my judgment, the pari passu principle serves                  25 a purpose and should come into play only if the purpose</p> <p style="text-align: center;">Page 35</p>
<p>1 behind divider 95. The facts of the case don't matter                  2 particularly. The issue was the validity of something                  3 called the Football Creditors Rule, which was basically                  4 a provision in the rules of the Football League that                  5 whenever a member football club became insolvent,                  6 so-called football creditors were to be paid first.                  7 There was basically a provision in the --                  8 LORD JUSTICE BRIGGS: It was an anti-deprivation issue --                  9 MR SMITH: It was. There were issues about that and whether                  10 it contravened the pari passu principle, and all that                  11 was part of the debate. But it was essentially a rule                  12 which was in the membership rules of the league saying,                  13 "If you want to continue being a member, make sure your                  14 football creditors are paid first, everyone else comes                  15 afterwards". And that was basically challenged by the                  16 Revenue as being contrary to the anti-deprivation                  17 principle, also contrary they argued to the pari passu                  18 principle. Indeed, that was one of the points which was                  19 advanced by the Revenue.                  20 LADY JUSTICE GLOSTER: Who won on that?                  21 MR SMITH: The Football League won.                  22 In dealing with the argument about whether the                  23 football creditor rules were contrary to the pari passu                  24 principle, David Richards J had to deal with the                  25 question of when in an administration the pari passu</p> <p style="text-align: center;">Page 34</p>	<p>1 of the insolvency procedure is to effect a distribution.                  2 In the case of liquidation or bankruptcy, this is when                  3 the company enters liquidation or the debtor is declared                  4 bankrupt. In the case of administration, this is when                  5 the administrator gives notice of ...(Reading to the                  6 words)... indicates that it is at that date and not                  7 before that that the pari passu regime is to operate."                  8 So he actually relied on that in support of his                  9 conclusion that the pari passu principle only came into                  10 play as at the date of the notice.                  11 LORD JUSTICE BRIGGS: Yes.                  12 LORD JUSTICE PATTEN: Was this drawn to his attention in                  13 this part of the submissions on this issue?                  14 MR SMITH: No, because as I say, this point about                  15 retrospectivity was a point the judge himself came up                  16 with. So no one had in fact argued this point in                  17 written submissions, and we didn't have oral submissions                  18 for the purposes of this particular issue. So he                  19 didn't --                  20 LORD JUSTICE PATTEN: When he provided this draft judgment                  21 to counsel, did nobody draw his attention to it?                  22 MR SMITH: No. Perhaps we should have, but no.                  23 So he wasn't aware of this and there's no reason why                  24 he necessarily should have recalled what he'd written in                  25 the course of his judgment. But the point is it is, we</p> <p style="text-align: center;">Page 36</p>

1 suggest, inconsistent with what he has held in his  
 2 Waterfall judgment on supplemental issue 2.  
 3 LORD JUSTICE BRIGGS: By saying the regime comes in, this  
 4 means, as I understand it, the anti-deprivation  
 5 principle wouldn't bite on a provision in a contract  
 6 for, let's say, preferential payment of a particular  
 7 class of creditors, as long as that provision itself  
 8 operated before the date of giving notice. Is that the  
 9 point?  
 10 MR SMITH: Yes --  
 11 LORD JUSTICE BRIGGS: I'm just trying to see what he means  
 12 by the pari passu regime, because aspects of the pari  
 13 passu regime are applied in administration by reference  
 14 to the administration date, the cut-off date.  
 15 MR SMITH: Yes, but they --  
 16 LORD JUSTICE BRIGGS: All sorts of aspects.  
 17 MR SMITH: But they only come into effect when you serve the  
 18 notice. So all the machinery in chapter 10 descends and  
 19 takes effect when you give the notice. Once that  
 20 machinery does come into effect, clearly parts of it --  
 21 LORD JUSTICE BRIGGS: A great deal of it is by reference to  
 22 a historic date.  
 23 MR SMITH: It is, but up until that point, the machinery  
 24 doesn't apply at all.  
 25 LORD JUSTICE BRIGGS: No, but that just means people can go

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1 on dealing with the company and the administrators in  
 2 a non-pari passu regime environment.  
 3 MR SMITH: It does.  
 4 LORD JUSTICE BRIGGS: But as I understand it in that case,  
 5 it merely disapplies the otherwise debilitating effect  
 6 of the anti-deprivation principle.  
 7 MR SMITH: And the pari passu principle. I think it was  
 8 put --  
 9 LORD JUSTICE BRIGGS: Yes.  
 10 MR SMITH: -- on the two bases I think by the Revenue.  
 11 LORD JUSTICE BRIGGS: Yes.  
 12 MR SMITH: That's right, but the key point we suggest is  
 13 none of that takes effect as a matter of chronology  
 14 until you actually give the notice. And indeed, when  
 15 you give the notice, of course your proved debt is  
 16 quantified by reference to the date of commencement of  
 17 the administration, on that one works. But none of that  
 18 has any effect at all until the date of the notice. And  
 19 if you look at the position where you've got a trading  
 20 administration, well obviously that continues going  
 21 along, debts that have accrued are paid, set-off rights  
 22 may be exercised. It's only when the notice is given  
 23 you get the pari passu regime that comes in and although  
 24 one accepts --  
 25 LORD JUSTICE BRIGGS: Can you think of any aspect of the

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1 set-off regime -- assume that it is triggered by the  
 2 giving of a notice -- that doesn't operate, as it were,  
 3 in the eyes of the law by reference to matters as they  
 4 stood at the administration date? The only one I can  
 5 think of is where a debt which might otherwise have  
 6 qualified for set-off has been paid.  
 7 MR SMITH: Yes.  
 8 LORD JUSTICE BRIGGS: Is there any other? It bans reference  
 9 to any new debts being incurred on either side of the  
 10 account, as I understand it.  
 11 MR SMITH: It does. So the two key points are actual  
 12 payment, as your Lordship says, but also any exercise of  
 13 contractual rights of set-off, including rights which go  
 14 way beyond insolvency set-off.  
 15 So if, for example, you've got some sort of  
 16 multilateral set-off of netting --  
 17 LORD JUSTICE BRIGGS: That might be an aspect of a debt  
 18 being paid, I suppose.  
 19 MR SMITH: Yes.  
 20 LORD JUSTICE BRIGGS: If a debt is paid by way of  
 21 contractual set-off, then it doesn't feature in the  
 22 notice set-off date account.  
 23 MR SMITH: That's right.  
 24 LORD JUSTICE BRIGGS: But otherwise, for the purpose of  
 25 working out what you can have on your side of the

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1 account and what is worth in sterling if it started out  
 2 its life in some foreign currency, for all other  
 3 purposes, it's by reference to the cut-off date.  
 4 MR SMITH: It is, I accept that. That's indeed the way it  
 5 is put in the passage in Lightman & Moss which I showed  
 6 you.  
 7 LORD JUSTICE BRIGGS: Yes, indeed.  
 8 MR SMITH: You've got the two dates, the cut-off date and  
 9 the set-off --  
 10 LORD JUSTICE BRIGGS: I have been using "cut-off date"  
 11 throughout perhaps because of some mistake but, having  
 12 read Lightman & Moss, I now can't recall doing so.  
 13 MR SMITH: Yes. It's a useful term, but you see they  
 14 analyse in terms of the two dates. But your Lordship is  
 15 right, the key point about the insolvency set-off only  
 16 taking effect as at the date of the notice is it means  
 17 that all the contractual set-offs, multilateral  
 18 set-offs, that take place in the intervening period take  
 19 place and are effective, and there's no reason of those  
 20 being ousted by the operation for insolvency set-off.  
 21 Because your Lordship will know the other aspect of  
 22 insolvency set-off is not only does it confer a right  
 23 but it also in effect takes away rights, because you're  
 24 not allowed to exercise any right of set-off that goes  
 25 beyond insolvency set-off. It has both its positive and

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<p>1 its negative aspect, and so the problem with saying it  2 insolvency set-off takes effect on the date of the  3 administration is that it would then be said, "Well,  4 that excludes the ability to exercise rights of set-off  5 that go beyond insolvency set-off because those are  6 contrary to the statute". And that clearly wasn't the  7 intention.  8 Indeed, that's broadly the argument which was  9 rejected by David Richards J in The Football League case  10 in relation to the Football Creditors Rule.  11 LADY JUSTICE GLOSTER: We're are going to rise at 11.45, a  12 ten-minute shorthand break, so you know.  13 MR SMITH: Yes.  14 LADY JUSTICE GLOSTER: I saw you're looking at the clock.  15 MR SMITH: I am. I am just looking at the clock because  16 I've just finished my first point. I was going to move  17 on to the second point on this, which is the substantive  18 effect point.  19 Now this is --  20 LORD JUSTICE BRIGGS: The law quite often annoys historians  21 by being retrospective, in the sense that something  22 happens on day 2 which is deemed for all relevant  23 purposes known to the law as if it had happened on  24 day 1. I am thinking of the poor wife who had her  25 financial provision order set aside which deprived her</p> <p style="text-align: center;">Page 41</p>	<p>1 have qualified have been paid.  2 MR SMITH: Well --  3 LORD JUSTICE BRIGGS: I can quite see why you need to  4 preserve contractual set-off to enable trading to take  5 place on a rational basis, where companies are trading  6 with each other on both sides of the account.  7 MR SMITH: But then you need to read that in. One I think  8 reverts to the position, well, isn't it simpler just to  9 take the rules at face value, which is that the set-off  10 only takes effect of the date of the notice, and  11 everything works perfectly on that basis, we would  12 suggest. So that's the first point.  13 The second point is an argument which is made by  14 both the administrators and Wentworth, which is to the  15 effect that insolvency set-off is different from  16 a receipt of a dividend, because insolvency set-off is  17 said to have a "substantive" effect.  18 There's a terminology issue here, as with lots of  19 areas, and it is very important to be clear, we would  20 suggest, about what is meant by  21 insolvency set-off having a substantive effect.  22 We submit that it is clear that the receipt by  23 a creditor of a dividend has a substantive effect. If  24 a creditor is owed £100 and receives a dividend of £50,  25 then the creditor's claim is discharged to the extent of</p> <p style="text-align: center;">Page 43</p>
<p>1 of the status of equity's darling on the date when she  2 had received a dodgy payment from her husband.  3 A historian would say it only happened two years  4 later but the law says, "No, it is retrospective". This  5 concept of retrospectivity is one which -- it is not  6 enough, I think, just to say it annoys historians.  7 MR SMITH: That's right. I think our starting point on that  8 is to say, well, you look at the words of the rule. On  9 the face of it, they provide for set-off to take effect  10 as at the date of notice, we would say. There's nothing  11 in the rule which says set-off has a retrospective  12 effect. "Why does it have to have a retrospective  13 effect?" is one question. There's no obvious answer to  14 that.  15 It clearly works as a scheme that it takes effect on  16 the date of the notice by reference to the debts it  17 quantified beforehand. And there is a problem, we would  18 suggest, with it having retrospective effect, which is  19 would then be said that because it applies from the date  20 of the administration, it would be contrary to that for  21 a creditor to be able to have exercised rights of  22 multilateral set-off which go beyond insolvency set-off  23 in the intervening period.  24 LORD JUSTICE BRIGGS: Yes. But unless you treat that as  25 just a means whereby some debts which would otherwise</p> <p style="text-align: center;">Page 42</p>	<p>1 £50. That is a substantive effect, in our submission,  2 he is owed £50 less than he started with.  3 Similarly with set-off, if a creditor who is owed  4 £100 but who owes the company £50, has his claim  5 discharged by set-off to the extent of the £50, in that  6 way set-off has substantive effect in exactly the same  7 way as a dividend.  8 So we do not dispute that insolvency set-off has  9 a substantive effect. Our point is that the substantive  10 effect is limited to the foreign currency value of the  11 sterling set-off at the time the set-off takes effect.  12 So if you go back to our paragraph 49 example in our  13 skeleton argument -- I think it is behind divider 16.  14 It is paragraph 49 at the bottom of page 15, dealing  15 with a situation where a company owes a creditor \$100  16 but the creditor owes the company £75, and where  17 sterling depreciates between the date of administration  18 and the date of the set-off. In our submission, what  19 the creditor receives by way of substantive effect is  20 the value of the \$100 as at the date of the set-off.  21 That's when he actually receives the benefit, that's  22 when he receives the payment.  23 So we accept it has a substantive effect, but the  24 question is: what is that substantive effect and to what  25 extent is it discharged, the original foreign currency</p> <p style="text-align: center;">Page 44</p>

<p>1 claim?</p> <p>2 LORD JUSTICE BRIGGS: The actual scheme of the rule is that</p> <p>3 looking at the set-off account, it discharges the debt</p> <p>4 by reference to the exchange rates prevailing at the</p> <p>5 cut-off date.</p> <p>6 MR SMITH: Yes.</p> <p>7 LORD JUSTICE BRIGGS: So why do you say if that's what the</p> <p>8 rules provide, it doesn't have that substantive effect?</p> <p>9 MR SMITH: We say he only actually receives the payment when</p> <p>10 the set-off takes effect. Although it is valued by</p> <p>11 reference to the date of the administration, the</p> <p>12 creditor only receives the benefit of the set-off when</p> <p>13 the set-off takes effect -- it is equivalent to him</p> <p>14 having received a dividend on that date. And for the</p> <p>15 purposes of the currency conversion claim, the purposes</p> <p>16 of the non-provable currency conversion claim, you have</p> <p>17 to look at the value of what the creditor received as at</p> <p>18 the date he received it.</p> <p>19 LORD JUSTICE BRIGGS: Don't you have to say that it is</p> <p>20 substantive only for the purposes of proof but not</p> <p>21 otherwise substantive?</p> <p>22 MR SMITH: Well --</p> <p>23 LORD JUSTICE BRIGGS: I'm just trying to see --</p> <p>24 MR SMITH: -- it certainly is substantive for the purposes</p> <p>25 of proof, but what we're saying is it is only</p> <p style="text-align: center;">Page 45</p>	<p>1 make the point that the Insolvency Code is partly</p> <p>2 substantive and partly non-substantive. Well, as</p> <p>3 a general proposition, we wouldn't disagree with that.</p> <p>4 Then, however, they make the point in sub-paragraph 2</p> <p>5 where they say that the payment of a dividend is</p> <p>6 non-substantive.</p> <p>7 In our submission, that's not right, and that simply</p> <p>8 cannot be right. Payment of a dividend does have</p> <p>9 a substantive effect. If the creditor who is owed £100</p> <p>10 is paid £50, then he's discharged to the extent of the</p> <p>11 £50. That's the substantive effect. It is no</p> <p>12 different --</p> <p>13 LADY JUSTICE GLOSTER: I don't know how all this links in</p> <p>14 with Bower v Marris. You are arguing yes, it's</p> <p>15 substantive, but you're not when it comes to your</p> <p>16 arguments in relation to Bower v Marris. You are saying</p> <p>17 it has a different effect, go back and reorganise it.</p> <p>18 MR SMITH: No. I think the point in relation to Bower v</p> <p>19 Marris is whether on the language of 2.88 the</p> <p>20 application of Bower v Marris as an interest calculation</p> <p>21 tool has been excluded, which in our submission it</p> <p>22 hasn't. The point here is whether there's any</p> <p>23 distinction between payment of a dividend and set-off --</p> <p>24 LADY JUSTICE GLOSTER: Right.</p> <p>25 MR SMITH: -- in terms of having a substantive effect. Now</p> <p style="text-align: center;">Page 47</p>
<p>1 substantive to the foreign currency value of what the</p> <p>2 creditor receives as at the date the set-off takes</p> <p>3 effect.</p> <p>4 So I see your Lordship's point, and your Lordship's</p> <p>5 point I think is to say: well, because the creditor's</p> <p>6 claim against the company is valued under the rules by</p> <p>7 reference to the date of commencement of the</p> <p>8 administration, does that mean there's any space for</p> <p>9 a currency conversion claim?</p> <p>10 In our submission, there is, because you're dealing</p> <p>11 with the non-provable currency conversion claim, and you</p> <p>12 have to look at the value of what the creditor receives</p> <p>13 when he receives it, when he actually receives it, which</p> <p>14 is the date when the set-off takes effect, which is the</p> <p>15 date of the notice.</p> <p>16 Just looking at what is said by my learned friends</p> <p>17 on this point, as we see it there's a slight difference</p> <p>18 in what's being put by the administrators and by</p> <p>19 Wentworth. The administrators' argument is set out at</p> <p>20 paragraph 48 of their skeleton argument, which is behind</p> <p>21 divider 22 and it is at page 15.</p> <p>22 LORD JUSTICE BRIGGS: Page 15?</p> <p>23 MR SMITH: Page 15, yes, paragraph 48.</p> <p>24 Just looking at what they say in paragraph 48 in the</p> <p>25 sub-paragraphs, first of all, in sub-paragraph 1, they</p> <p style="text-align: center;">Page 46</p>	<p>1 the administrators' argument as we understand it is to</p> <p>2 say they are different because payment of dividend</p> <p>3 doesn't have any substantive effect --</p> <p>4 LORD JUSTICE BRIGGS: It doesn't say it doesn't have any</p> <p>5 substantive effect, but it doesn't have a substantive</p> <p>6 effect consisting of discharge of the whole debt even if</p> <p>7 it is 100 per cent dividend. Of course they accept it</p> <p>8 has a consequence if you get money.</p> <p>9 MR SMITH: Yes, absolutely. So the real question is whether</p> <p>10 insolvency set-off when it takes effect can be regarded</p> <p>11 as effectively wiping out the entirety of your original</p> <p>12 cause of action. And in that --</p> <p>13 LORD JUSTICE BRIGGS: Isn't that what those who say it has</p> <p>14 substantive effect mean when they say it has substantive</p> <p>15 effect?</p> <p>16 MR SMITH: That is certainly what Wentworth mean, and one</p> <p>17 can see that from their skeleton argument. It is not so</p> <p>18 clear that's what the administrators were aiming at, but</p> <p>19 we certainly disagree that payment of a dividend isn't</p> <p>20 substantive. Payment of a dividend is substantive, and</p> <p>21 really the only question in the case of insolvency</p> <p>22 set-off is whether the argument that insolvency set-off</p> <p>23 entirely extinguishes the original cause of action is</p> <p>24 right or not.</p> <p>25 Wentworth in support of their proposition that</p> <p style="text-align: center;">Page 48</p>

1 insolventy set-off is substantive in the sense of wiping  
2 out the original cause of action rely on what was said  
3 by the House of Lords in Stein v Blake --  
4 LADY JUSTICE GLOSTER: Shall we come to Stein v Blake --  
5 MR SMITH: Yes. It may make sense to come to Stein v Blake  
6 after the --  
7 LADY JUSTICE GLOSTER: We will take ten minutes for the  
8 shorthand writers.  
9 (11.43 am)  
10 (A short break)  
11 (11.58 am)  
12 LADY JUSTICE GLOSTER: We'll sit until 4.30 pm this  
13 afternoon to make up a bit of time, because two of us  
14 have got a hand-down in another court at 2 o'clock, so  
15 we'll sit not before 2.10 this afternoon.  
16 MR SMITH: I am grateful.  
17 LADY JUSTICE GLOSTER: Yes.  
18 MR SMITH: We were just on the point concerning the  
19 substantive effect of insolventy set-off and I was about  
20 to go to Stein v Blake, which is the case relied on  
21 primarily by Wentworth.  
22 It might first be helpful to look at what Wentworth  
23 say in their skeleton argument at paragraph 13,  
24 bundle A2, divider 21, page 4, because that neatly  
25 encapsulates the point which is in dispute between us.

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1 LORD JUSTICE PATTEN: What paragraph did you say?  
2 MR SMITH: Paragraph 13, page 4 onwards of the skeleton,  
3 behind divider 21 of bundle A2.  
4 LORD JUSTICE PATTEN: Yes.  
5 MR SMITH: You'll see they refer to our submissions where we  
6 rely on the Kaupthing case, which will come to shortly,  
7 and Stein v Blake. They refer to our position as being  
8 that:  
9 "Insolventy set-off does not extinguish the claim  
10 ... (Reading to the words)... or rather insolventy  
11 set-off left intact whichever was the greater claim save  
12 to the extent of its pro tanto discharge by the set-off  
13 of the smaller claim."  
14 So that's an accurate summary of our respective  
15 positions. We say insolventy set-off leaves the claims  
16 intact, except to the extent of their pro tanto  
17 discharge. They say the effect of insolventy set-off is  
18 in effect to distinguish the two claims and create a new  
19 balance which is provable. For that purpose, they rely  
20 on Stein v Blake and in particular the speech of  
21 Lord Hoffmann in that case.  
22 Just to explain by way of preview what we say about  
23 that. Firstly, we say Stein v Blake doesn't in fact  
24 hold that the effect of an insolventy set-off is to  
25 extinguish the two causes of action and create a new

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1 claim for the balance. But, secondly, even if it does  
2 say that, that case was concerned with the insolventy  
3 set-off rule in bankruptcy, not in administration or  
4 liquidation, and the insolventy set-off rules in  
5 administration or liquidation have since been  
6 significantly recast. And in light of what the Court of  
7 Appeal held in the Kaupthing case, the Stein v Blake  
8 analysis can't be applied any longer to insolventy  
9 set-off in administration or liquidation.  
10 So I will go first of all to Stein v Blake and just  
11 show you what we say about that. It is authorities  
12 bundle 2, tab 62. It's obviously a well-known decision  
13 of the House of Lords back in 1995. As I say, this was  
14 a case concerned with bankruptcy, and the facts were  
15 that a plaintiff had brought a claim for damages, breach  
16 of contract. The defendant had counterclaimed for  
17 damages for misrepresentation. The plaintiff then was  
18 adjudged bankrupt and his trustee in bankruptcy then  
19 purported to assign the claims. The question was: was  
20 the claim assignable?  
21 You'll see from the headnote that what the  
22 House of Lords held was that all that was assignable was  
23 the claim to the net balance after insolventy set-off  
24 had taken effect and that the trustee was entitled to  
25 assign that net balance.

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1 To be clear, no one doubts the correctness of the  
2 decision in Stein v Blake. It's obviously right that  
3 insolventy set-off is mandatory and that it is  
4 self-executing and it takes effect in bankruptcy on the  
5 making of a bankruptcy order, and that the effect of the  
6 set-off is that the creditor is only left with a claim  
7 for the net balance remaining after the set-off.  
8 But the point, as we understand it, is that  
9 Wentworth say that in the course of his analysis  
10 Lord Hoffmann analysed the effect of insolventy set-off  
11 as extinguishing the original causes of action in their  
12 entirety and substituting in their place a new sterling  
13 claim to the net balance.  
14 Just picking up the references to that, first of all  
15 at page 250 between C and D, in the first two sentences,  
16 Lord Hoffmann frames the issue. You'll see in the  
17 second sentence, he says:  
18 "... or is the effect of section 323 which is the  
19 set-off provision, to extinguish the claims and to  
20 substitute the claim for the net balance owing after  
21 setting off the one against the other."  
22 Then at the bottom of that page, you see the terms  
23 of section 323, which has some similarity to the set-off  
24 rule in the administration or liquidation, but is  
25 obviously far more abbreviated.

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<p>1 Then the part I think Wentworth primarily rely on is                  2 on page 255, between letters A down to C:                  3 "The principles so far discussed should provide                  4 an answer to the first of the issues ...(Reading to the                  5 words)... can assign to a third party."                  6 It is probably the next sentence which is the most                  7 helpful part to Wentworth, because Lord Hoffmann says:                  8 "In my judgment, the conclusion must be that the                  9 original chose in action ceases to exist and is replaced                  10 by a claim to a net balance. If the set-off is                  11 mandatory and self-executing and results as of the                  12 bankruptcy date ...(Reading to the words)... to                  13 understand how the cross-claims can as choses in action                  14 continue to exist."                  15 So they rely on that as saying the correct analysis                  16 of insolvency set-off is that where it takes effect, the                  17 two original causes of action effectively disappear and                  18 you're left with a new statutory cause of action to the                  19 balance, which is in effect a creation or                  20 a substitution.                  21 In our submission, the first point is those                  22 references can't bear the weight which Wentworth seeks                  23 to place them on them. Lord Hoffmann wasn't seeking to                  24 address the juridical nature of the claims to the net                  25 balance, and he wasn't required to do so.</p> <p style="text-align: center;">Page 53</p>	<p>1 bankruptcy set-off provision which was at issue in                  2 Stein v Blake. If we look at the rule in                  3 administration, which is back in authorities bundle 4,                  4 behind divider 172, you'll see it is rather different                  5 mainly as a result of certain changes that were made in                  6 2005. One of those changes was in relation to the                  7 insertion of sub-rule 4 which you'll see over the page,                  8 which allowed the set-off of contingent or future sums                  9 due to the company. So that was a new addition since                  10 Stein v Blake, and basically it said that what you can                  11 do from 2005 onwards is to set off future or contingent                  12 sums owed to the company and not merely by the company.                  13 Then the machinery in sub-rules 5 to 7 is all new as                  14 well. Also then sub-rule 8, which I showed you earlier,                  15 which is the conclusory rule.                  16 One of the questions that arises from the inclusion                  17 of sub-rule 4 is what happens when you end up with                  18 a balance which is owed to the creditor and not to the                  19 company. Because if you think of the example -- to take                  20 an example similar to the type of situation which arose                  21 in Kaupthing, which was an insolvent bank, you may have                  22 a situation where the bank becomes insolvent, it goes                  23 into administration. A customer of the bank has both                  24 a deposit with the bank and is also under a liability in                  25 respect of a loan payable in the future. Set-off</p> <p style="text-align: center;">Page 55</p>
<p>1 All that was necessary for him to decide in order to                  2 resolve the issue in Stein v Blake was whether the                  3 trustee in bankruptcy was able to assign the net balance                  4 remaining after the effects of insolvency set-off. He                  5 doesn't, for example, seek to analyse how it is that                  6 section 323 and the language in that section is                  7 consistent with creating a new statutory claim to the                  8 net balance as opposed to leaving the creditor simply                  9 with the residual part of his original claim to the                  10 extent it has not been discharged by a set-off.                  11 So our first point in relation to this is that there                  12 is a danger in over-reading in relation to these                  13 sentences made in the course of Lord Hoffmann's speech,                  14 which weren't essential to the determination of the                  15 issue, and extracting too much from them by way of                  16 analysis. And ultimately, we say those sort of dicta                  17 can't support the weight which Wentworth seek to place                  18 on them.                  19 But the second point is that in any event, the rule                  20 dealing with insolvency set-off has changed                  21 significantly since Stein v Blake, and Wentworth's                  22 analysis of the way in which it says insolvency set-off                  23 works is impossible, we would say, to apply to the new                  24 modified rule which applies to LBIE's administration.                  25 Now I showed you section 323, which is the</p> <p style="text-align: center;">Page 54</p>	<p>1 applies and you're then left with a situation where                  2 actually the balance is owing by the customer under his                  3 loan.                  4 If you applied the Stein v Blake logic, you would                  5 simply say: well, that's a new statutory cause of                  6 action, the customer is immediately liable to repay that                  7 to the bank. But that's not how it's been dealt with by                  8 the rules or by the court. So far as the question of                  9 paying in future is concerned, that's been preserved by                  10 sub-rule 8. But so far as other questions are                  11 concerned, like the question of interest and the issue                  12 of whether contractual interest continues to apply on                  13 the outstanding balance, the courts have held --                  14 correctly we submit -- that the net balance owed by the                  15 customer continues to attract interest under the                  16 original terms of the loan.                  17 So to go back to my example where the customer had                  18 a deposit, he had a loan advanced by him to the bank as                  19 well. You apply set-off, that results in part or most                  20 of the loan remaining outstanding. That's not remaining                  21 outstanding under a newly created statutory balance, it                  22 remains outstanding under the loan which hasn't been                  23 discharged by the set-off, and the customer continues to                  24 be liable to pay interest in accordance with the                  25 original terms of the loan.</p> <p style="text-align: center;">Page 56</p>

<p>1 That is the analysis which the courts adopted in the 2 Kaupthing case. You see that first of all from the 3 judgment of Norris J in authorities bundle 3, tab 85. 4 (Pause). 5 This decision concerned various different questions 6 that arose in relation to the operation of insolvency 7 set-off in the administration of Kaupthing Singer &amp; 8 Friedlander, which was an English subsidiary of 9 an Icelandic bank that went into administration here. 10 The particular point I've just been addressing, the 11 judge dealt with at paragraphs 25 and 26. 12 In particular, just picking it up two-thirds of the 13 way through paragraph 25, the judge started to address 14 the question of what the position was if the effect of 15 insolvency set-off was that there was a balance due to 16 the company, in other words Kaupthing in that case: 17 "If the balance is due to the company, the position 18 as regards interest is said to be less clear. The 19 administrators say that the balance bears interest in 20 accordance with terms of the loan and that interest on 21 that balance remains recoverable. The creditors submit 22 that the process of taking account destroys any right to 23 interest which arises post-administration, even though 24 a borrower who had no cross-claims ...(Reading to the 25 words)... post-administration interest."</p> <p style="text-align: center;">Page 57</p>	<p>1 balance is not a newly created liability, it is merely 2 the remainder of the previously existing debt which has 3 not been discharged. 4 That particular point in the judgment wasn't 5 appealed but it was, in my submission, quoted with 6 approval by the Court of Appeal in the same case which 7 you see at tab 86. 8 The particular issue on appeal related to the 9 judge's conclusions as to the operation of discounting 10 in relation to set-off. The question broadly was where 11 you had a loan owed to the bank which was discounted to 12 a present value for the purposes of set-off, whether the 13 resulting net balance also remained discounted. The 14 Court of Appeal held that the answer to that was no. 15 If you turn to paragraph 34 against letter F, you 16 have Etherton LJ's conclusion on that point, and 17 basically what he said is: 18 "The discounting of the debt owed to the company for 19 the purposes of set-off only applies insofar as it is 20 required for the purposes of set-off ..." 21 You'll see he then said: 22 "... and as not touching at all upon what remains 23 due to the company after insolvency set-off has taken 24 place." 25 So you only apply the machinery insofar as you need</p> <p style="text-align: center;">Page 59</p>
<p>1 The creditors were essentially running 2 a Stein v Blake argument and saying, "because of the 3 insolvency set-off, my original liability under my loan 4 has been extinguished, there's a net balance owing by 5 me, but I don't have to pay interest on that because 6 there's no provision requiring me to pay interest". 7 The judge dealt with that in paragraph 26 where he 8 refers to the provisions of the rule and sets out the 9 provision in Rule 2.85(a), which was new in 2005, and he 10 says: 11 "But there is no need to read this as if it said 12 'and the balance shall not bear interest notwithstanding 13 what the contract says ...(Reading to the words)... it 14 is the balance due under a contract the remainder of 15 which has been extinguished in the insolvency set-off. 16 Indeed, it is quite plain that the balance continues to 17 be subject to the terms of the contract under which it 18 arises. But in the case of a contingent or prospective 19 debt, the rules goes on to say that such a balance shall 20 be paid if and when a debt becomes due and payable, i.e. 21 under the contract on the loan maturity date and earlier 22 under default provisions." 23 And that is obviously flatly inconsistent with the 24 Stein v Blake analysis which had been advanced in that 25 case and which has been advanced here. He says the</p> <p style="text-align: center;">Page 58</p>	<p>1 it for set-off. The remainder of the loan remains 2 outstanding on its existing contractual terms. 3 At paragraph 36, he rejected the relevance of 4 Stein v Blake, which had been one of the arguments run 5 by the creditors in that case. He said he didn't 6 consider Stein v Blake to be of relevance. But then 7 you'll also see in paragraph 37, he went on to comment 8 on the point which Norris J had decided, which I was 9 drawing to your Lordships' and your Ladyship's 10 attention, because he said: 11 "Further, Mr Fisher's reliance on the present 12 context on the Stein v Blake analysis of the 13 extinguishing effect on the insolvency set-off 14 ...(Reading to the words)... presents him with 15 a difficulty. He relies on the judge's decision that 16 interest is payable on the balance of the debt due to 17 the company as undermining the administrators' case that 18 the judge's interpretation has such extraordinarily 19 damaging results to the company and the general body of 20 creditors, that cannot reflect the meaning and intent of 21 Rule 2.85. The judge, however, came to that decision on 22 interest on the basis that the original contractual 23 liability remains, save to the extent that it has been 24 extinguished by the insolvency set-off, rejecting 25 Mr Fisher's submissions to the contrary. That decision</p> <p style="text-align: center;">Page 60</p>

<p>1 of the judge has not been appealed.                  2 "Mr Fisher frankly submitted that notwithstanding                  3 the absence of any appeal on the point, it is very                  4 difficult to see that the judge was right on that issue                  5 as a matter of law. There is nothing in Rule 2.85 or                  6 2.88 which expressly provides for the payment of such                  7 interest. If that is correct, then the effect of                  8 Mr Fisher's analysis relying on Stein v Blake is that                  9 the creditor is only ...(Reading to the words)...                  10 discounted to the value of the date at the future                  11 administration but not payable until the contractual                  12 date for repayment and without interest in the meantime.                  13 There could be no policy justification for such                  14 a remarkable result."                  15 So he basically approved Norris J on that point.                  16 The short point in relation to this is simply that                  17 trying to apply the Stein v Blake analysis in relation                  18 to the modern insolvency set-off rule where you may end                  19 up with debts owing by the creditor to the company in                  20 the future does not make any sense. You can't make it                  21 work. The only way it can be made to work is by                  22 regarding insolvency set-off as only applying pro tanto                  23 to the extent required for the set-off, and for the                  24 creditor's original liability to the company to remain                  25 in place except to the extent it has actually been</p> <p style="text-align: center;">Page 61</p>	<p>1 But in our submission, that is not particularly                  2 surprising. It simply reflects the fact that where                  3 a creditor's foreign currency claim is converted to                  4 sterling at one date, ie the commencement of the                  5 administration, but is paid at a later date, i.e. the                  6 date of the set-off, then you've got a timing gap                  7 between the two. And if sterling does depreciate within                  8 that timing gap, well, there may be a currency                  9 conversion claim because the payment through set-off in                  10 sterling may be less than the original foreign currency                  11 debt.                  12 So that point is really a consequence and derivative                  13 on whether we're right that there is a timing gap                  14 between the date of conversion and the date when set-off                  15 takes effect.                  16 Those are our submissions in relation to those two                  17 issues.                  18 LADY JUSTICE GLOSTER: Thank you very much.                  19 Mr Bayfield, you're next, are you?                  20 Submissions by MR BAYFIELD                  21 MR BAYFIELD: My Lady, I do have a slot to add to the                  22 submissions made by Mr Smith solely in relation to the                  23 retrospectivity question, but I don't need to take up                  24 any of the court's time to do so. We don't have                  25 anything to add.</p> <p style="text-align: center;">Page 63</p>
<p>1 discharged. That's essentially what Norris J held in                  2 the Kaupthing case, and the Court of Appeal held in the                  3 Kaupthing case. The point they made is really that                  4 under the modern rule, Stein v Blake is of no relevance                  5 or any application.                  6 So, for those reasons, we submit neither of the two                  7 arguments advanced by Wentworth and the administrators                  8 is a reason why a currency conversion claim can't arise                  9 as a matter of set-off. We say set-off isn't                  10 retrospective, and we say it's also not substantive in                  11 the sense of it entirely extinguishing the original                  12 causes of action.                  13 The final point I need to deal with relates to the                  14 position where the claim and the cross-claim which are                  15 set off are both denominated in the same foreign                  16 currency. This is where, for example, the creditor has                  17 a US dollar claim against the company and the company                  18 has a US dollar claim against the creditor. It is                  19 correct that on our analysis that may, depending on the                  20 facts, be capable of giving rise to a currency                  21 conversion claim. That would be the case if sterling                  22 depreciated against the US dollar during the time                  23 between the commencement of the administration and the                  24 date when the set-off takes effect, ie when the                  25 Rule 2.95 notice is given.</p> <p style="text-align: center;">Page 62</p>	<p>1 LADY JUSTICE GLOSTER: You have nothing to add?                  2 MR BAYFIELD: No.                  3 LADY JUSTICE GLOSTER: Can you just give us the reference to                  4 where this appears in the skeleton argument.                  5 MR BAYFIELD: Yes, of course. The joint administrators'                  6 skeleton at tab 22, bundle A2.                  7 LADY JUSTICE GLOSTER: Yes.                  8 MR BAYFIELD: We explain in paragraphs 9 and 10 why we're                  9 filing submissions at all in relation to supplementary                  10 issues. Supplemental issue 2 begins at paragraph 30,                  11 and you will find the arguments that we make in relation                  12 to it from paragraphs 30 through to 63 inclusive. But                  13 it is the earlier paragraphs that deal with the                  14 retrospectivity point and which we filed to ensure that                  15 the relevant authorities as well as the relevant                  16 arguments were before the court.                  17 LADY JUSTICE GLOSTER: You don't have any arguments to the                  18 effect that it will make difficulties in the                  19 administration or anything of that sort? You're simply                  20 ensuring that the full argument is before the court; is                  21 that right?                  22 MR BAYFIELD: My Lady, there is one point. On another                  23 aspect of the administration -- and we refer to this                  24 just in passing at paragraph 10 sub-paragraph 3 of the                  25 skeleton argument -- Wentworth in correspondence has</p> <p style="text-align: center;">Page 64</p>



1 canvassed its reliance on this aspect of the judge's  
 2 reasoning in a different case. And part of the reason  
 3 why we have felt it appropriate to file written  
 4 submissions in relation to this point is to ensure  
 5 consistency with the administrators' position on that  
 6 case.  
 7 This is plainly not the occasion to argue something  
 8 that arises elsewhere, but one can see that there may be  
 9 difficulties which arise if there is a backdating of the  
 10 date on which the set-off takes effect in circumstances  
 11 where in a case like this, as Lord Justice Briggs notes,  
 12 there was a huge amount of trading of the debt --  
 13 LADY JUSTICE GLOSTER: Yes.  
 14 MR BAYFIELD: -- in the period -- including in the period  
 15 between the administration date and the cut-off date,  
 16 and that has involved the assignments of particular  
 17 debts or particular claims that a creditor has to  
 18 another creditor or to someone who wasn't originally  
 19 a creditor at all, in circumstances where other claims  
 20 have been left behind.  
 21 The problem may arise in circumstances in which it  
 22 is said that what creditor B took an assignment of  
 23 didn't in fact exist because it had been eradicated by  
 24 insolvency set-off at a date in the past, even though  
 25 that was not something that creditor B could have known

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1 at the time.  
 2 LADY JUSTICE GLOSTER: Is that an issue that is already the  
 3 subject of proceedings?  
 4 MR BAYFIELD: It is. It's the subject of proceedings in  
 5 relation to which the administrators have sought  
 6 directions. The respondents are Barclays Bank and  
 7 Wentworth, but the issue has been taken by Wentworth.  
 8 LADY JUSTICE GLOSTER: But that's down the track. There  
 9 hasn't been a decision in relation to it.  
 10 MR BAYFIELD: No, we're at an early stage. All that has  
 11 happened thus far is that a position paper has been  
 12 filed by the administrators which responds to, amongst  
 13 all of the other issues, the fact that Wentworth has  
 14 raised in correspondence its reliance in the type of  
 15 context that I've explained on the judge's analysis in  
 16 supplemental issue 2.  
 17 LADY JUSTICE GLOSTER: Yes, I see. Thank you very much.  
 18 Yes, who is next? Mr Dicker.  
 19 Submissions by MR DICKER  
 20 MR DICKER: My submissions at this stage are going to  
 21 concern item 12, supplemental issue 1(a) which was the  
 22 first of the two issues --  
 23 LADY JUSTICE GLOSTER: Yes.  
 24 MR DICKER: -- that my learned friend Mr Smith dealt with.  
 25 Just to remind you, we're concerned with

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1 a pre-administration contract which contains a close-out  
 2 mechanism and a right to interest on the close-out sum.  
 3 The transaction one has in mind in this context is  
 4 obviously a transaction under a ISDA Master Agreement.  
 5 The issue assumes the contract is closed out after  
 6 the date of the administration order. The close-out sum  
 7 we say is obviously provable given that it arises out of  
 8 an obligation incurred prior to the date of the  
 9 administration. That's simply Rule 13.12(1)(b). The  
 10 present issue concerns the claim to issue on interest on  
 11 that close-outcome: is it payable in accordance with  
 12 Rule 2.88(7) and (9) or not?  
 13 We deal with this in our supplemental reply  
 14 skeleton. Just so you have the reference on the  
 15 transcript, it is paragraphs 2 to 21, bundle A2, tab 20,  
 16 at pages 2 to 10.  
 17 The submissions I will be making are obviously on  
 18 the assumption that David Richards J was correct on  
 19 issue 4. In other words, I've failed in my earlier  
 20 arguments in relation to issue 4 so far as  
 21 post-administration foreign judgments are concerned.  
 22 LADY JUSTICE GLOSTER: Issue 4 being item ...?  
 23 MR DICKER: That's the two foreign judgments. You'll  
 24 remember I focused primarily on foreign judgments  
 25 actually obtained post-administration.

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1 LADY JUSTICE GLOSTER: Yes.  
 2 MR DICKER: There was also an issue ... (Pause).  
 3 Item 11, I'm sorry. Mr Bayfield kindly adds the  
 4 item number.  
 5 LADY JUSTICE GLOSTER: Yes.  
 6 LORD JUSTICE BRIGGS: You make that assumption because the  
 7 submission against you is simply based on the  
 8 inconsistency in outcome?  
 9 MR DICKER: Yes, absolutely.  
 10 LORD JUSTICE BRIGGS: Yes.  
 11 MR DICKER: We say, in short, Hildyard J was right for the  
 12 reasons he gave. I can deal with this reasonably  
 13 shortly, but, as my Lord Lord Justice Briggs has just  
 14 observed, York's argument is essentially assume the  
 15 judge was right in relation to issue 4, the logic of his  
 16 reasoning in relation to issue 4 applies equally to  
 17 a contract containing a contingent right to interest.  
 18 You're not entitled under 2.88 to interest on a foreign  
 19 judgment which you have obtained after the date of  
 20 administration. Equally, York submits, you're not  
 21 entitled to interest on a pre-administration contract  
 22 where the right to interest was also contingent.  
 23 This obviously only applies in the context of the  
 24 master agreement to the termination on notice, because  
 25 it's the notice which brings about the early termination

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<p>1 date and which in turn gives a creditor interest from 2 that date. York accepts it doesn't apply in the case of 3 an automatic early termination because interest 4 obviously runs from the date of administration order. 5 The commercial consequences of York's argument are 6 significant. There are obviously a large number of 7 creditors whose transactions were only closed out after 8 LBIE collapsed for a variety of reasons. 9 LADY JUSTICE GLOSTER: What, because they didn't have 10 automatic termination? 11 MR DICKER: Because they didn't, and whether because they 12 were waiting to see how things developed to see whether 13 or not LBIE would perform, whether they were able to get 14 assets back or things of that sort, for whatever reason 15 the transaction was not in fact closed out until a later 16 date. 17 As a matter of contract under the ISDA Master 18 Agreement, those creditors are all entitled to interest 19 from the early termination date. On York's case they 20 won't receive such interest even in the event of 21 a surplus, because it says the logic of the judge's 22 decision on issue 4 is because the right to interest was 23 contingent at the date of the administration order. 24 Even though the contingency subsequently happens and 25 even though as a matter of contract you're entitled to</p> <p style="text-align: center;">Page 69</p>	<p>1 Taking this in stages, the starting point is 2 obviously Rule 2.88 because ultimately this is 3 a question of construction. It's not the focus of 4 York's submissions. But just dealing with Rule 2, 88 we 5 say it is intended to compensate creditors for the delay 6 caused by the administration and to do so at the rate 7 that was applicable to the debt during the relevant 8 period, not a rate which applied on some other date. 9 So, in short, Rule 2.88(9) when it refers to "the 10 rate applicable to the debt apart from the 11 administration", essentially requires what one might 12 call a read-across. You simply look at the rights of 13 the creditor as at the relevant date 14 post-administration, you see what rights they had in 15 relation to interest at that date and that's what 16 Rule 2.88(9) gives you. 17 York's submission is obviously different. They say 18 the right to interest effectively had to be present and 19 accruing on the date of the administration order. You 20 will note that the word "accruing" does not appear in 21 Rule 2.88(9) and, in our submission, there's no 22 justification for reading the rule as if it did. 23 The next point is this. York says: the judge held 24 that a cut-off date is required. I've already made my 25 submissions in the context of issue 4 on foreign</p> <p style="text-align: center;">Page 71</p>
<p>1 interest from that date, you don't get it under 2 Rule 2.88. 3 Obviously, if the judge's conclusion in relation to 4 2.88 is an exclusive code, this is another situation in 5 which creditors don't get paid the full amount and the 6 shortfall is effectively distributed either to other 7 creditors or to subordinated creditors and shareholders. 8 LORD JUSTICE BRIGGS: Always assuming the interest rate 9 under the ISDA Master Agreement is higher than the 10 judgment. 11 MR DICKER: Yes. We say, that's a surprising outcome, given 12 that we're dealing with a pre-administration contract 13 and a close-out sum which is provable. 14 The other preliminary point to note is, although the 15 supplemental issue is only expressed to concern a right 16 to interest that was triggered due to action taken by 17 the creditor after the date of the administration, the 18 logic would appear to apply equally even if it was due 19 to action taken by a third party or, indeed, happened 20 automatically on some particular event which post-dated 21 the administration order. 22 So if the right to interest is contingent for 23 whatever reason, the logic of York's position appears to 24 be you're not entitled to interest under 2.88 even from 25 the date that contingency accrues.</p> <p style="text-align: center;">Page 70</p>	<p>1 judgments as to why a cut-off date as at the date of the 2 administration isn't required. But just assume for 3 present purposes I'm wrong about that, the judge is 4 right and you need a cut-off date as at the date of the 5 administration order. York's conclusion doesn't follow 6 from that because, if there's a cut-off date as at the 7 date of the administration order, there's no reason why 8 it ought to be any different in effect from the normal 9 cut-off provision under 13.12. 10 In other words, if the liability is one which arises 11 out of an obligation incurred pre-cut-off date, then 12 just as such a liability would be provable, equally it 13 should rank under 2.88(9). 14 York's cut-off date is obviously much more severe 15 than that. It doesn't matter that it arose out of 16 an obligation incurred pre-administration. Unless it is 17 also present and accruing as at the date of the 18 administration, you're not entitled to it. 19 As my Lord Lord Justice Briggs observed, York's 20 argument is essentially, "Look at what the judge decided 21 in relation to issue 4 dealing with foreign judgments, 22 the logic nonetheless applies equally to contingent 23 claims to interest". That issue was, of course, 24 concerned with post-administration judgments and we're 25 obviously here concerned with pre-administration</p> <p style="text-align: center;">Page 72</p>

<p>1 contracts. One can't obviously start by assuming that 2 the animal we're concerned with is the same. 3 Just dealing with the two parts of the judge's 4 judgment on issue 4, the first part, as you will recall, 5 concerned an entirely hypothetical judgment that 6 a creditor could have obtained but in fact never did 7 obtain. The question he asked in that context was: 8 could a Judgments Act rate under a hypothetical judgment 9 of that sort ever be a rate applicable to the debt apart 10 from the administration?" 11 The judge said the answer to that was no. I don't 12 need to say any more in relation to that category of 13 judgments because York doesn't rely on it. There's 14 obviously a clear distinction between an entirely 15 hypothetical judgment on the one hand and 16 a pre-administration contract on the other. 17 So turning to the second category, which was 18 a creditor who had actually obtained a foreign judgment, 19 albeit only after the date of administration, and again 20 the learned judge considered whether or not Judgments 21 Act rate under such a judgment was a rate applicable to 22 the debt apart from the administration and he held no. 23 But it is worth seeing the reasons he gave. If you 24 go to his main judgment, he deals with this in 25 paragraphs 178 to 183. It is worth just taking this in</p> <p style="text-align: center;">Page 73</p>	<p>1 LIBOR, that is the applicable rate for the purposes of 2 Rule 2.88(9)." 3 Then the other part of Wentworth's submissions: 4 "This does not apply to a creditor who obtains 5 a judgment after the commencement of the administration 6 because at the date of the administration he had no 7 right to interest at the relevant judgment rate." 8 We say when the learned judge is referring to 9 Wentworth's submission the reference there to "no right 10 to interest at the relevant judgment rate" must mean 11 something different from "no in right" in the sense that 12 it is a present right but payable only in the event of 13 a contingency occurring. 14 The judge agreed with Wentworth. He sets out 15 Mr Zacaroli's submissions for Wentworth at 180. And he 16 says at 181: 17 "In my judgment, these grounds make a compelling 18 case for the proposition the rate applicable to the debt 19 apart from the administration is to be determined by 20 reference to the rights of the creditor as at the 21 commencement of the administration." 22 We say Hildyard J correctly identified the point 23 that David Richards J was making and the distinction he 24 was drawing. This is Hildyard J's judgment, 25 paragraphs 518 to 521. The distinction is essentially</p> <p style="text-align: center;">Page 75</p>
<p>1 stages and reading it having regard to York's argument 2 that essentially there's no difference between the 3 pre-administration contract and the post-administration 4 judgment. 5 The argument in favour of the conclusion the judge 6 reached was made by Wentworth, and you'll see its 7 argument at 179. What Wentworth did was essentially to 8 distinguish between a contract on the one hand and 9 a post-administration judgment on the other. So three 10 lines down in 179, the judge records: 11 "If by reason of its contractual rights the creditor 12 is entitled to a higher rate of interest for a period 13 after the commencement of the administration than the 14 rate applicable at the date of administration, Wentworth 15 accepts the creditor is entitled to be paid interest 16 under Rule 2.88(7) taking account of that higher rate." 17 That we say is entirely consistent with our position 18 and suggesting -- it is certainly no indication that the 19 judge thought, whatever he was deciding in relation to 20 issue 4, applied equally in relation to a contract -- no 21 suggestion that the distinction which Wentworth was 22 seeking to draw wasn't a real distinction. 23 Just continuing, he goes on to say: 24 "For example, if a contract stipulates for 25 a fluctuating rate of interest, such as one linked to US</p> <p style="text-align: center;">Page 74</p>	<p>1 that which my Lord Lord Justice Patten referred to on 2 Thursday. The distinction is between on the one hand 3 the possibility of a future right to payment of 4 interest, being a new right acquired after the date of 5 the administration, on the one hand and on the other the 6 existence of a present right to payment of interest on 7 the fulfilment of a condition. Hildyard J described the 8 difference as lying in the source of the right or 9 entitlement and the existence or not of that source as 10 at the date of the administration. 11 We say there is such a distinction that can be drawn 12 and it is reflected and consistent with, subject to one 13 point I will make in a second, the decisions of the 14 House of Lords In re Sutherland and the Supreme Court in 15 Nortel. 16 The one caveat is this: there is one possible case 17 in which interest on a foreign judgment might be said to 18 be a contingent right although that foreign judgment was 19 only obtained after the company went into 20 administration, and that is if proceedings had already 21 been commenced by the date of the administration. 22 Just to elaborate on that, a line of authorities 23 which the Supreme Court had to consider in Nortel 24 concerned cases dealing with orders for costs 25 post-administration, post --</p> <p style="text-align: center;">Page 76</p>

<p>1 LORD JUSTICE BRIGGS: There were a rather dreadful line of 2 authorities and Nortel blew them all away, didn't it? 3 MR DICKER: Yes. The submission we made in the Supreme 4 Court was that the line of cases by which 5 Lord Justice Briggs concluded he was bound at first 6 instance essentially held -- 7 LORD JUSTICE BRIGGS: Yes. Kicking and screaming, I think. 8 MR DICKER: -- that the right to (inaudible) arises when the 9 order for costs is made, and therefore it is not a right 10 that exists as at the date of the administration order. 11 Our submission in the Supreme Court was essentially, 12 "Well, once you commence proceedings you're effectively 13 agreeing to be bound by the rules of the game" --" 14 LADY JUSTICE GLOSTER: Jurisdiction, yes. 15 MR DICKER: -- if one can express it that way, and in 16 a similar way that you are bound by the terms of 17 a contract. In that situation a right to costs would 18 not simply post-date the administration order, it would 19 be contingent and therefore provable. We say similar 20 logic may apply in relation to foreign judgments. 21 Just to show -- 22 LADY JUSTICE GLOSTER: So if you had a jurisdiction dispute 23 at the time of the administration order and the foreign 24 court had not assumed jurisdiction, that wouldn't 25 matter, would it, if jurisdiction was subsequently taken</p> <p style="text-align: center;">Page 77</p>	<p>1 defendant, submit themselves to a statutory scheme which 2 gives rise to a relationship between them governed by 3 rules of court. They are liable under those rules to be 4 made to pay costs contingently on the outcome and on the 5 exercise of the court's discretion. An order for costs 6 made in proceedings which were begun before the judgment 7 debtor went into liquidation is, in my view, provable as 8 a contingent liability, as indeed it had been held to be 9 in the case of arbitration proceedings." 10 LORD JUSTICE BRIGGS: Yes. It was the contrast between the 11 old rules about legal proceedings and the old rules 12 about arbitration proceedings that seemed so bizarre, 13 and this finally sorted that out. 14 MR DICKER: That was the point your Lordship made very 15 clearly at first instance -- 16 LORD JUSTICE BRIGGS: Yes. 17 MR DICKER: -- that there was no logic in the distinction, 18 but there was a very long line of authority dealing with 19 costs cases which have reached the opposite conclusion. 20 LORD JUSTICE BRIGGS: Yes. 21 MR DICKER: Those have been swept away. 22 This relevant only to this extent: again we're 23 assuming the judge is right in relation to issue 4. 24 Post-administration judgments do not fall within 25 Rule 2.88(9). We say, subject to the point I've just</p> <p style="text-align: center;">Page 79</p>
<p>1 by the foreign court? 2 MR DICKER: And that would be how the argument would go. 3 LADY JUSTICE GLOSTER: Yes. 4 MR DICKER: Can I just show you the one paragraph in Nortel 5 which deals with this. It's in volume 3 of the 6 authorities, tab 96. I think you can get it most 7 clearly and shortly from Lord Sumption's judgment. It's 8 the last paragraph in the case at 136 -- 9 LORD JUSTICE BRIGGS: 136? Do you mean paragraph 136? 10 MR DICKER: Paragraph 136 -- 11 LORD JUSTICE BRIGGS: Yes. 12 MR DICKER: -- where Lord Sumption says: 13 "In the present case the Court of Appeal considered 14 itself to be bound by a line of cases in which it was 15 held that a liability for costs arising from a judgment 16 given after the commencement of the insolvency was not 17 provable as a contingent debt even if the litigation was 18 in progress when the company went into liquidation." 19 He refers to those. At E he says: 20 "There are a number of problems about those cases." 21 At letter C he says: 22 "In my view, they were wrongly decided." 23 And then he says: 24 "In the costs cases, I have considered that those 25 who engage in litigation, whether as claimant or</p> <p style="text-align: center;">Page 78</p>	<p>1 made, there is a distinction between 2 a post-administration judgment and a pre-administration 3 contract. The first is an example of what Lord Reid 4 described in Sutherland as the individual standing 5 outside a shop thinking about buying a watch, or someone 6 who was at risk of a liability of some future date. The 7 second involves an existing right, albeit contingent on 8 something happening. 9 The other point is this. It would be wrong, 10 obviously, to construe the judge's judgment in relation 11 to issue 4 in a vacuum without reference to other 12 aspects of the same judgment. 13 In our submission, when trying to understand what 14 the judge had in mind it is also helpful to look at the 15 way he dealt with issues 6 and 7. 16 Issue 7 is item 5 on the list. If you recall, that 17 concerns contingent claims and the date from which 18 interest runs. 19 As the court has seen, David Richards J held in the 20 context of issue 7, item 5, that interest under 21 Rule 2.88 on a contingent claim runs from the date of 22 the administration order equally with all proved debts. 23 If one just quickly explores the implications of that, 24 they include the following: if the underlying debt is 25 contingent, it necessarily follows that any claim to</p> <p style="text-align: center;">Page 80</p>

<p>1 interest on that debt will also be contingent. So                  2 David Richards J in the context of issue 7 is                  3 necessarily contemplating a contingent claim to                  4 interest.                  5 On York's case such a claim inevitably falls                  6 entirely outside Rule 2.88 simply because it is                  7 contingent at the date of the administration order. So                  8 on its case issue 7, which David Richards J considered,                  9 would logically not arise and would not need to be                  10 decided.                  11 There's one further point in relation to this. My                  12 learned friend referred to supplemental issue 1(c), and                  13 perhaps if we can turn that up. It's in bundle A2,                  14 tab 1, paragraphs 26 to 36. (Pause).                  15 It is important to appreciate this issue is not                  16 concerned with interest running after the contingency                  17 occurs. This is concerned with the previous period                  18 between the date of the administration order and the                  19 date that the contingency occurs.                  20 The issue the judge was addressing was: what is the                  21 rate of interest applicable apart from the                  22 administration for that period? Is it the contractual                  23 rate which started to apply later, or is it zero because                  24 at this stage no contractual interest was accruing?                  25 The judge held essentially 2.88, if one uses the</p> <p style="text-align: center;">Page 81</p>	<p>1 MR DICKER: No.                  2 LADY JUSTICE GLOSTER: Why not?                  3 MR DICKER: Well, there was an argument below as to when                  4 you're working out which is the greater do you                  5 essentially do it over the period, or are you                  6 effectively entitled to sort of salami slice it up and                  7 say, "Well, during that period it was the Judgments Act                  8 rate"? The judge held that that wasn't the right                  9 approach.                  10 LADY JUSTICE GLOSTER: And no one has appealed that.                  11 LORD JUSTICE BRIGGS: But is he saying you can only do it                  12 once for the whole period between cut-off date and                  13 dividend or you can do it once up to the point when the                  14 contingency matures and then again afterwards?                  15 MR DICKER: No, for the whole period, as I understand it.                  16 LADY JUSTICE GLOSTER: I don't understand the logic of that.                  17 Anyway, there's no appeal against that.                  18 MR DICKER: But for present purposes --                  19 LADY JUSTICE GLOSTER: It doesn't matter.                  20 LORD JUSTICE BRIGGS: Sorry, but I'm really confused. Say                  21 you had an ISDA contract with an interest rate applying                  22 only after close-out higher than the Judgments Act rate,                  23 as I understand it you get Judgments Act rate interest                  24 down to the date when the contingency matures because                  25 the rate under the ISDA contract is zero. But I didn't</p> <p style="text-align: center;">Page 83</p>
<p>1 image of a read-across to what the creditors'                  2 contractual rights are at the relevant time, indicates                  3 it should be zero because for this period no interest                  4 was payable under the contract because interest only                  5 started accruing when the contingency occurred.                  6 As I say, it is important to appreciate supplemental                  7 issue 1(c) is not concerned with the interest that York                  8 are addressing in relation to the present issue. That                  9 interest is the interest which the creditor is entitled                  10 to after the contingency occurs. (Pause).                  11 Just to finish supplemental issue 1(c), at                  12 paragraph 36 the judge also decided that when you're                  13 working out which is the greater of the Judgments Act                  14 rate and the rate applicable to the debt apart from the                  15 administration, essentially you do it on a global basis.                  16 So for the entirety of the period you work out what the                  17 interest would have been at the Judgments Act rate on                  18 the one hand and what the interest would have been under                  19 the contract on the other hand, bearing in mind in                  20 relation to the contract for part of the period there                  21 may have been no interest accruing. For that period at                  22 least the interest rate was zero.                  23 LADY JUSTICE GLOSTER: There are the two alternative rates                  24 for the whole period, so can it dip in and out from one                  25 to the other?</p> <p style="text-align: center;">Page 82</p>	<p>1 understand that to mean and then you only got Judgments                  2 Act rate thereafter.                  3 MR DICKER: What, as I understand, the judge held in 36, if                  4 one goes back to it -- and this is concerned with the                  5 greater of --                  6 LORD JUSTICE BRIGGS: Yes.                  7 MR DICKER: -- the rate applicable to the debt on the one                  8 hand and the Judgments Act rate on the other. He says:                  9 "I am satisfied the correct answer to sub-issue 1 is                  10 that in sub-paragraph 2. So in a case where contractual                  11 interest ..."                  12 If one goes back to 26 --                  13 LORD JUSTICE BRIGGS: That's the period up to the maturity                  14 of the contingency.                  15 MR DICKER: Yes.                  16 LORD JUSTICE BRIGGS: He then goes on to say --                  17 MR DICKER: Then he goes on to say the correct answer to                  18 sub-issue 2 and that's, if you go back to 26 --                  19 LADY JUSTICE GLOSTER: I think he is salami slicing, isn't                  20 he?                  21 MR DICKER: Sorry, if one goes back to 26 --                  22 LORD JUSTICE BRIGGS: I find it very difficult to understand                  23 what his answer is.                  24 MR DICKER: -- the just below zero rate:                  25 "For the purposes of Rule 2.88(9) statutory interest</p> <p style="text-align: center;">Page 84</p>

<p>1 be calculated by assessing the greater of the rate 2 applicable and Judgments Act 1838 rate separately for 3 periods prior to and post- the commencement of 4 contractual interest ..."</p> <p>5 LADY JUSTICE GLOSTER: He is asking the second bit, he is 6 saying "yes" to the last question: 7 "Should such assessment be formed taking the periods 8 together?"</p> <p>9 MR DICKER: Yes.</p> <p>10 LADY JUSTICE GLOSTER: So he says it is nothing but 11 contractual rate before the contingency matures. He 12 then aggregates it over the whole period or what?</p> <p>13 MR DICKER: No, what, as I understand, the judge decided is 14 that we're comparing on the one hand the Judgments Act 15 rate and on the other hand the contractual rate for the 16 relevant period, which is the entirety of the period for 17 which interest is to be assessed.</p> <p>18 LORD JUSTICE BRIGGS: That's cut-off date down to dividend?</p> <p>19 MR DICKER: Correct, down to dividend. And if one just 20 imagines a situation in which there is only one dividend 21 paid in full, to make it easier --</p> <p>22 LORD JUSTICE BRIGGS: Yes.</p> <p>23 MR DICKER: -- what the judge is saying is what you do is 24 work out what Judgments Act rate interest would be for 25 the entirety of that period, and that's your first</p> <p style="text-align: center;">Page 85</p>	<p>1 interest.</p> <p>2 LADY JUSTICE GLOSTER: You look at the actual rate you would 3 have got taking into account a 0 per cent period 4 contractually.</p> <p>5 MR DICKER: Correct.</p> <p>6 LORD JUSTICE BRIGGS: So it is so many days at 0 per cent 7 and so many days at whatever the ISDA rate is.</p> <p>8 MR DICKER: Is that more or less than --</p> <p>9 LORD JUSTICE BRIGGS: -- the Judgments Act rate across the 10 whole period?</p> <p>11 MR DICKER: Right.</p> <p>12 LADY JUSTICE GLOSTER: Right.</p> <p>13 LORD JUSTICE BRIGGS: I suppose it probably means that. 14 I was somewhat perplexed as to what it meant.</p> <p>15 LADY JUSTICE GLOSTER: So it is quite dependent upon when 16 the event occurs that gives the right to a contractual 17 rate of interest, isn't it?</p> <p>18 MR DICKER: It is, but that is inherent in the nature of the 19 contractual right the creditor has. The judge is 20 essentially saying the rule gives you the greater of two 21 rates, one is the Judgments Act rate, one is essentially 22 the interest which you would have got under your 23 contract in respect of the same period.</p> <p>24 LORD JUSTICE BRIGGS: He called it two rates but it's really 25 three rates.</p> <p style="text-align: center;">Page 87</p>
<p>1 figure. Your second figure is --</p> <p>2 LADY JUSTICE GLOSTER: So if it is 8 per cent for half the 3 period and 10 per cent judgment rate for the second bit 4 of the period -- I know that doesn't apply in reality 5 but say that did happen -- do you time apportion it or 6 what?</p> <p>7 MR DICKER: In relation to Judgments Act rate that doesn't 8 apply, because the rules make it clear it is the 9 Judgments Act rate as at the date of the administration.</p> <p>10 LADY JUSTICE GLOSTER: Okay. So it is 8 per cent.</p> <p>11 MR DICKER: So it is just 8 per cent for the entire period.</p> <p>12 LADY JUSTICE GLOSTER: Yes.</p> <p>13 MR DICKER: That's your first sum.</p> <p>14 LADY JUSTICE GLOSTER: Yes.</p> <p>15 MR DICKER: The second sum you have to work out is how much 16 interest would the creditor be entitled to over the same 17 period.</p> <p>18 LORD JUSTICE BRIGGS: Is 0 per cent up to the contingency 19 occurs and let's say 215 per cent thereafter --</p> <p>20 MR DICKER: Correct.</p> <p>21 LORD JUSTICE BRIGGS: -- and then have to work out the 22 proportionate length of the two periods, presumably, to 23 see which you do better under.</p> <p>24 MR DICKER: Well, I think what the judge had in mind was you 25 simply work out essentially which gives you more</p> <p style="text-align: center;">Page 86</p>	<p>1 MR DICKER: I think he's taking contractual rate, as it 2 were, compendiously --</p> <p>3 LORD JUSTICE BRIGGS: Yes.</p> <p>4 MR DICKER: -- and no surprise in relation to that. Go back 5 to the example Wentworth gave in paragraph 179 of his 6 judgment, where Wentworth talks about a contractual 7 right to interest at a floating rate. That floating 8 rate may change over time. Wentworth said, "Of course 9 you're entitled to the floating rate from time to time" 10 and the judge doesn't seem to have --</p> <p>11 LORD JUSTICE BRIGGS: Yes. So why aren't you entitled to 12 nought and then a higher amount, as if it is a sort of 13 binary rate from time to time?</p> <p>14 LADY JUSTICE GLOSTER: Anyway, there's no appeal in relation 15 to this point --</p> <p>16 MR DICKER: No.</p> <p>17 LADY JUSTICE GLOSTER: -- and it's not an issue we're 18 deciding anyway?</p> <p>19 MR DICKER: No.</p> <p>20 LADY JUSTICE GLOSTER: Is that a good point to stop?</p> <p>21 MR DICKER: Yes.</p> <p>22 LADY JUSTICE GLOSTER: Not before 2.10 pm. 23 (1.02 pm) 24 (The short adjournment) 25 (2.10 pm)</p> <p style="text-align: center;">Page 88</p>

1 LADY JUSTICE GLOSTER: Yes, Mr Dicker.  
 2 MR DICKER: Before the short adjournment, we were dealing  
 3 with the judge's approach to assessing the greater of  
 4 Judgments Act rate and the rate applicable to the debt  
 5 apart from the administration.  
 6 I think you can see the effect of his judgment most  
 7 clearly from the order he made in relation to  
 8 supplemental issue 1(c). If you could take part A,  
 9 volume 2, tab 3, the relevant declaration in relation to  
 10 supplemental issue 1(c) is paragraph 2:  
 11 "In the case of when contractual interest  
 12 ... (Reading to the words)... to the date until the  
 13 contractual interest first starts to run."  
 14 And then this:  
 15 "In determining under Rule 2.89(9) ... (Reading to  
 16 the words)... before and after the date on which  
 17 contractual interest starts to run should be taken  
 18 together, not separately."  
 19 LORD JUSTICE BRIGGS: Yes.  
 20 MR DICKER: Obviously bear in mind my only point in relation  
 21 to all of this is York's argument is the logic of the  
 22 judge's decision in relation to item 12, issue 4, is  
 23 that no one can have any interest at the rate applicable  
 24 to the debt apart from the administration, if that  
 25 interest was only contingent as at the relevant date.

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1 LORD JUSTICE BRIGGS: Yes.  
 2 MR DICKER: As I say, there's no reflection of that anywhere  
 3 in the judge's judgment.  
 4 Now just thinking further over the short adjournment  
 5 about the logic in the judge's approach, we say that  
 6 logic in fact is straightforward. You're either treated  
 7 as if you had a judgment for the period, in which case  
 8 you get interest at the Judgments Act rate, or you rely  
 9 on your contractual rights, in which case you get  
 10 whatever you would have got as a matter of contract for  
 11 the entirety of that period, and neither of those  
 12 permit, as it were, cherry-picking.  
 13 LADY JUSTICE GLOSTER: Yes.  
 14 MR DICKER: And saying I can have the Judgments Act rate for  
 15 a bit, then I will revert to my contractual rights, then  
 16 back to the Judgments Act rate.  
 17 Now, I only had two remaining submissions. The  
 18 first is this: if I am wrong in everything I've said and  
 19 Hildyard J was wrong to distinguish between the two  
 20 situations, it obviously doesn't follow that York is  
 21 right. You then have a question: if both the  
 22 post-administration judgment which has been obtained and  
 23 the pre-administration contract are indistinguishable  
 24 from each other, do they both carry interest, or as York  
 25 argues, do neither of them carry interest?

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1 We say if one got to that question, the answer is  
 2 plain: both would carry interest for the simple reason  
 3 it is inconceivable that the legislature intended to  
 4 exclude a creditor with a pre-administration contract  
 5 entitled to interest, albeit on a contingency, from  
 6 receiving that interest for the period for which payment  
 7 of his debt has been delayed as a result of the  
 8 insolvency. That must be right.  
 9 If therefore the situation is, contrary to  
 10 Hildyard J, indistinguishable from a subsequently  
 11 obtained actual judgment, the result must be the same in  
 12 relation to that as well.  
 13 The last point is this, and I'm sure your Lordships  
 14 have it well in mind, all the submissions I have been  
 15 making on this issue so far have been on the premise  
 16 that David Richards J was right in relation to item 12,  
 17 issue 4. Obviously our case is he was wrong to hold  
 18 that a creditor who actually obtained a judgment  
 19 post-administration is not covered. In short, he was  
 20 wrong to say that 2.88(7) requires one to apply  
 21 a cut-off date as at the date of administration --  
 22 LADY JUSTICE GLOSTER: Sorry, I've got the wrong item  
 23 number. My note says, "All submissions on the premise  
 24 that David Richards J was right on item 12, issue 4".  
 25 Either my note is wrong or what you've told me --

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1 MR DICKER: I'm sorry --  
 2 LORD JUSTICE BRIGGS: It is item 11.  
 3 MR DICKER: It is item 11. It is my fault entirely, I got  
 4 the wrong number.  
 5 LADY JUSTICE GLOSTER: Thank you.  
 6 MR DICKER: In which case, what I was submitting was  
 7 probably rather confusing.  
 8 LADY JUSTICE GLOSTER: Yes. So he was right on item 11.  
 9 MR DICKER: 11.  
 10 LADY JUSTICE GLOSTER: Contrary to your submissions on that  
 11 appeal.  
 12 MR DICKER: Absolutely. So obviously our primary position  
 13 is he was wrong in relation to item 11.  
 14 LORD JUSTICE BRIGGS: Yes.  
 15 MR DICKER: Post-administration judgments are relevant for  
 16 the purposes of 2.88(9), and the simple reason is we say  
 17 2.88(9) requires what I referred to as a read across.  
 18 You look at what the rights of the creditor were for the  
 19 relevant period and the interest which he receives is  
 20 the interest that he would have received pursuant to  
 21 those rights.  
 22 Now, that obviously fits in with the rest of our  
 23 submissions, because essentially that is exactly the  
 24 same as what happened in liquidation between 1869 and  
 25 1986. Whether you call it remission to contractual

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<p>1 rights, whether one talks about payment in full or                  2 whether one talks as per Vaisey J(?) about treating                  3 a company as if it was solvent and always had been                  4 solvent. So that's what we say obviously so far as our                  5 primary case is concerned.                  6 Now, as my learned friend accepted, if we're right                  7 in relation to that, then obviously his argument in                  8 relation to supplemental issue 1(a) falls away and                  9 there's nothing to argue about. One doesn't have                  10 a situation in which the judge is right, actual                  11 judgments are excluded, and therefore no argument based                  12 on the logic that is said to flow from that.                  13 That's all in relation to supplemental issue 1(a).                  14 I'm not going to make any submissions in relation to                  15 item 13, which was the set-off issue my learned friend                  16 dealt with --                  17 LADY JUSTICE GLOSTER: Yes, supplemental issue 2.                  18 MR DICKER: Yes. We make a few observations, just so you                  19 have the reference on the transcript, in our reply                  20 skeleton, paragraphs 22 to 27, bundle A2, tab 20,                  21 page 10. But I have nothing to add to what is set                  22 out --                  23 LADY JUSTICE GLOSTER: But you are making those submissions?                  24 MR DICKER: Yes. And they are, you will see when you have                  25 a look at them, more by way of observation than positive</p> <p style="text-align: center;">Page 93</p>	<p>1 made the argument why there is no inconsistency. We                  2 support that, but it's in those paragraphs.                  3 LADY JUSTICE GLOSTER: Yes.                  4 MR ZACAROLI: So turning to the issue on which we do make                  5 substantive submissions, and that's set-off giving rise                  6 to currency conversion claims, item 13, supplemental                  7 issue 2.                  8 We say first of all that set-off has a substantive                  9 effect such that there is no possibility of a currency                  10 conversion claim thereafter, and the judge was right so                  11 to conclude, albeit his conclusion on that was a rather                  12 more passing conclusion. But he did say that and we say                  13 that's right. Secondly, the judge was right in any                  14 event on his timing point as to the retroactive effect                  15 of set-off.                  16 I think one or both of those arguments lead to the                  17 conclusion that taking my learned friend Mr Smith's                  18 example of a \$100 claim in favour of the creditor at the                  19 date of administration and a £75 liability towards the                  20 company in the other direction, assuming that the two                  21 equal exactly the same amount in sterling at the date of                  22 administration, which is his example, so the \$100 equals                  23 £75, we say set-off takes effect substantively as of                  24 that date with the result that the creditor's claim for                  25 \$100 is extinguished. It is a claim which existed in</p> <p style="text-align: center;">Page 95</p>
<p>1 submissions.                  2 LADY JUSTICE GLOSTER: Shall we draw any material                  3 distinction from that?                  4 MR DICKER: No, we're essentially not taking a position in                  5 relation to this. The argument is being advanced on the                  6 one hand by York and on the other hand by Wentworth,                  7 where we identify a few implications. But no more than                  8 that.                  9 So unless I can help you further, that was all                  10 I was going to say in relation to those.                  11 LADY JUSTICE GLOSTER: Thank you very much, Mr Dicker.                  12 Yes, Mr Zacaroli.                  13 Submissions by MR ZACAROLI                  14 MR ZACAROLI: So far as supplemental issue 1(a) is                  15 concerned, Wentworth's only contribution is to point out                  16 that there is no inconsistency between David Richards J                  17 in relation to item 11, issue 4, and Hildyard J on                  18 supplemental issue 1(a). We explain why that is briefly                  19 in our reply skeleton, paragraphs 1 to 11, and that can                  20 be found at bundle A, part 2, at tab 21.                  21 LORD JUSTICE PATTEN: Sorry, give me the reference again.                  22 Where is the skeleton?                  23 MR ZACAROLI: It's at bundle A, part 2 --                  24 LORD JUSTICE PATTEN: Yes.                  25 MR ZACAROLI: -- at tab 21. My learned friend Mr Dicker</p> <p style="text-align: center;">Page 94</p>	<p>1 dollars but it is converted at that point into sterling                  2 and it is entirely extinguished. So there is no                  3 possibility of the creditor returning to say, "Well,                  4 I didn't get paid dollars that I'm entitled to".                  5 I will come on to develop that point, but that is                  6 essentially what we say is the substantive effect of                  7 set-off. It takes away the underlying contractual right                  8 to be paid in dollars to the extent it has been set off.                  9 Two references. The first is Stein v Blake. You've                  10 been taken to this authority, but can I just show you                  11 the relevant passage we rely upon. It is bundle 2 of                  12 the authorities, tab 62. You were shown the passage, it                  13 is page 255 in the judgment of Lord Hoffmann under the                  14 heading "8" at the top "Do the causes of action                  15 survive?" He says in the clearest terms in that first                  16 paragraph that they do not; they are extinguished for                  17 the purposes of set-off. (Pause).                  18 For my Lords' note, although I won't take you to the                  19 case, he makes the same point in BCCI (No 8). We                  20 needn't turn it up because it is the same point, just                  21 made more shortly. It is at bundle 2, tab 63,                  22 page 223B.                  23 LADY JUSTICE GLOSTER: 266?                  24 LORD JUSTICE BRIGGS: 223.                  25 MR ZACAROLI: So it is bundle 2, tab 63, at page 223B.</p> <p style="text-align: center;">Page 96</p>



<p>1 LORD JUSTICE BRIGGS: Right.</p> <p>2 LORD JUSTICE PATTEN: When he says:</p> <p>3 "It is replaced by a claim to a net balance, the</p> <p>4 original chose in action ceases to exist replaced by a</p> <p>5 claim to a net balance ..."</p> <p>6 What is the claim to a net balance in terms of</p> <p>7 analysing what is the legal basis of the cause of</p> <p>8 action? It's not the original contractual claim. Is</p> <p>9 that what he's saying, it's a statutory right? What is</p> <p>10 it?</p> <p>11 MR ZACAROLI: I think he is. I think he's saying that both</p> <p>12 causes of action disappear and you're left with simply</p> <p>13 a number that is payable one way or the other as</p> <p>14 a result of the operation of the statutory scheme, which</p> <p>15 has a substantive effect.</p> <p>16 LADY JUSTICE GLOSTER: Why should it be a different cause of</p> <p>17 action? Why is it just the residue of the old one, and</p> <p>18 does it matter anyway?</p> <p>19 MR ZACAROLI: Well, there was a separate point raised rather</p> <p>20 in passing, because it's not an issue raised by any of</p> <p>21 the directions sought, which is: because of the effect</p> <p>22 of statutory set-off -- there's a conversion -- sorry,</p> <p>23 does a set-off between, let's say, a \$1 claim owed by</p> <p>24 the creditor to the company -- or even just a £1 claim,</p> <p>25 a very small claim owed by the creditor to the</p> <p style="text-align: center;">Page 97</p>	<p>1 simple one where there is a total extinction because of</p> <p>2 the equality of the amounts at the date of the</p> <p>3 administration. As I say, there was another point we</p> <p>4 were suggesting, although it was not an issue to be</p> <p>5 determined, which is what happens if you have a much</p> <p>6 larger claim owed to the creditor, what happens to the</p> <p>7 remainder of it, which my Lady's question would then be</p> <p>8 highly relevant. It doesn't matter for the purposes of</p> <p>9 the argument we are running, which is no currency</p> <p>10 conversion claim is created by set-off.</p> <p>11 The other reference is in this court's judgment in</p> <p>12 the Waterfall I appeal and that can be found in bundle 3</p> <p>13 at tab 101.</p> <p>14 LADY JUSTICE GLOSTER: Page?</p> <p>15 MR ZACAROLI: It is tab 101 and first of all in the judgment</p> <p>16 of Lewison LJ at paragraph 94. The argument he is</p> <p>17 dealing with is the question of whether the statutory</p> <p>18 scheme has a substantive effect and therefore can't give</p> <p>19 rise to currency conversion claims. At paragraph 94, he</p> <p>20 says:</p> <p>21 "Accordingly, foreign currency creditors argue their</p> <p>22 foreign currency debts remain outstanding except to the</p> <p>23 extent they have been discharged by a payment in</p> <p>24 sterling at the exchange rate prevailing at the date of</p> <p>25 conversion. To paraphrase Lord Hoffmann, this argument</p> <p style="text-align: center;">Page 99</p>
<p>1 company -- have the effect when it is offset against</p> <p>2 an enormous claim in dollars in favour of the creditor,</p> <p>3 does that have the effect of meaning there can be no</p> <p>4 currency conversion claim at all for the creditor, even</p> <p>5 in relation to the \$1 billion which isn't set off?</p> <p>6 We're not dealing with that here. I'm not</p> <p>7 suggesting that for the purpose of this argument. I'm</p> <p>8 suggesting for the purposes of the set-off, that which</p> <p>9 is set-off, there is a substantive set-off in the sense</p> <p>10 that the underlying cause of action to that extent is</p> <p>11 extinguished. That's absolutely clear when one sees</p> <p>12 Kaupthing, because they make that clear even there.</p> <p>13 LORD JUSTICE BRIGGS: So I think you're saying that say</p> <p>14 you've got a \$100 claim on the cut-off date set off in</p> <p>15 full by a £70 claim, even though the notice of</p> <p>16 distribution the set-off date may occur three years</p> <p>17 later, let's say, by which time the currencies have a</p> <p>18 very different relation to each other, that £70 still</p> <p>19 sets off the whole \$100 claim.</p> <p>20 MR ZACAROLI: Yes.</p> <p>21 LORD JUSTICE BRIGGS: The position would be otherwise if was</p> <p>22 a \$200 claim because it might be you would still be left</p> <p>23 with \$100 and there may be currency conversion</p> <p>24 implications arising out of that.</p> <p>25 MR ZACAROLI: Exactly. But the example I chose was the very</p> <p style="text-align: center;">Page 98</p>	<p>1 was skilfully deployed but I think it is wrong.</p> <p>2 ...(Reading to the words)... substantive effect on the</p> <p>3 underlying debt."</p> <p>4 So he is referring there to part of the statutory</p> <p>5 scheme that is set off, having a substantive effect</p> <p>6 contrary to the argument being advanced.</p> <p>7 My Lord Lord Justice Briggs made similar comments at</p> <p>8 paragraphs 150, 152 and 153 of the judgment.</p> <p>9 Again, he is identifying a different aspect of the</p> <p>10 statutory scheme to the rule about currency conversion</p> <p>11 and saying that it has substantive effect. So at</p> <p>12 paragraph 150, the second sentence:</p> <p>13 "More generally, the regime for insolvency set-off</p> <p>14 in Rule 4.90 ...(Reading to the words)... which does</p> <p>15 have a substantive permanent effect and is couched in</p> <p>16 terms which make no mention of any limited purpose."</p> <p>17 And he repeats the same point at paragraph 152 in</p> <p>18 relation to set-off:</p> <p>19 "There is to my mind no logical conclusion and no</p> <p>20 reason why a provision for conversion into sterling of</p> <p>21 a foreign currency amount by reference to a historical</p> <p>22 date ...(Reading to the words)... except only to the</p> <p>23 extent that set-off is involved."</p> <p>24 And then 153 --</p> <p>25 LORD JUSTICE BRIGGS: Well, there's an assumption there in</p> <p style="text-align: center;">Page 100</p>

<p>1 the next sentence, which is that the set-off is                  2 self-executing at the moment of conversion, ie that it                  3 happens at the cut-off date. I'm not sure whether there                  4 was any argument about that in Waterfall I.                  5 MR ZACAROLI: There wasn't. To be fair to my Lord, there                  6 wasn't any.                  7 LORD JUSTICE BRIGGS: I don't think there was.                  8 MR ZACAROLI: No. That's a fair point, and I'll deal with                  9 the --                  10 LORD JUSTICE BRIGGS: I know, but that might need to be                  11 borne in mind.                  12 MR ZACAROLI: Yes. Then my Lord makes a similar point in                  13 153:                  14 "The potential for injustice caused by the permanent                  15 conversion of a foreign currency debt into sterling is                  16 entirely the result of the inevitable gap in time                  17 between the conversion date and the payment of dividends                  18 during which the risk of depreciation ...(Reading to the                  19 words)... to all proven creditors."                  20 So, again, excluding set-off from that concept.                  21 So our first point is it is of substantive effect.                  22 Second, there's nothing in the Kaupthing decision of                  23 either Norris J or the Court of Appeal which casts doubt                  24 on that. In both cases, the court was careful to                  25 exclude from its discussion as to the consequences of</p> <p style="text-align: center;">Page 101</p>	<p>1 that that bit which has been set off is extinguished in                  2 the insolvency set-off.                  3 The Court of Appeal make a similar point at the next                  4 tab, tab 86, at paragraph 36 in the judgment of                  5 Etherton LJ:                  6 "I do not accept the principle in Stein v Blake that                  7 on the taking of the account for the purposes of                  8 insolvency set-off the original causes of action                  9 extinguished has any relevance to the present issue."                  10 And then in the next paragraph, he deals with:                  11 "Mr Fisher's reliance in the present context on the                  12 Stein v Blake analysis ...(Reading to the words)... that                  13 the judge's interpretation has such extraordinarily                  14 damaging results."                  15 The next sentence:                  16 "The judge however came to the decision on interest                  17 ...(Reading to the words)... save to the extent that it                  18 has been extinguished by the insolvency set-off."                  19 What is clear from Kaupthing is they are not                  20 suggesting that Lord Hoffmann was wrong in Stein v Blake                  21 or departing from it anyway. All they are dealing with                  22 is consequences on the outward claim left by the company                  23 against the creditor. And in relation to Rule 2.105 and                  24 the discount in question in relation to future debts,                  25 they there are really reaching a decision as a matter of</p> <p style="text-align: center;">Page 103</p>
<p>1 set-off leaving the claim by the company against the                  2 creditor unaffected for the remainder. He was careful                  3 to leave out of that discussion that which was                  4 extinguished by way of set-off. And in the decision of                  5 Norris J, my Lords were taken to paragraph 26. This is                  6 bundle 3, tab 85.                  7 LADY JUSTICE GLOSTER: Yes.                  8 MR ZACAROLI: Remember this case was only concerned with the                  9 consequences of set-off on the remainder of the outward                  10 claim by the company against the creditor, and Norris J                  11 at 26 was dealing with the concept of interest on that                  12 claim. My Lords were cited this passage just below                  13 letter E:                  14 "The balance is not a newly created liability --"                  15 LADY JUSTICE GLOSTER: Hang on. In 26, I don't seem to have                  16 letters on mine.                  17 MR ZACAROLI: Paragraph 26, it is just over halfway through.                  18 LADY JUSTICE GLOSTER: Yes.                  19 MR ZACAROLI: The sentence begins, "The balance is not                  20 a newly created liability ..."                  21 LADY JUSTICE GLOSTER: Yes, I have it.                  22 MR ZACAROLI: "... the novel product of a statutory process.                  23 It is the balance due under a contract, the remainder of                  24 which has been extinguished."                  25 So even in the Kaupthing decision, he's accepting</p> <p style="text-align: center;">Page 102</p>	<p>1 construction, and as at the end of paragraph 36 shows:                  2 "Stein v Blake has nothing to do with it because the                  3 question is whether as a matter of proper interpretation                  4 of Rule 2.85(7) and (8), the discounted mechanism in                  5 Rule 2.105 applies further than is necessary for the                  6 purpose of establishing the amount of distribution to be                  7 made to the creditor."                  8 It is simply looking at the outward claim and the                  9 remainder of it after the application of set-off. It                  10 doesn't do anything to damage or take away the                  11 substantive effect for the purposes -- to the extent                  12 that there has actually been set-off.                  13 Now, our third broad point on this is that if York                  14 were right in its analysis, it must follow as a matter                  15 of logic that where the company has a claim against the                  16 creditor in a foreign currency, the potential at least                  17 for a currency conversion claim exists outwardly against                  18 the creditor.                  19 The starting point is a currency conversion claim                  20 exists because per the Court of Appeal in Waterfall I,                  21 the conversion into sterling is for the limited purposes                  22 of proof only. If we can pick up Rule 2.185,                  23 Rule 2.85(6) incorporates a series of rules said to                  24 apply for the purposes of this rule in relation to any                  25 sums due to the company. One of those rules is</p> <p style="text-align: center;">Page 104</p>

<p>1 Rule 2.86 in relation to claims payable otherwise than 2 in sterling. 3 So the argument would be that the incorporation of 4 the currency conversion in relation to outward debts is 5 for the limited purpose of set-off. It is only for the 6 purpose of this rule. In the same way, the argument 7 would go on my learned friend's case, currency 8 conversion for the purposes of the inward claims is also 9 only for the purposes of set-off and no more substantive 10 than that. But what is sauce for the goose must be 11 sauce for the gander, so if set-off is not substantive 12 so as to destroy the underlying dollar claim on the 13 inward claim, nor can it be substantive in relation to 14 the outward claim. It must follow as night follows day, 15 because both the incorporation of currency conversion 16 rule is in both ways, in both cases, for the limited 17 purpose of set-off only, leaving the substantive claims 18 untouched. 19 Now we don't for a minute suggest that there is 20 a currency conversion claim in favour of the company 21 against the creditor when the company was owed, let's 22 say, \$100 and the set-off worked at the date of account 23 three years later in a way which meant that it got less 24 than \$100 when converted at that date. We don't suggest 25 there is a currency conversion claim there, but we show</p> <p style="text-align: center;">Page 105</p>	<p>1 just a claim against the creditor. 2 So the very fact that such a claim would exist 3 wholly undermines the finality intended by the set-off 4 rule, and the logic we say is that therefore a claim 5 exists in neither direction. Set-off is once and for 6 all of the underlying contractual entitlement to dollars 7 or yen or euro or whatever it might be, both ways. 8 It cannot be complained against us at this point, 9 "The currency conversion claims are a one-way bet and 10 therefore there's no such thing as a claim by the 11 company against the creditor". That's true only when it 12 is talking about the creditor's rights against the 13 company. So if the creditor is entitled to be paid 14 \$100, if through the statutory process the creditor gets 15 paid in fact \$120 because the conversion rates go the 16 other way, there is no clawback claim against the 17 creditor in respect of that. But that's because the 18 only claim we're talking about there is the creditor's 19 claim against the company. 20 Here we're talking about something completely 21 different. That is a contractual right the company has 22 under its separate debt with the creditor to be paid in 23 a foreign currency. And if it doesn't get paid its 24 foreign currency, there is no reason whatsoever to say 25 that it can't claim the full amount of the foreign</p> <p style="text-align: center;">Page 107</p>
<p>1 that the fact that one would inexorably have to exist if 2 York was right would show that York is wrong, and in 3 fact to allow such a claim would wholly undermine the 4 purpose of the set-off rule, which is to create finality 5 so far as that part of the debts each way is concerned. 6 It would mean that there would be some second round 7 of proofs both ways after set-off had occurred. So the 8 inward claim on my learned friend's case if set-off 9 resulted because of the mismatch in dates resulted in 10 some dollars still outstanding to the creditor, that 11 creditor has a claim for that. Equally, the company has 12 a claim on its contract against the creditor for 13 a difference, a shortfall as a result of operation of 14 set-off. Those would have to be dealt with. 15 Now, it is not an answer to this point that the 16 creditor's claim is a non-provable claim and therefore 17 is just dealt with at the end of the process. That 18 can't be an answer, because the company's claim is not 19 in any sense of the concept non-provable. It's just 20 a claim. 21 So the company has a claim for a currency shortfall 22 because of the operation of set-off in relation to its 23 claim against the creditor, which simply has to be got 24 in. It doesn't wait until any period of time has 25 elapsed, until some further distribution process. It's</p> <p style="text-align: center;">Page 106</p>	<p>1 currency debt. So we say set-off has to be substantive 2 in that sense, otherwise it creates a situation which 3 undermines wholly the purposes of the set-off rule. 4 We say the judge was also right on the timing point 5 dealt with at paragraphs 39 to 45 of the supplemental 6 judgment. In essence, there are two dates to keep in 7 mind. The first is the account date, that is the date 8 as at which the account is taken, and that arises under 9 2.85(3), "an account shall be taken as at the date of 10 the notice, notice of distribution". 11 LORD JUSTICE BRIGGS: You don't like the set-off date. You 12 think that prejudices the argument, do you? It is just 13 that Lightman &amp; Moss very conveniently say there are two 14 dates; cut-off date and set-off date. 15 MR ZACAROLI: Well, it does prejudice the question. 16 LORD JUSTICE BRIGGS: Quite, so you don't want to use 17 set-off date. 18 MR ZACAROLI: I think the account date is a perfectly 19 acceptable neutral term for it. 20 That's the first date. The other relevant date in 21 an administration is the date of administration. 22 I eschew the word "cut-off date" as well because 23 actually cut-off is prior to administration. Various 24 claims are for cut-off and set-off prior to 25 administration and liquidation. You can't bring into</p> <p style="text-align: center;">Page 108</p>

<p>1 account claims he had acquired in the period when he                  2 knew a petition was presented, for example. So the                  3 cut-off date in fact goes a little bit before that.                  4 This is terminology I prefer to use: account date and                  5 date of administration. Those are the two dates.                  6 The account date is relevant because that's the date                  7 as of which you take into account debts due from one                  8 party to the other. Importantly, therefore, it is only                  9 debts which are still due from one party to the other                  10 that can be brought into the set-off account at all. So                  11 if a debt has been paid by the administrators consistent                  12 with the purposes of administration before that date, it                  13 simply doesn't form part of this regime whatsoever. It                  14 is not a debt which is then due and therefore isn't                  15 taken into account.                  16 But all debts which are taken into account are taken                  17 into account are taken into account for the purposes of                  18 set-off using their valuation and other attributes                  19 relevant to them as at the date of administration. It                  20 is wholly retrospective, apart from the question: which                  21 debts do you take into account? You might say --                  22 LORD JUSTICE BRIGGS: So you would answer my question to                  23 Mr Smith when I said, "Was there anything other than                  24 debts paid by the account date which affects the                  25 calculation?" You would say no.</p> <p style="text-align: center;">Page 109</p>	<p>1 inconsistent with the propositions I've just put forward                  2 now. And in any event he was dealing with a completely                  3 different issue, the operation of the anti-deprivation                  4 principle or the pari passu principle, if those two                  5 things are different, in the context of                  6 an administration, and was saying that the pari passu                  7 principle for that purpose cuts in at the point of the                  8 notice of distribution.                  9 At paragraph 90 of his judgment in that case,                  10 which -- I am just going to find the reference.                  11 Bundle 3, tab 95. (Pause).                  12 At paragraph 90, you were shown this passage, but                  13 what he says there:                  14 "It is in my judgment significant that insolvency                  15 set-off applies in an administration to debts as at the                  16 date of such notice and not earlier."                  17 He indicates that it's that date and not before that                  18 the pari passu regime is to operate. Actually, what                  19 he's talking about are debts in existence at that date.                  20 It operates in relation to debts. We agree. To                  21 identify what debts are brought into account for the                  22 purposes of set-off, you have to look at the debts as at                  23 the date of the notice for the reasons I've already                  24 given.                  25 LORD JUSTICE BRIGGS: I'm sorry, I got the paragraph wrong.</p> <p style="text-align: center;">Page 111</p>
<p>1 MR ZACAROLI: I would say no, obviously excluding                  2 a contractual set-off. But that's a form of payment,                  3 and that's --                  4 LORD JUSTICE BRIGGS: Yes.                  5 MR ZACAROLI: If there has been an exercise of contractual                  6 set-off in the interim period, neither debt continues,                  7 there's just whatever is left after that contractual                  8 set-off.                  9 But everything else points you back to the date of                  10 administration. Thus, for example, the conversion of                  11 both inward and outward claims is to be made at the date                  12 of administration, and that's two ways.                  13 Secondly, when you're discounting a future debt for                  14 its maturity for the purposes of proof, that's done                  15 under Rule 2.105 in both directions, discounting back to                  16 the date of administration, no other date.                  17 Thirdly, statutory interest will run on the balance                  18 which is left after the set-off has been operated from                  19 the date of administration. So everything goes back to                  20 the date of administration. The judge was entirely                  21 right, therefore, to say that it is retrospective in                  22 effect as a matter of substance.                  23 To the extent that the learned judge made some other                  24 comments in relation to this in the football creditors                  25 case, we say actually what he said there was not</p> <p style="text-align: center;">Page 110</p>	<p>1 MR ZACAROLI: 90.                  2 LORD JUSTICE BRIGGS: Thank you. (Pause).                  3 MR ZACAROLI: The judge noted York's argument in relation to                  4 currency conversion claims where there is a foreign                  5 currency claim in the same currency owed both to and by                  6 the company. So they gave an example of the company                  7 owes \$100 and is owed \$100 by the same creditor, and on                  8 their case there would be a currency conversion claim                  9 there in favour of the creditor, leaving aside my point                  10 that if that is true, there must be a currency                  11 conversion claim in the other direction in exactly the                  12 same amount.                  13 But leaving that aside, that just shows, we submit,                  14 the absurdity of the position that they advance. As the                  15 judge himself concluded at paragraph 47. In York's                  16 skeleton, I think I've probably dealt with the substance                  17 of this point, but just to show where it arises, York's                  18 skeleton, which is volume A, part 2, at tab 16,                  19 paragraph 45, they identify practical problems which                  20 they say have given rise to by our case. It's really                  21 the set-off point that I've already mentioned. They say                  22 if there is a contractual set-off which takes place                  23 between the date of administration and the date of                  24 account, then it gives rise to problems.                  25 Well, it doesn't, and it doesn't because if there</p> <p style="text-align: center;">Page 112</p>

<p>1 has been a contractual set-off, that means there is no                  2 longer a debt owed from A to B and from B to A. There                  3 is simply a net balance, and that is the only debt which                  4 is brought into account for the purposes of set-off at                  5 the account date. It is like payment in the interim                  6 period.                  7 If one steps back for a moment and asks: why does it                  8 make sense as we say it does that there is no currency                  9 conversion claim created by the operation of set-off?                  10 We say it's because they are very different things;                  11 payment and discharge by way of set-off. A currency                  12 conversion claim arises because through the statutory                  13 scheme, pounds, sterling, are actually handed to the                  14 creditor, which at the date they are handed are worth                  15 less in dollars than they were at the date of the                  16 administration. That's how a currency conversion claim                  17 arises.                  18 We say it is fallacious however to equate the                  19 payment of money on a particular date with a set-off                  20 account being taken as of a particular date,                  21 particularly when the substantive effect of set-off                  22 actually always takes place at the date of                  23 administration when the currencies are obviously the                  24 same as they -- there's no difference between currency                  25 claims at that date.</p> <p style="text-align: center;">Page 113</p>	<p>1 So why land on that date and say that's if you were paid                  2 sterling in a particular sum that date? There's no                  3 logical reason why you'd pick that date.                  4 What they are really complaining about is that                  5 because the statutory scheme identifies set-off taking                  6 as of the account date, in their world it is the account                  7 date at which set-off occurs, they say because the                  8 statutory scheme identifies that date for that purpose,                  9 it can give rise to currency differentials. True, it                  10 can, but the choice of any date would produce                  11 a different currency conversion claim either way. In                  12 a sense, it is irrelevant what date you choose for that                  13 account purposes. Everything goes back substantively to                  14 the date of administration and you cannot equate the                  15 occurrence of the account date as being paid actual                  16 sterling pounds that date, which in your pocket are                  17 worth less than dollars.                  18 So that's it in short. It is both substantive in                  19 effect and it takes effect as at the date of                  20 administration. For those two reasons, there is no                  21 possibility of a currency conversion claim arising from                  22 the operation of set-off.                  23 Unless I can assist further, those are our                  24 submissions on that issue.                  25 LADY JUSTICE GLOSTER: Thank you.</p> <p style="text-align: center;">Page 115</p>
<p>1 Contrast the liquidation. The liquidation is only                  2 one date, as everyone accepts. There is no possibility                  3 of currency conversion claims arising in the                  4 liquidation, the account is taken as of the date of                  5 liquidation. But we all know that no account is                  6 actually taken at that date. The process of working out                  7 what is owed to the creditor and what is owed by the                  8 creditor can take a long time. It could take years. So                  9 the creditor only knows that there is set-off in                  10 a certain sum giving rise to a particular amount payable                  11 one way or the other sometime later. No suggestion                  12 whatsoever though because of that that there's                  13 a currency conversion claim.                  14 We say in administration, there's no real                  15 difference. Yes, there is a date at which the account                  16 has to be taken, and that's for the practical reason                  17 that in an administration, there is a possibility of                  18 trading before you get to distribution, therefore you                  19 have to have a different account date to the date of the                  20 liquidation or the date in liquidation.                  21 But the time as of which the account is taken is we                  22 say something of a red herring, because the reality is                  23 that whenever you take that account is going to be not                  24 the date at which you know you've got a claim. It's                  25 going to be some time in the past, like in liquidation.</p> <p style="text-align: center;">Page 114</p>	<p>1 Yes, Mr Bayfield.                  2 Submissions by MR BAYFIELD                  3 MR BAYFIELD: My Lady, starting with supplemental                  4 issue 1(a), as we predicted might happen in paragraph 9                  5 of our skeleton argument, Mr Dicker for the SCG has now                  6 covered the ground that was set out in paragraphs 11 to                  7 29 of the skeleton argument, and I needn't therefore                  8 deal with them.                  9 LADY JUSTICE GLOSTER: Yes.                  10 MR BAYFIELD: Can I then very briefly indeed just take my                  11 Lady and my Lords back to the supplemental issues                  12 judgment on 1(c) just to make one point that I'm not                  13 sure has come out quite as clearly as it might have done                  14 so far.                  15 So we're into tab 1 of the second volume of the                  16 part A core bundle, and it is paragraph 31 of the                  17 judgment that I just wanted to show to you. Because                  18 what that makes clear is neither Mr Dicker nor Mr Smith                  19 can actually make much headway, if any, with the judge's                  20 conclusion on supplemental issue 1(c). Because as one                  21 sees from the second half of the paragraph, he                  22 approached supplemental issue 1(c) on an assumption, but                  23 no more than that, that York's position on supplemental                  24 issue 1(a) was wrong; and therefore supplemental                  25 issue 1(c) is addressed on a particular hypothesis, and</p> <p style="text-align: center;">Page 116</p>

1 therefore really can't assist the court in relation to  
2 the proper answer to supplemental issue 1(a).  
3 LADY JUSTICE GLOSTER: What paragraph are you on?  
4 MR BAYFIELD: 31. It's the final sentence of 31.  
5 LADY JUSTICE GLOSTER: Yes. Yes, thank you.  
6 MR BAYFIELD: The administrators' position in relation to  
7 supplemental issue 2 was slightly more complicated,  
8 because we straddle the positions adopted by York on the  
9 one hand and Wentworth on the other.  
10 In relation to the judge's primary reasoning on  
11 supplemental --  
12 LADY JUSTICE GLOSTER: Why do you care as long as you've got  
13 an answer?  
14 MR BAYFIELD: My Lady, we don't. I wasn't going to make any  
15 further submissions. I was just going to identify what  
16 in fact the position was that was adopted, because at  
17 the time, firstly, in relation to the retrospective  
18 effect point, the authorities weren't before the court  
19 and we thought it important that the court should see  
20 what the judge had said in the Football Creditors Rule  
21 case and what Lightman & Moss have said. And in  
22 relation to the substantive effect of set-off point at  
23 the stage we filed our written submissions, Wentworth  
24 had not yet filed theirs. Mr Zacaroli has covered all  
25 of that ground and there's nothing I need to say about

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1 that.  
2 LADY JUSTICE GLOSTER: Very well. Thank you very much.  
3 Yes, Mr Smith.  
4 Submissions in reply by MR SMITH  
5 MR SMITH: I am grateful. I will be very brief in reply.  
6 Perhaps I could start with supplemental issue 2, given  
7 we've just been discussing that with submissions with  
8 Mr Zacaroli.  
9 In our submission, the key to this point is the  
10 timing point, and it is most helpful, we would suggest,  
11 to start with that. So far as that's concerned, one  
12 starts with the language in Rule 2.85(3), and we suggest  
13 it is clear from that that the set-off takes effect as  
14 at the date of the account, not at the date of  
15 commencement of the administration.  
16 So one is in a position where set-off takes effect  
17 at that date. There's no language in the rule which  
18 provides for the set-off to have retrospective effect,  
19 and there's no reason why it has to have retrospective  
20 effect.  
21 Indeed, if it did have retrospective effect, there  
22 would be, in our submission, a serious problem because  
23 one would then be in the realms of saying that the pari  
24 passu principle that insolvency set-off takes effect as  
25 from the date of administration, and the effect of that

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1 would be to exclude the valid operation of all other  
2 forms of set-off. That's the very reason why, as we saw  
3 from Lightman & Moss this morning, it was decided that  
4 insolvency set-off shouldn't take effect at that date,  
5 it does take effect as at the date of the notice.  
6 Now assuming that's right, then one then moves to  
7 the second point which is put forward by Wentworth,  
8 which is the substantive point in the argument that  
9 insolvency set-off has a substantive effect.  
10 We'd suggest there has been a slight change in  
11 Wentworth's position on this point, and if one looks at  
12 their skeleton argument, paragraph 13, it was certainly  
13 put in the skeleton on the basis that the effect of  
14 an insolvency set-off is to extinguish the original  
15 causes of action and to substitute a new cause of action  
16 in the nature of a statutory claim to the net balance.  
17 Now in our submission, that was and is  
18 unsustainable. Mr Zacaroli I think has rowed back from  
19 that in his oral submissions. He now says that  
20 insolvency set-off has substantive effect to the extent  
21 of the set-off.  
22 So if we just go back to the example we gave in our  
23 skeleton argument behind divider 16, bundle A2, it is  
24 paragraph 49. As I understand it, what in effect he's  
25 now saying is insolvency set-off takes effect as at the

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1 date of administration and it has substantive effect as  
2 at that date. So on our example, £75 would discharge  
3 entirely \$100.  
4 That's basically what he's saying, as I understand  
5 it. But in my submission, that's entirely bound up with  
6 his submission on the timing of the set-off, because his  
7 submission there is dependent on showing that set-off  
8 took effect as at the date of the administration. Now,  
9 if one proceeds on the basis he's wrong about that and  
10 set-off takes effect, as we suggest it does, as at the  
11 date of the notice, then there's no basis for his  
12 submission at all. You value the set-off as at the date  
13 it is actually received by the creditor, which is the  
14 date of the notice, and our submission in paragraph 49  
15 holds good, which is why, as I said at the start of  
16 these reply submissions, it really all depends on the  
17 timing point in relation to the set-off and who is wrong  
18 and who is right about that.  
19 The other point he made was about the possibility of  
20 a claim by the company against the creditor for a  
21 currency conversion claim running in the other  
22 direction. In our submission, the short answer to that  
23 is that the Court of Appeal in Waterfall I held there  
24 wasn't such a claim. We deal with this in our skeleton  
25 argument at paragraphs 12 to 18, bundle A2/16/4. In our

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1 submission, that logic applies equally where the  
 2 payments are received by way of set-off rather than by  
 3 way of dividend. So that's all I would say about  
 4 supplemental issue 2.  
 5 So far as supplemental issue 1(c) is concerned in  
 6 reply to Mr Dicker, the first point which Mr Dicker made  
 7 was to suggest that the starting point is that Rule 2.88  
 8 is intended to compensate the creditor for the rates  
 9 applicable to the debt throughout the relevant period.  
 10 He says basically the purpose of the rule is you look at  
 11 the creditors' entitlements as they develop following  
 12 the commencement of the administration, and the purpose  
 13 of Rule 2.88 is to compensate the creditor for those  
 14 entitlements.  
 15 We respectfully suggest on the hypothesis  
 16 David Richards J is right, that can't be the relevant  
 17 principle, because the logic there would apply equally  
 18 to the case of a foreign judgment creditor who  
 19 subsequently obtains a foreign judgment  
 20 post-administration. If you're looking at how his  
 21 rights develop throughout the administration, he  
 22 subsequently obtained a judgment, and on that logic  
 23 there's no reason why he should not be compensated for  
 24 the interest rate applicable to that judgment once he's  
 25 obtained it.

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1 The second point Mr Dicker made was that  
 2 unsurprisingly Hildyard J was right to draw the  
 3 distinction he did between creditors who had obtained  
 4 a foreign judgment post-administration and those who had  
 5 only obtained a close-out amount. But we would  
 6 respectfully point out really it's clear from his  
 7 submissions that the distinction he seeks to draw and  
 8 which the judge seeks to draw is not by any means  
 9 a clear-cut one.  
 10 I think it is accepted that where a creditor has  
 11 actually commenced proceedings for a foreign judgment  
 12 pre-administration, it is accepted he's essentially in  
 13 the same position as a close-out creditor, and I think  
 14 Mr Dicker conceded that. It is also difficult, we  
 15 suggest, to see why a creditor who subsequently obtains  
 16 an arbitration award post-administration pursuant to an  
 17 existing contract is in any different position at all.  
 18 We suggest that highlights the fact that this is  
 19 a difficult and unsatisfactory distinction, and the more  
 20 logical and workable distinction, which must have been  
 21 intended by the draftsman, is simply between rights to  
 22 interest which have accrued at the date of the  
 23 administration and rights which are merely contingent.  
 24 So those are the only points we would make in  
 25 relation to supplemental issue 1(c). Unless I can

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1 assist you further, that's all we have to say.  
 2 LADY JUSTICE GLOSTER: No. Thank you very much.  
 3 MR ZACAROLI: My Lords, my Lady, that brings us to an end of  
 4 part A, Waterfall II A, that is.  
 5 LADY JUSTICE GLOSTER: Yes. Shall we have the break for ten  
 6 minutes for the shorthand writers and then we'll move  
 7 on.  
 8 Is everybody else leaving?  
 9 MR SMITH: Well, I was just going to raise whether --  
 10 LADY JUSTICE GLOSTER: Don't feel you've got to stay for us.  
 11 MR SMITH: No. If the court is content, I would ask to be  
 12 released because we have no active part in relation to  
 13 part B at all.  
 14 LADY JUSTICE GLOSTER: No, by all means.  
 15 MR SMITH: I am grateful. Thank you.  
 16 LADY JUSTICE GLOSTER: And anybody else who wants to go, I'm  
 17 sure. We'll see the rest of you at 3.15 pm.  
 18 (3.05 pm)  
 19 (A short break)  
 20 (3.21 pm)  
 21 Submissions by MR ZACAROLI  
 22 LADY JUSTICE GLOSTER: Yes, Mr Zacaroli.  
 23 MR ZACAROLI: There's a very significant change of gears now  
 24 dealing with part B, where we're solely concerned with  
 25 the effect of agreements reached between the

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1 administrators and various creditors on two things: on  
 2 currency conversion claims and on non-provable claims  
 3 for interest.  
 4 Both parts assume that such claims exist. So for  
 5 the currency conversion claims, we're assuming that the  
 6 Supreme Court agrees with the Court of Appeal in  
 7 Waterfall I, and so far as non-provable claims to  
 8 interest are concerned, apart from one corner which  
 9 we'll deal with, we're assuming the judge was wrong on  
 10 that issue, because he said no such claims exist other  
 11 than one corner of them.  
 12 The proposed structure we are going to follow,  
 13 subject to my Lords, is to deal separately with  
 14 construction on the one hand and with the rule in  
 15 Ex parte James in paragraph 74 on other hand.  
 16 LORD JUSTICE BRIGGS: You have to approach Ex parte James on  
 17 the assumption that you win on construction, don't you?  
 18 MR ZACAROLI: Exactly, yes.  
 19 LORD JUSTICE BRIGGS: Otherwise if you lose on construction,  
 20 you'll never get there.  
 21 MR ZACAROLI: Yes. But it seemed to me that we were going  
 22 deal with whole of the construction arguments first and  
 23 then the whole of Ex parte James afterwards.  
 24 LADY JUSTICE GLOSTER: So it is really the bottom of the  
 25 barrel, is it, Ex parte James?

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1 MR ZACAROLI: It has sometimes been referred to like that.  
 2 LORD JUSTICE BRIGGS: Are we going round counsel twice?  
 3 MR ZACAROLI: We are going to adopt the same procedure as  
 4 before, which is I will open everything, even the bits  
 5 that we won below --  
 6 LORD JUSTICE BRIGGS: Okay.  
 7 MR ZACAROLI: -- and my learned friend will respond, if the  
 8 court is content with that order.  
 9 So the proposed structure is firstly to deal with  
 10 construction so far as it concerns the release of  
 11 currency conversion claims. For that purpose, we need  
 12 only look at the claim determination deeds, the CDDs.  
 13 LADY JUSTICE GLOSTER: Yes.  
 14 MR ZACAROLI: On that, we are the appellant --  
 15 LADY JUSTICE GLOSTER: Yes.  
 16 MR ZACAROLI: And that is declaration I. Then I am going to  
 17 turn --  
 18 LADY JUSTICE GLOSTER: And we've got the order -- the order  
 19 is in a different core bundle, isn't it?  
 20 MR ZACAROLI: It is, that's right.  
 21 LADY JUSTICE GLOSTER: I will take mine out actually. It's  
 22 the order at A1 --  
 23 MR ZACAROLI: B1, tab 3, is the principal order.  
 24 LORD JUSTICE BRIGGS: The reason why we're only looking at  
 25 CDDs is because there's no appeal in relation to the

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1 CRAs.  
 2 MR ZACAROLI: That's right, yes. I'm not suggesting we  
 3 won't be looking at the CRAs for some purposes, but  
 4 we're not concerned with advancing an argument of  
 5 construction in relation to the CRAs on the currency  
 6 conversion claims.  
 7 LADY JUSTICE GLOSTER: We don't have the notice of  
 8 application, but that doesn't matter.  
 9 MR ZACAROLI: Oh, it's the same application.  
 10 LADY JUSTICE GLOSTER: Yes, okay.  
 11 MR ZACAROLI: So that's the first section of my submissions.  
 12 The second will be arguments of construction insofar as  
 13 it relates to the release of claims to interest, for  
 14 which purpose we won primarily on that issue below.  
 15 LADY JUSTICE GLOSTER: Sorry, say that again.  
 16 MR ZACAROLI: That's the question of release of non-provable  
 17 claims to interest.  
 18 LADY JUSTICE GLOSTER: Yes.  
 19 MR ZACAROLI: On that issue, we primarily won, and therefore  
 20 we're the respondent.  
 21 LADY JUSTICE GLOSTER: Yes, but you'll take it now.  
 22 MR ZACAROLI: We'll take it now. And on one aspect of  
 23 that -- so it is supplemental declaration 5, we'll begin  
 24 with there.  
 25 LORD JUSTICE PATTEN: Yes.

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1 MR ZACAROLI: The list, luckily for this part in the -- we  
 2 perhaps should have a list of issues, it's much shorter.  
 3 It's supplemental declaration 5. The part that we lost  
 4 below was in relation to interest on currency conversion  
 5 claims.  
 6 LORD JUSTICE PATTEN: That's issue supplementary 5, is it?  
 7 MR ZACAROLI: That's correct. Supplemental issue 5.  
 8 LORD JUSTICE PATTEN: Yes.  
 9 LADY JUSTICE GLOSTER: Do you think we could give these item  
 10 numbers?  
 11 MR ZACAROLI: We can.  
 12 LADY JUSTICE GLOSTER: So it is just 1, 2, 3 and 4.  
 13 MR ZACAROLI: Yes. (Pause).  
 14 So from the top, construction of currency conversion  
 15 claims is number 1, item 1.  
 16 LADY JUSTICE GLOSTER: Yes.  
 17 MR ZACAROLI: Release of claims to interest is item 3.  
 18 LADY JUSTICE GLOSTER: Yes.  
 19 MR ZACAROLI: And then -- however, in relation to part of  
 20 interest, it is in item 4 because in relation to  
 21 interest on currency conversion claims, the learned  
 22 judge held that those claims were waived by the CRA but  
 23 were not waived by the CDDs.  
 24 So we're partly appellants, partly respondents on  
 25 that question.

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1 LORD JUSTICE BRIGGS: I see.  
 2 MR ZACAROLI: You'll see in the supplemental issues the way  
 3 that the declarations work is we have rolled up both  
 4 construction and Ex parte James. So item 3 is  
 5 non-provable claims to interest generally, and item 4 is  
 6 non-provable claims to interest on a currency conversion  
 7 claim.  
 8 LADY JUSTICE GLOSTER: Sorry, is 4 the Ex parte James point?  
 9 MR ZACAROLI: No. Ex parte James comes in three times, I'm  
 10 afraid. Item 2 is Ex parte James so far as concerns  
 11 currency conversion claims.  
 12 LADY JUSTICE GLOSTER: Yes.  
 13 MR ZACAROLI: Item 3 is construction and Ex parte James so  
 14 far as --  
 15 LADY JUSTICE GLOSTER: Yes, I see. I'm not following.  
 16 LORD JUSTICE BRIGGS: And it is in 4 as well, isn't it?  
 17 MR ZACAROLI: It is in 4 as well, because --  
 18 LORD JUSTICE BRIGGS: It comes in twice in 4, doesn't it?  
 19 MR ZACAROLI: In the sense that it's different result  
 20 whether it is the CDDs or CRAs. By the time we get to  
 21 this, it will be fairly short, I think, I am hoping.  
 22 The general principles will be hopefully dealt with  
 23 under claims to interest generally, claims to currency  
 24 conversion claims generally.  
 25 So my third section will be Ex parte James across

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<p>1 the board.                  2 LORD JUSTICE PATTEN: Yes.                  3 MR ZACAROLI: So turning, if I may, to the question of the                  4 construction of the claims determination deeds so far as                  5 they relate to the release of currency conversion                  6 claims.                  7 LADY JUSTICE GLOSTER: Item 1?                  8 MR ZACAROLI: Item 1, yes. Most of my submissions will                  9 relate to item 1 when it comes to construction.                  10 First of all, to deal with the background. The                  11 judgment contains a relatively detailed description of                  12 the circumstances in which the various forms of                  13 agreement reached between the administrators and                  14 creditors came to be made, and there are also two                  15 statements of agreed facts. I don't know if the court                  16 has had a chance to identify those or read them yet, but                  17 those are first of all one relating to the matters                  18 relevant to construction, and those are the B                  19 supplemental bundle at tab 6.                  20 Then there's a second statement of agreed facts at                  21 tab 7 of the same bundle, and that is the facts relevant                  22 to consideration of the principle in Ex parte James in                  23 paragraph 74.                  24 LORD JUSTICE PATTEN: Sorry, I was just making a note.                  25 Where is the other one?</p> <p style="text-align: center;">Page 129</p>	<p>1 dealing with those, we're dealing with things as                  2 a matter of generality on the assumption that these are                  3 the only facts relevant to all construction as between                  4 the administrators and all creditors.                  5 LADY JUSTICE GLOSTER: But disputed facts don't appear in                  6 the statement of agreed facts. We're told that at the                  7 beginning.                  8 MR ZACAROLI: That's correct. There's a statement of                  9 disputed facts that follows at tab 8. I think it's fair                  10 to say that we're likely to be troubled by digging into                  11 the disputed facts for the purposes of construction.                  12 LORD JUSTICE PATTEN: And we're concerned with the CDDs up                  13 to what date?                  14 MR ZACAROLI: Well, the CDDs in about March 2014 started                  15 to -- uniformly incorporated a provision which preserved                  16 currency conversions, so it is until then. There were                  17 some CDDs between about October 2013 and March 2014 --                  18 LORD JUSTICE PATTEN: So some CDDs will pre-date the time                  19 when the possibility of a surplus was common knowledge                  20 and some will post-date it?                  21 MR ZACAROLI: Yes. Some will pre-date the date upon which                  22 currency conversion claims were raised as an issue with                  23 the administrators by creditors, and some will post-date                  24 that.                  25 It is both sides' contention that the same answer of</p> <p style="text-align: center;">Page 131</p>
<p>1 MR ZACAROLI: It is tab 7 of the same bundle. Tab 6 is the                  2 construction --                  3 LORD JUSTICE PATTEN: I see, thank you.                  4 MR ZACAROLI: It is headed, "Facts in relation to issue                  5 36A", but that's the Ex parte James and the paragraph 74                  6 issue.                  7 LORD JUSTICE BRIGGS: And these genuinely agreed, not just                  8 assumption, are they? Or are they just agreed purely                  9 for the purposes for arguing these issues, in which case                  10 they are probably assumed?                  11 MR ZACAROLI: Well, I think I am right in saying, I will be                  12 corrected, they are agreed facts.                  13 LORD JUSTICE BRIGGS: Okay, he says.                  14 MR ZACAROLI: However, these are in the main bilateral                  15 contracts between the administrators and one creditor.                  16 Certainly the CDDs, they are a series of bilateral                  17 contracts. There is an assumption being made that there                  18 are no facts relevant to construction, for example,                  19 other than those identified in the statement of agreed                  20 facts.                  21 LADY JUSTICE GLOSTER: Yes, but there might be one                  22 (inaudible).                  23 MR ZACAROLI: There may be creditors who had specific things                  24 said to them, et cetera, which means there are other                  25 facts which will be relevant to construction. We're not</p> <p style="text-align: center;">Page 130</p>	<p>1 construction, and indeed Ex parte James, applies                  2 irrespective of the date upon which the CDDs were                  3 entered into, save in of course the fact that where                  4 there's express exclusionary language, we have no case                  5 because the currency conversion claim is maintained.                  6 LORD JUSTICE PATTEN: No, of course.                  7 MR ZACAROLI: However, both sides say or contend for the                  8 opposite conclusion both as a matter of construction and                  9 Ex parte James. It is just we both agree whether it is                  10 an agreement entered into at the beginning of the                  11 process, the middle or the end, as a matter of                  12 construction, they mean the same thing.                  13 I don't propose just to read out the statements of                  14 agreed facts and if there is a chance for the court to                  15 have a look at those in the intervening period between                  16 now and tomorrow, I will certainly recommend that as                  17 being --                  18 LADY JUSTICE GLOSTER: Yes, very well.                  19 MR ZACAROLI: -- a very succinct way of identifying the                  20 background in more detail than I am going to develop                  21 now. I am going to go through it quickly.                  22 So this is a summary, then, of the chronology and it                  23 is a summary only. The detail can be found in the                  24 statement of agreed facts.                  25 There are creditors in the Lehman estate of three</p> <p style="text-align: center;">Page 132</p>

<p>1 broad kinds: those with trust claims to assets, so trust                  2 asset claims, those with client money claims, and                  3 unsecured claims. All of them give rise to immense                  4 complexity or at least potentially all of them give rise                  5 to immense complexity.                  6 The overriding objective --                  7 LADY JUSTICE GLOSTER: Well, client money claims aren't                  8 necessarily trust claims or inevitably not trust claims?                  9 MR ZACAROLI: They are not claims to assets, so there's                  10 distinction between trust claims to assets and client                  11 money claims. Client money claims are trust claims                  12 but --                  13 LORD JUSTICE BRIGGS: No claims to share in a pool.                  14 MR ZACAROLI: Yes.                  15 LORD JUSTICE BRIGGS: Sort of pool.                  16 MR ZACAROLI: Yes, a pool that's rather got expanded, but                  17 a pool, yes.                  18 LORD JUSTICE BRIGGS: Sorry, what was the third class? Just                  19 unsecured --                  20 MR ZACAROLI: Unsecured claims, yes.                  21 The overriding objective of the administrators                  22 really from the beginning was to seek to deal with all                  23 of these claims with as little expense and delay as                  24 possible. Because if there had been a creditor by                  25 creditor resolution of every single issue that could</p> <p style="text-align: center;">Page 133</p>	<p>1 LADY JUSTICE GLOSTER: Sorry, just going back to                  2 paragraph 32, there was no jurisdiction to sanction the                  3 proposal in relation to the compromise of proprietary                  4 claims?                  5 MR ZACAROLI: That's right, yes. And these were claims to                  6 trust assets, so these were proprietary claims.                  7 LADY JUSTICE GLOSTER: Right. Not just because it was                  8 a mixture of creditors' claims and proprietary claims,                  9 just because proprietary claims were included?                  10 MR ZACAROLI: Yes, it was predominantly proprietary claims.                  11 To be fair, I seem to recall that the unsecured element                  12 was a tag-on at that stage, and I think it was sought to                  13 make the tail wag the dog but that failed. So there was                  14 no jurisdiction for that scheme.                  15 So instead the CRA was developed, a standardised                  16 agreement to which creditors could sign up if they                  17 wished to, they weren't bound to. It only became                  18 effective if a sufficient number signed up to it, which                  19 in fact happened, so it became effective -- at least it                  20 became effective for creditors with trust asset claims.                  21 It was intended at the outset to do more than and deal                  22 also with purely unsecured creditors, but the conditions                  23 precedent to it applying to unsecured claims were not                  24 fulfilled, so it never applied purely to unsecured                  25 creditors.</p> <p style="text-align: center;">Page 135</p>
<p>1 exist between them, one was talking about many more                  2 years' delay than had been suffered so far. So it was                  3 in everyone's interests, in particular creditors who                  4 signed up to these agreements, to do so because it gave                  5 them a quick and speedier more efficient distribution.                  6 The first thing that the administrators sought to do                  7 related to claims to trust assets, and that was to                  8 promulgate a scheme of arrangement to deal with trust                  9 asset claimants. For my Lords' note, the history is                  10 dealt with in slightly more detail at paragraphs 26 to                  11 31 of the judgment below.                  12 In November 2009, the Court of Appeal concluded                  13 there was no jurisdiction to promote a scheme in                  14 relation to trust assets, so that died a death. In                  15 parallel with that, and I think foreshadowing that                  16 conclusion, the administrators had put in place                  17 a multilateral claims resolution process that would                  18 operate outside of the scheme but on a consensual basis,                  19 and that is the claims resolution agreement which I will                  20 refer to as the CRA.                  21 The judgment deals with the development of the CRA                  22 at paragraphs 33 to 38, and its detailed terms so far as                  23 relevant are recorded at paragraphs 77 to 113 of the                  24 judgment.                  25 It's a standardised --</p> <p style="text-align: center;">Page 134</p>	<p>1 Then the third methodology adopted was to develop                  2 a purely bilateral approach through the claims                  3 determination deeds, nicknamed Project Canada, you'll                  4 see in the statement of agreed facts.                  5 The background to these is summarised in                  6 paragraphs 39 to 56 of the judgment.                  7 LORD JUSTICE BRIGGS: 39 to -- sorry?                  8 MR ZACAROLI: 39 to 56.                  9 LORD JUSTICE BRIGGS: Thank you.                  10 MR ZACAROLI: So far as these CDDs were concerned, they were                  11 as I say bilateral agreements between LBIE on the one                  12 hand and the creditor on the other. The very basic idea                  13 was that the administrators would calculate themselves                  14 what net balance they said was owed to that creditor                  15 under either a financial contract or a whole variety of                  16 financial contracts aggregated. That figure was offered                  17 to the creditor without breakdown on a take it or leave                  18 it basis. There was to be no negotiation as to the                  19 number.                  20 They then sought so far as possible to record                  21 an agreement, reaching a settlement at that number in                  22 the CDDs. The intention was to have relatively                  23 standardised terms of the CDDs, but wasn't it quite,                  24 "It's a take or leave it basis". There was                  25 a possibility for creditors to suggest amendments which</p> <p style="text-align: center;">Page 136</p>

<p>1 would be dealt with on a case-by-case basis. The                  2 reference to that is in Mr Lomas' tenth witness                  3 statement at paragraph 57. It's a single sentence. It                  4 is the B supplemental bundle, tab 10, at page 19. He                  5 says:                  6 "The joint administrators have sought so far as                  7 reasonable possible to ensure that CDDs remain                  8 relatively standardised. However LBIE has considered                  9 proposed amendments on a case-by-case basis."                  10 That has led to developments in the standardised                  11 form of the CDD over time, for example incorporating the                  12 provision which said that the currency conversion claims                  13 are not waived.                  14 That resulted in a large number of different types                  15 of CDD dealing with different situations. Each one was                  16 a bilateral contract between the estate and the                  17 creditor. The brief evolution of the forms of CDD is as                  18 follows:                  19 In the earlier days, there was a lack of clarity as                  20 to whether a creditor would have a client money claim                  21 and/or an unsecured claim against the estate, and what                  22 sort of unsecured claim that might be -- my Lord                  23 Lord Justice Briggs will remember the complications that                  24 client money issues gave rise to. So to deal with that                  25 problem, it was known that a sum was owing to the</p> <p style="text-align: center;">Page 137</p>	<p>1 to be converted into sterling for the purposes of being                  2 approved. For the court's note, we will be looking at                  3 an agreed claim CDD in due course at bundle B2, tab 4.                  4 For creditors where there were no client money issue                  5 or subsequently as the client money issues got parked or                  6 dealt with, the second form of CDD that was developed                  7 was called the admitted claims CDD. So this is the                  8 standard form used where there was no client money                  9 claim, just an unsecured claim against LBIE.                  10 It is uniformly the case that in relation to                  11 admitted claim CDDs, the net amount said to be owing to                  12 the creditor was always expressed in sterling.                  13 LORD JUSTICE BRIGGS: Presumably because the perception at                  14 that stage was that the exit route for a claimant under                  15 an admitted claim would be by proof.                  16 MR ZACAROLI: Indeed. Indeed, it says that. It says the                  17 idea of the admitted claim is it would be admitted to                  18 proof either in a distribution, in liquidation or                  19 a scheme of arrangement. That's said in terms in the                  20 CDDs. And I suspect my Lord has put his finger on the                  21 nub of the issues between the parties as to what is the                  22 effect --                  23 LORD JUSTICE BRIGGS: I wasn't meaning to cast even a tiny                  24 scintilla of a tiny cloud about what I thought about the                  25 issue.</p> <p style="text-align: center;">Page 139</p>
<p>1 creditor, but one didn't know whether it was a client                  2 money claim which was claimable against the client money                  3 trust, or whether it was an unsecured claim. The first                  4 type of CDD developed was called an agreed claim CDD.                  5 The purpose was to agree a single net balance owed to                  6 the creditor without prejudice as to whether that was                  7 a client money claim or an unsecured claim.                  8 In those agreements, the agreed claims CDDs, the                  9 agreed claim amount, the single sum owing, was                  10 denominated in the currency of the underlying contract,                  11 or if there were a variety of different currencies in                  12 the underlying contracts, it was the predominant                  13 currency in which the contracts were denominated.                  14 If it later turned out that the client had a client                  15 money claim, then it was entitled to a distribution from                  16 the client money trust. If it later turned out the                  17 client had no client money claim or it chose to waive or                  18 assign that client money claim to an entity set up for                  19 that purpose within the administration process, then the                  20 agreed claim CDD provided for the amount stated as the                  21 agreed claim amount to be converted into sterling for                  22 the purposes of a proof in the administration or                  23 whatever might follow, a scheme of arrangement or even                  24 a liquidation. So the agreed claim amount if not                  25 already in sterling was within the agreed the claim CDD</p> <p style="text-align: center;">Page 138</p>	<p>1 MR ZACAROLI: But that is essentially what the issue comes                  2 down to.                  3 These will be the main focus of our submissions,                  4 because as is obvious, the claim amount is expressed in                  5 sterling and we say that if you've agreed to be paid                  6 sterling, that's it, you haven't got a currency                  7 conversion claim because you've agreed to be paid                  8 sterling. But we'll come back to the submissions in due                  9 course. We'll be looking at one example of that, and                  10 that's the admitted claims CDD at bundle B2 at tab 7.                  11 As I mentioned, a number of variants developed over                  12 time of these forms. The judge didn't need to deal with                  13 any of the variants, apart from two I will come to,                  14 because it was common ground below that whatever the                  15 variant, it was either an agreed claim CDD variant or                  16 an admitted claim CDD variant. Whatever other variants                  17 there were did not make a difference to the question of                  18 construction with which we're concerned, so we can focus                  19 only on the ones the judge focused on, the agreed claims                  20 CDD and the admitted claims CDD.                  21 Two variants I do need to look at, and we'll look at                  22 them a little later. The first is that at some point                  23 there was an amendment to the standard form to carve out                  24 from the release of claims to interest claims to                  25 statutory interest on the claim that was admitted to</p> <p style="text-align: center;">Page 140</p>

1 proof. So there was an express carve out of statutory  
 2 interest in the CDDs at a point -- I will come to the  
 3 exact date in a moment.  
 4 We accept that even prior to that, there was  
 5 an implicit carve out of claims for statutory interest  
 6 in the release language, so we don't suggest that any of  
 7 the CDDs released claims to statutory interest on your  
 8 admitted claim subsequently admitted to proof. The  
 9 relevant CDD which I will look at for the purposes of  
 10 identifying that is at B2, tab 8.  
 11 Then secondly, as my Lord Lord Justice Patten  
 12 already identified, later on the standard form was  
 13 amended to carve out currency conversion claims from the  
 14 release, and the version we'll be looking at there is  
 15 B2, tab 9. (Pause).  
 16 LADY JUSTICE GLOSTER: And is it agreed that those releases  
 17 do carve out currency conversion claims?  
 18 MR ZACAROLI: They preserve -- yes, they carve out currency  
 19 conversion claims in the release. Yes, they do, that's  
 20 common ground. We're not concerned with those.  
 21 LADY JUSTICE GLOSTER: Yes.  
 22 LORD JUSTICE BRIGGS: It is really carving in rather than  
 23 carving out, isn't it?  
 24 MR ZACAROLI: Yes. Now just briefly to recap on something  
 25 I mentioned even more briefly earlier, the chronology of

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1 awareness of currency conversion claims. The evidence  
 2 is as follows: prior to March 2013 --  
 3 LADY JUSTICE GLOSTER: How can we go into that evidence?  
 4 I mean, are you saying it's factual matrix in relation  
 5 to the construction of the later deeds, or what are you  
 6 saying about that?  
 7 MR ZACAROLI: Well, I make some detailed submissions about  
 8 its relevance. I think both sides -- what we say is --  
 9 LADY JUSTICE GLOSTER: Yes.  
 10 MR ZACAROLI: -- you construe the deeds that existed until  
 11 the time at which currency conversion claims came to be  
 12 in existence, and you cannot take into account their  
 13 subsequent emergence when you look at those earlier  
 14 CDDs.  
 15 LADY JUSTICE GLOSTER: Yes.  
 16 MR ZACAROLI: So very clearly, as a matter of rules of  
 17 construction, anything which emerged later is wholly  
 18 irrelevant to the construction of a CDD entered into  
 19 before March 2013.  
 20 LADY JUSTICE GLOSTER: Yes.  
 21 MR ZACAROLI: We say it makes no difference in fact once  
 22 they began to emerge, but one starts with the earlier  
 23 position that it is obviously inadmissible and  
 24 irrelevant to look at what happened later.  
 25 LADY JUSTICE GLOSTER: Yes.

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1 MR ZACAROLI: But just so you know the chronology -- and  
 2 this is in the agreed statement of facts, it's not  
 3 disputed -- prior to March 2013, the concept of  
 4 non-provable claims to currency conversion claims had  
 5 been neither considered by the administrators nor raised  
 6 with them by creditors. That's paragraph 8 of the --  
 7 LORD JUSTICE PATTEN: This is perhaps more relevant when we  
 8 come to Ex parte James but what puzzled me slightly  
 9 about all this, if it be the case that you're right and  
 10 the judge was wrong on the issue we're about to embark  
 11 on, that there was a contractual release of the currency  
 12 conversion claims and if it's right that it was  
 13 unintended, would it not have been open to the  
 14 administrators simply to have varied the agreements in  
 15 the same way that they did effectively with the later  
 16 CDDs and accepted that there should be a variation which  
 17 perhaps without making any admissions accepted that the  
 18 claims were still viable?  
 19 MR ZACAROLI: Well, in a sense, that is --  
 20 LORD JUSTICE PATTEN: It seems a bit odd to be conducting  
 21 the administration on the basis that there's been this  
 22 release or release of the claims, if that's the right  
 23 construction of the agreements, and then subsequently to  
 24 have entered into a series of CDDs in which they were  
 25 expressly preserved. I mean, that seems a rather

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1 unequal way of dealing with the matter.  
 2 MR ZACAROLI: I hear my Lord's point, and that is indeed  
 3 a point that the judge made.  
 4 LORD JUSTICE PATTEN: There may be an answer to it, but it's  
 5 an obvious question.  
 6 MR ZACAROLI: Yes. So first of all, could they vary the  
 7 agreements? The answer to that is no, they could not.  
 8 These were agreements that had been entered into and  
 9 reached. These were binding agreements made with  
 10 creditors -- let's say one made in 2011 --  
 11 LORD JUSTICE PATTEN: Well, you can vary any agreement.  
 12 MR ZACAROLI: They could agree a variation with creditors,  
 13 yes.  
 14 LORD JUSTICE PATTEN: Yes, that's what I mean. So if the  
 15 point you're now arguing for that the judge rejected had  
 16 anything in it, they could simply say, "We are going to  
 17 vary the agreement to exclude that possibility".  
 18 MR ZACAROLI: When I say they could have, yes, in theory  
 19 parties can agree a variation.  
 20 LORD JUSTICE PATTEN: Is there any reason in principle why  
 21 they couldn't have done that to ensure that there was  
 22 equality of treatment across the whole class of  
 23 creditors?  
 24 MR ZACAROLI: Well, yes, because that would be to cause  
 25 detriment to the remainder of the estate by

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1 acknowledging that these claims -- if the terms of the  
 2 agreement are clear that the claim is released, it would  
 3 then be allowing a claim in to the estate which didn't  
 4 exist which had been waived by the creditor at a stage  
 5 where the creditor got an advantage in the sense of --  
 6 the quid pro quo was an early distribution.  
 7 LORD JUSTICE PATTEN: Okay. That's the answer, is it?  
 8 MR ZACAROLI: That's an answer, yes.  
 9 LORD JUSTICE BRIGGS: Is it common ground that all these  
 10 CDDs are fully executed agreements, or are they in any  
 11 sense executory? In other words, does the departure of  
 12 the claim which is released happen the moment the  
 13 agreement comes into effect, or is there some kind of  
 14 contractual promise not to pursue it although it's still  
 15 living there in a ghostly fashion?  
 16 MR ZACAROLI: I think the former.  
 17 LORD JUSTICE BRIGGS: That's what I'm assuming, but I don't  
 18 know whether that has been spelt out or whether it is  
 19 common ground.  
 20 MR ZACAROLI: I don't think that distinction has been  
 21 identified in argument prior to my Lord raising it, but  
 22 I will say on the terms of the document, it is clearly  
 23 the former.  
 24 LORD JUSTICE BRIGGS: Right.  
 25 MR ZACAROLI: But that's really as of the date of the --

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1 LORD JUSTICE BRIGGS: So it's gone. So to amend the  
 2 agreement wouldn't just be, as it were, looking forward  
 3 to let somebody off an obligation to continue to waive  
 4 something. It would be to bring back a claim which at  
 5 the date immediately prior to the amendment wasn't  
 6 a claim.  
 7 MR ZACAROLI: Yes.  
 8 LORD JUSTICE BRIGGS: Right.  
 9 MR ZACAROLI: So my Lord's point is the same I think as why  
 10 can't they just -- why shouldn't they be required under  
 11 Ex parte James?  
 12 LORD JUSTICE PATTEN: Well, exactly. It's essentially the  
 13 same point, I think.  
 14 MR ZACAROLI: Yes.  
 15 LORD JUSTICE PATTEN: But I mean, it seems rather more --  
 16 I couldn't understand why one is resorting to  
 17 Ex parte James if the administrators could simply have  
 18 said, "Look, you know, this was an unintended  
 19 consequence and we'll now vary all the relevant  
 20 agreements".  
 21 MR ZACAROLI: Yes. So the other --  
 22 LADY JUSTICE GLOSTER: I suppose the answer is the other  
 23 creditors, the opposing creditors, would have objected,  
 24 and started proceedings against the administrators.  
 25 MR ZACAROLI: Yes. That's why I say that they can't act

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1 unilaterally --  
 2 LORD JUSTICE PATTEN: So they would have had to have ended  
 3 up in front of the judge asking for directions about it  
 4 anyway.  
 5 MR ZACAROLI: Yes. I suspect our position would have been  
 6 subjected to that.  
 7 LORD JUSTICE PATTEN: Well, I'm sure.  
 8 MR ZACAROLI: The other point I would make in response, my  
 9 Lord, is the assumption that there's an unintended  
 10 consequence, because that we'd say is a --  
 11 LORD JUSTICE PATTEN: I know -- yes, okay.  
 12 MR ZACAROLI: I'll come on to how we develop that in due  
 13 course, but the intention was to release anything.  
 14 LORD JUSTICE PATTEN: I only meant it in the sense that they  
 15 preserved the claims in subsequent cases --  
 16 MR ZACAROLI: Yes.  
 17 LORD JUSTICE PATTEN: -- when the problem became apparent.  
 18 MR ZACAROLI: Yes. Different circumstances, different  
 19 creditors. But that's correct, they did after 2014 vary  
 20 them in that way.  
 21 LORD JUSTICE PATTEN: Yes.  
 22 LORD JUSTICE BRIGGS: Is your awareness chronology going to  
 23 have built into it when an awareness of a possible  
 24 surplus occurred? Because you make quite a bit of that  
 25 in your skeleton, I seem to recall, as opposed to

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1 awareness that there might be a claim arising out of the  
 2 fact that there might be a surplus.  
 3 MR ZACAROLI: Yes. I'm going to be focusing orally on the  
 4 former -- well, the latter, the awareness of the claim  
 5 much more.  
 6 LORD JUSTICE BRIGGS: Thank you.  
 7 MR ZACAROLI: Because we say the awareness of a surplus is a  
 8 part of the story.  
 9 LORD JUSTICE BRIGGS: Yes, but it seemed to have happened  
 10 before the penny dropped, if it did drop, or if it is  
 11 was a penny rather than a valueless piece of brass --  
 12 MR ZACAROLI: That's correct.  
 13 LORD JUSTICE BRIGGS: -- that there might be a currency  
 14 conversion claim.  
 15 MR ZACAROLI: Yes. The introduction of language -- well,  
 16 creditors waking up to the fact of currency conversion  
 17 claims, if it is a fact, and the amendment of language  
 18 to deal with them is dealt with at the same statement of  
 19 facts at tab 7 at paragraphs 21 to 22.  
 20 LORD JUSTICE PATTEN: Sorry, what are we looking at now?  
 21 MR ZACAROLI: It is bundle B, supplemental at tab 7. I've  
 22 shown you paragraph 8, which was prior to March 2013.  
 23 LORD JUSTICE PATTEN: Oh, right.  
 24 MR ZACAROLI: Then paragraphs 21 to 22 deal with what  
 25 subsequently happened.

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<p>1 LORD JUSTICE PATTEN: This is all the statement of facts.  2 MR ZACAROLI: That's all the statement of facts, yes.  3 We are talking about multiple billions of pounds'  4 worth of claims compromised by the currency conversion  5 claims, arguably compromised by the CDDs, both before  6 and after the relevant time period. The numbers don't  7 matter, but it is an important point that there's a lot  8 of money at stake on both sides of that divide.  9 LORD JUSTICE PATTEN: Yes, that goes without saying.  10 MR ZACAROLI: The construction argument that we advance is  11 in itself very straightforward. We say that it's  12 a prerequisite of a currency conversion claim that the  13 creditor is remitted to its contractual right to be paid  14 in dollars after the proved process and the statutory  15 interest process has been gone through so they can claim  16 that their original dollar entitlement remains  17 unsatisfied by payments from the proved process, and  18 we've been through that at some length already.  19 It exists because the conversion of the claimant's  20 sterling is only for the purposes of proof, and that is  21 the essential lever, as it were, of the Court of  22 Appeal's reasoning in Waterfall I. For your note, we  23 needn't turn it up, it is paragraphs 136 to 137 of the  24 Waterfall I Court of Appeal decision, and paragraphs 147  25 to 150.</p> <p style="text-align: center;">Page 149</p>	<p>1 MR DICKER: My Lord, I think all I can say is that my  2 recollection is certainly the arguments made to the  3 Supreme Court essentially followed those made by both  4 sides to the Court of Appeal.  5 LORD JUSTICE BRIGGS: Okay.  6 MR DICKER: That obviously doesn't preclude the Supreme  7 Court taking its own course.  8 LORD JUSTICE BRIGGS: No. In other words, it wasn't fought  9 on some radically different battlefield.  10 MR DICKER: No.  11 LORD JUSTICE BRIGGS: Okay.  12 MR ZACAROLI: So at the moment in the world where the Court  13 of Appeal's judgment is the last word, the basis of it  14 is that the conversion was for the purposes of proof  15 only and did not affect a permanent alteration(?) of the  16 creditors' rights.  17 So we contend that a CDD which first identifies the  18 sole amount owing to that creditor as a sterling sum,  19 and secondly, permanently and irrevocably releases any  20 other claim whatsoever than a claim to that sterling sum  21 has removed the foundation for a currency conversion  22 claim because there is no longer a contractual right  23 remaining to be paid in dollars. That's the argument in  24 a nutshell.  25 LADY JUSTICE GLOSTER: Are the release provisions in</p> <p style="text-align: center;">Page 151</p>
<p>1 LORD JUSTICE BRIGGS: Do you know whether there's any what  2 you might call respondent's notice-type submission in  3 the Supreme Court which would seek to uphold them on any  4 other analytical basis?  5 MR ZACAROLI: I'm not aware of that --  6 LORD JUSTICE BRIGGS: No.  7 MR ZACAROLI: -- but it may be upheld on a different  8 analytical basis because it is the Supreme Court --  9 LORD JUSTICE BRIGGS: The Supreme Court is the Supreme  10 Court, sure --  11 MR ZACAROLI: Yes.  12 LORD JUSTICE BRIGGS: -- but most of the time they respond  13 to submissions.  14 MR ZACAROLI: I don't know. Let me find out whether  15 that's ...  16 LORD JUSTICE BRIGGS: I only ask because in a sense there's  17 a binary question arising out of what the Supreme Court  18 might decide, which would either simply cure  19 Waterfall II B in relation to currency conversion claims  20 or not. But I suppose it's possible that they might  21 uphold them but on some different analytical basis than  22 the only one which I think the Court of Appeal upheld  23 them on.  24 MR ZACAROLI: Yes, I think that's a possibility. My learned  25 friend was there.</p> <p style="text-align: center;">Page 150</p>	<p>1 materially different terms in the four agreements?  2 MR ZACAROLI: No, they're not, no.  3 Before I come to the words themselves, can I just  4 deal with the law. You'll be pleased to hear that  5 I don't propose to trawl through all the cases on  6 construction. There are just two cases to remind the  7 court of. The first is Arnold v Britton.  8 LADY JUSTICE GLOSTER: Yes.  9 MR ZACAROLI: The second is a decision of the Supreme Court  10 from the week before last called Wood v Capita Insurance  11 Services.  12 LORD JUSTICE BRIGGS: Yes.  13 MR ZACAROLI: I'm sure that each member of the court is very  14 familiar with the Arnold v Britton Supreme Court  15 decision, so can I just remind you --  16 LADY JUSTICE GLOSTER: You can take it as read.  17 MR ZACAROLI: Yes. I just remind you it can be found first  18 of all at bundle 3, tab 97 and the key passage is in the  19 judgment of Lord Neuberger beginning at paragraph 14 and  20 ending at paragraph 23. My Lords will recall he sets  21 out seven points he wishes to draw out of the earlier  22 cases, including Rainy Sky, Chartbrook, et cetera.  23 I just highlight one or two of those points that we say  24 are pertinent here.  25 LORD JUSTICE BRIGGS: Yes.</p> <p style="text-align: center;">Page 152</p>

<p>1 MR ZACAROLI: The first of them is that which appears at 2 paragraph 19 of Lord Neuberger's judgment. He talks 3 about commercial common sense and says: 4 "The third point I should mention is that commercial 5 common sense is not to be invoked retrospectively. The 6 mere fact that a contract of arrangement ...(reading to 7 the words)... language has worked out badly or even 8 disastrously for one of the parties is not a reason for 9 departing from the natural language. 10 "Fourthly and linked to that, while commercial 11 common sense is a very important factor to take into 12 account when interpreting a contract, the court should 13 be very slow to reject the natural meaning of the 14 provision as correct ...(reading to the words)... 15 ignoring the benefit of wisdom and hindsight." 16 And again, a further linked point at paragraph 21: 17 "The fifth point concerns the facts known to the 18 parties. When interpreting a contractual provision, one 19 can only take account of facts or circumstances which 20 exist at the time the contract was made and which were 21 known or reasonably available to both parties." 22 LORD JUSTICE BRIGGS: Yes. 23 MR ZACAROLI: Other than that, as I say, I hope I can take 24 as read the relevant paragraphs. The other case is the 25 one from two weeks ago, and that is at bundle 3,</p> <p style="text-align: center;">Page 153</p>	<p>1 the approach to construction, don't they? 2 MR ZACAROLI: Apparently, although they all mean the same 3 thing. 4 LORD JUSTICE BRIGGS: It is probably just modernising the 5 language. 6 MR ZACAROLI: We accept that the court's task is to construe 7 the words in the context in which those words appear -- 8 LORD JUSTICE BRIGGS: Yes. 9 MR ZACAROLI: -- including the background reasonably known 10 to both parties. That is clearly the right test. 11 LORD JUSTICE PATTEN: Well, that's been the law since <i>Prenn</i> 12 <i>v Simmonds</i>, if not before. 13 MR ZACAROLI: Indeed. And really it's a question of the 14 emphasis one gives to the written words as opposed to 15 background circumstances in any given case. 16 LORD JUSTICE PATTEN: Yes. 17 MR ZACAROLI: We would say relying on what Lord Neuberger 18 said in <i>Arnold v Britton</i> in case like this, where we're 19 dealing with closely negotiated or very carefully 20 drafted agreements -- 21 LORD JUSTICE PATTEN: Yes. 22 MR ZACAROLI: -- we're not dealing with widows and orphans 23 in this case. This is an investment bank dealing with 24 dealing with liquid substance -- 25 LORD JUSTICE BRIGGS: We're at the worthy end of the</p> <p style="text-align: center;">Page 155</p>
<p>1 tab 104. 2 LORD JUSTICE BRIGGS: Yes. 3 MR ZACAROLI: Lord Hodge gave the judgment with which 4 Lord Neuberger, Lord Mance, Lord Clark and Lord Sumption 5 agreed. The passage for my Lords to read -- again, 6 I won't read it out -- is paragraphs 8 to 15 inclusive. 7 The point reached the Supreme Court probably because of 8 what is said in paragraph 8 that: 9 "In written case, counsel for <i>Capita</i> argued the 10 Court of Appeal in that case had fallen into error 11 ...(reading to the words)... had rowed back from the 12 guidance on contractual interpretation which this court 13 gave in <i>Rainy Sky</i>." 14 LORD JUSTICE PATTEN: Apparently that's what I said and they 15 got leave to appeal on that basis. But the Supreme 16 Court now says that all their decisions on construction 17 all mean the same thing, apparently. 18 MR ZACAROLI: Yes. I don't see it necessary for the 19 purposes of the contracts we're construing here to try 20 and drive a course through all the authorities to come 21 way or the other. Ultimately, it's a question of fact. 22 Looking at the documents in this case, it's a question 23 of law, but looking at the documents in this case -- 24 LADY JUSTICE GLOSTER: Well, every generation of 25 House of Lords or the Supreme Court justices reformulate</p> <p style="text-align: center;">Page 154</p>	<p>1 spectrum, aren't we? 2 MR ZACAROLI: Yes, we're at the worthy end of the spectrum. 3 LORD JUSTICE BRIGGS: If the spectrum is lawyers getting 4 together and putting something together with enormous 5 care at one end and something scribbled on the back of 6 a betting slip at the other end, we're fairly much at 7 the sophisticated end. 8 MR ZACAROLI: Yes, indeed. 9 LORD JUSTICE PATTEN: I think Lord Hoffmann said in 10 <i>Investors Compensation</i>, you don't readily assume that 11 lawyers have made mistakes in drafting contracts. 12 MR ZACAROLI: Yes. We say when you look at the words here, 13 we will see it is extremely clear what comes out of this 14 agreement, what is left for the creditor to claim. 15 LORD JUSTICE BRIGGS: That said, an element of fuzziness is 16 sometimes deliberate. If the parties want to do a deal 17 and can't absolutely agree everything, so it is sort of 18 fudged over. 19 MR ZACAROLI: Yes. Again, we say it's not this case, but -- 20 LADY JUSTICE GLOSTER: You tell us that this case isn't <i>BCCI</i> 21 <i>v Ali</i> either. 22 MR ZACAROLI: Well, that's the only other case to show you, 23 but I felt the judge had identified the relevant 24 passages sufficiently in the judgment, which he does at 25 paragraphs 60 and 63. It is probably worth just</p> <p style="text-align: center;">Page 156</p>

<p>1 reminding ourselves what the judge did say about BCCI v 2 Ali. 3 At paragraph 60, he recites Lord Nicholls giving the 4 unobjectionable and I would say received view about how 5 you construe contracts, and at paragraph 63, he cites 6 from Lord Bingham's speech, in particular at 7 paragraph 29 of the speech of Lord Bingham -- sorry, 8 this is Lord Nicholls now -- yes, Lord Nicholls: 9 "Although expressed in different words, the constant 10 theme is that the scope of general words of a release 11 depends upon the context furnished by the surrounding 12 circumstances in which the release was given. The 13 generality of the wording has no greater reach than the 14 context indicates." 15 Just to leap forward if I may to a preview of our 16 core submission on this, the relevant right which 17 a creditor would need to rely upon to found a currency 18 conversion claim is the right under its underlying 19 contract to be paid in dollars or yen, or whatever might 20 be. We are not here in the territory that BCCI v Ali 21 might have been in about is this wording broad enough to 22 cover claims that may be this or there on the outlier of 23 possibilities? The one thing that the CDDs undoubtedly 24 release and waive is any claim arising under the 25 underlying contract. That's the very centre, as it</p> <p style="text-align: center;">Page 157</p>	<p>1 charges, expenses ... against each other." 2 Turning to the definitions, the first one to note is 3 the reference to "admitted claim" defined as: 4 "An unsecured claim of a creditor of a company which 5 qualifies for dividends from the estate of the company 6 available to its unsecured creditors pursuant to the 7 Insolvency Rules and the Insolvency Act or if applicable 8 as amended or replaced or under a scheme of arrangement 9 or a CVA." 10 Then "agreed claim amount" is defined in this 11 contract as £18 million-odd sterling. Then the next 12 relevant definition is "Claim": 13 "Claim is a claim in law, in equity or otherwise in 14 whatsoever nature." 15 And then you'll see a whole raft of things that are 16 included. I note in particular over the page (iv), 17 "Including a proprietary claim", and that is defined at 18 the bottom of the same page, page 3, as: 19 "... a claim whether actual, prospective or 20 contingent, whether arising by statute, common law in 21 equity against the company or the administrators that 22 the creditor is the legal and/or beneficial owner of 23 an asset and (2) for the delivery or transfer of 24 an asset and asset includes ...(reading to the words)... 25 and rights ..."</p> <p style="text-align: center;">Page 159</p>
<p>1 were, of the analysis here. 2 So although it is true that you need to construe 3 release language in its context, we would say we're 4 simply not concerned with what might be at the edges of 5 the picture. We are at the very heart of that here, 6 which is releasing claims arising under the very thing 7 which is centrally released. 8 So with that, can I take the court to the first of 9 the documents to construe, which is the admitted claims 10 CDD at bundle B2, tab 7. 11 LADY JUSTICE GLOSTER: You're not taking us to 4? 12 MR ZACAROLI: I'm going to take you to 4 in a second, if 13 I may. We put the admitted claims CDD at the heart of 14 our case because they are all in sterling. The agreed 15 claims CDD are sometimes in sterling, but more usually 16 not. 17 The particular one we're looking at you'll see from 18 the front page is dated some time in February 2012. The 19 name of the creditor has been redacted. Turning to 20 page 1 of the agreement itself under "Recitals", the 21 second recital B says: 22 "In consideration of the company and the creditor 23 agreeing that the creditor's claims under the creditor 24 agreement against the company are fixed at the agreed 25 claim amount ...(reading to the words)... costs,</p> <p style="text-align: center;">Page 158</p>	<p>1 LADY JUSTICE GLOSTER: And the underlying contractual claim 2 here was in dollars, we know. 3 MR ZACAROLI: We don't know what the underlying claim in 4 this agreement was. It doesn't matter -- 5 LADY JUSTICE GLOSTER: It doesn't matter because lots of 6 them were. 7 MR ZACAROLI: We know that LBIE traded primarily in dollars. 8 That was the currency it was trading. This in fact was 9 a French agreement as you can see from the definition of 10 "Creditor agreement" on the top left-hand of page 3. It 11 is an FBF master agreement, that's a Fédération Bancaire 12 Française agreement. 13 LADY JUSTICE GLOSTER: So it might have been euros. 14 MR ZACAROLI: Those are the only definitions I need to draw 15 to your attention. Then we turn to claims at 16 paragraph 2 of the agreement, headed "Claims agreement". 17 Perhaps my Lords and my Lady would just read clause 2, 18 because it is the key clause and then I will pick up 19 some points from it. 20 LORD JUSTICE PATTEN: Sorry, what do you want us to read? 21 MR ZACAROLI: The whole of clause 2. 22 LORD JUSTICE PATTEN: The whole of 2, yes. (Pause). 23 LADY JUSTICE GLOSTER: So just looking at 2.4, it's not 24 limited to an insolvency process, is that right? Is 25 that what you'd say?</p> <p style="text-align: center;">Page 160</p>



<p>1 MR ZACAROLI: Yes.</p> <p>2 LADY JUSTICE GLOSTER: So there isn't an argument they're</p> <p>3 not in an insolvency process once we get to currency</p> <p>4 conversion claims?</p> <p>5 MR ZACAROLI: We would say there's not. I don't know if</p> <p>6 that's a particular point relied on, but we say not.</p> <p>7 LADY JUSTICE GLOSTER: Presumably it is covered by</p> <p>8 "otherwise bring any claim"?</p> <p>9 MR ZACAROLI: Yes. (Pause).</p> <p>10 LORD JUSTICE BRIGGS: Is the use of a capital C in "to Claim</p> <p>11 for" in the first line of 2.4 just a mistake?</p> <p>12 LADY JUSTICE GLOSTER: It must be, because "claim" is</p> <p>13 a noun.</p> <p>14 LORD JUSTICE BRIGGS: Yes, exactly. I can't see there's</p> <p>15 a verbal definition of claim anywhere.</p> <p>16 MR ZACAROLI: I think that's right, yes. Yes, the</p> <p>17 capitalised claim is correct on the third line.</p> <p>18 LORD JUSTICE BRIGGS: Yes, quite. (Pause).</p> <p>19 LADY JUSTICE GLOSTER: Right, where next?</p> <p>20 MR ZACAROLI: So can I make nine points on this clause?</p> <p>21 The first is in the very first sentence, the words:</p> <p>22 "Notwithstanding the terms of any contract to which</p> <p>23 the creditor and the company are a party including the</p> <p>24 creditor agreement ..."</p> <p>25 So this acknowledges that this is a deliberate</p> <p style="text-align: center;">Page 161</p>	<p>1 The sixth point is in the middle of the clause. At</p> <p>2 clause 2.3, we see the words "whether known or unknown",</p> <p>3 so the parties are contemplating the existence of</p> <p>4 unknown claims which they are intending to discharge and</p> <p>5 release.</p> <p>6 The seventh point is four lines from the end, the</p> <p>7 line begins:</p> <p>8 "Thereby has yet been ...(Reading to the words)...</p> <p>9 or otherwise ..."</p> <p>10 Then these words:</p> <p>11 "... whether arising under the credit agreement or</p> <p>12 not."</p> <p>13 So that's why I say the one thing we know is</p> <p>14 released is any claims arising under the creditor</p> <p>15 agreement.</p> <p>16 And then the eighth point is to note the width of</p> <p>17 the language at the end. We've already got:</p> <p>18 "Claims whether known or unknown and whether in</p> <p>19 existence now, coming into existence at some time in the</p> <p>20 future and whether or not in the contemplation of the</p> <p>21 creditor and/or the company and/or the administrators on</p> <p>22 the date hereof."</p> <p>23 The ninth point is to note that it is clearly not</p> <p>24 just limiting itself to the release of claims that will</p> <p>25 be provable in the insolvency process. The point my</p> <p style="text-align: center;">Page 163</p>
<p>1 variation and departure from the rights under the</p> <p>2 creditor agreement.</p> <p>3 The second point is that the creditor having been</p> <p>4 permitted the admitted claim in the agreed claim amount</p> <p>5 in clause 2.1, that is then fixed in 2.2 as the</p> <p>6 creditor's entire claim against the company. So its</p> <p>7 sole and only remaining claim is the admitted claim in</p> <p>8 the agreed claim amount.</p> <p>9 The third point is just to note in passing of course</p> <p>10 is that is the sum which is fixed in sterling by the</p> <p>11 definition.</p> <p>12 The fourth point is in 2.3:</p> <p>13 "The discharge and release is irrevocable,</p> <p>14 unconditional and forever."</p> <p>15 So the first word on the third line, it's clearly</p> <p>16 not being limited for any particular purposes. It's</p> <p>17 an absolute irrevocable and forever discharge.</p> <p>18 LORD JUSTICE BRIGGS: And immediate.</p> <p>19 MR ZACAROLI: And immediate, yes.</p> <p>20 The fifth point is to note the parentheses at the</p> <p>21 beginning of the fourth line:</p> <p>22 "... including all Claims for interest, costs and</p> <p>23 orders for costs".</p> <p>24 So interest is specifically picked up as being</p> <p>25 released. (Pause).</p> <p style="text-align: center;">Page 162</p>	<p>1 Lady Lady Justice Gloster picked up in 2.4 "or otherwise</p> <p>2 bring any claim" shows that, but also -- I will come</p> <p>3 back to this point in a moment -- but in the body of 2.3</p> <p>4 towards the end, the fact that it is releasing claims</p> <p>5 that exist now or coming into existence at some time in</p> <p>6 the future, i.e. a claim which on any view could not be</p> <p>7 provable, shows it is meant to be as broad as possible.</p> <p>8 I don't need to show you much else from the</p> <p>9 agreement, just a couple of points really in passing, we</p> <p>10 don't place heavy reliance on them. But clause 8.2 on</p> <p>11 page 11, a standard clause about the creditor having</p> <p>12 made its own independent decision to enter into the</p> <p>13 deed, whether it is appropriate to do so. And a whole</p> <p>14 agreement clause at clause 12, again standard language.</p> <p>15 And then just to note that the appendix to the CDD</p> <p>16 is on a transfer notice. We'll come back to this, but</p> <p>17 one of the purposes or one of the benefits identified of</p> <p>18 a CDD was that it was an easily transferable agreement;</p> <p>19 the administrators recognised the trade which was then</p> <p>20 going on and was likely to go on in LBIE claims.</p> <p>21 Paragraph 4.2 of the transfer notice refers to the</p> <p>22 transfer of the whole of the admitted claim, that is the</p> <p>23 sterling sum, together with the right to receive</p> <p>24 dividends in respect with or in connection with limited</p> <p>25 claim.</p> <p style="text-align: center;">Page 164</p>

1 LORD JUSTICE BRIGGS: Which clause is this?  
 2 MR ZACAROLI: 4.2.  
 3 LORD JUSTICE BRIGGS: 4.2. Yes, I see that. (Pause).  
 4 LADY JUSTICE GLOSTER: Why does that help you if it is  
 5 limited to dividends?  
 6 MR ZACAROLI: It's just it reinforces the point that all  
 7 that can be transferred is the admitted claim, which is  
 8 the sterling sum. It's not a big, free-standing point.  
 9 The fact that there is a transfer notice confirms that  
 10 one of the benefits of the CDD process was to enable the  
 11 dates to be transferred between two other potential  
 12 holders. And within the transfer notice the fact that  
 13 it identifies the admitted claim as being what's  
 14 transferred just shows that's all the creditor has.  
 15 That's all that's left after he's entered into the CDD.  
 16 as I say, it's not a big, free-standing point.  
 17 LORD JUSTICE BRIGGS: But they presumably could be and were  
 18 transferred before this?  
 19 MR ZACAROLI: Yes, yes.  
 20 Now before I make --  
 21 LADY JUSTICE GLOSTER: You've got to construe 2.3 as limited  
 22 insofar as it relates to future claims arising out of  
 23 future trading between the parties, wouldn't you?  
 24 LORD JUSTICE BRIGGS: Well --  
 25 LADY JUSTICE GLOSTER: That may have not have been

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1 contemplated at the time, but hasn't there got to be  
 2 some limitation?  
 3 LORD JUSTICE BRIGGS: Was this after the notice of  
 4 distribution?  
 5 MR ZACAROLI: This was, yes. That was the 29th --  
 6 LORD JUSTICE BRIGGS: So LBIE wasn't going to be doing any  
 7 future trading?  
 8 MR ZACAROLI: No.  
 9 LORD JUSTICE BRIGGS: I suppose it might exclude the  
 10 entirely unconnected claims arising out of being run  
 11 over by the administrator.  
 12 MR ZACAROLI: Yes, but that's your BCCI v Ali point about  
 13 scope.  
 14 Can I just show you two other documents before  
 15 I return to make submissions or I --  
 16 LADY JUSTICE GLOSTER: But if the administrators had used  
 17 the counterparty for some purpose in the context of the  
 18 administration to effect a transaction, are you saying  
 19 there would have to be an express clause in any  
 20 subsequent contract to go with it?  
 21 MR ZACAROLI: My Lady, we don't --  
 22 LADY JUSTICE GLOSTER: That may have an air of unreality  
 23 about it, but --  
 24 MR ZACAROLI: It may have. The example given by the judge  
 25 below was if one of the creditors happens to occupy the

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1 floor above the administrators in the old building, for  
 2 example.  
 3 LADY JUSTICE GLOSTER: Yes.  
 4 MR ZACAROLI: I don't need to deal with that, if I may  
 5 respectfully answer that way, because that's talking  
 6 about things which may exist at the edges of the picture  
 7 in the BCCI v Ali what's the scope of the release  
 8 clause. But because we are here so obviously in the  
 9 centre of that picture, releasing any claim that arises  
 10 under the creditor agreement, which is the agreement  
 11 defined in this one as the FBF master agreement; in  
 12 other words it was an ISDA Master Agreement, et cetera,  
 13 any claim arising under that is right at the heart of  
 14 what is being released.  
 15 So in any case of a release, there may be matters at  
 16 the edges about how wide the picture was supposed to be  
 17 so far as the scope is concerned, but we're not --  
 18 LADY JUSTICE GLOSTER: Yes. You say on any basis, a  
 19 currency conversion claim is covered.  
 20 MR ZACAROLI: Yes. Well, I also put it a different way,  
 21 which is that the right to be paid in dollars is  
 22 covered, because that what you need: a contractual right  
 23 to payment in dollars to found a currency conversion  
 24 claim.  
 25 Two other documents just to show you, as I said

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1 I would. The one at tab 8 --  
 2 LORD JUSTICE BRIGGS: Can I just check: this is one that  
 3 doesn't have a wrinkle to preserve statutory interest?  
 4 MR ZACAROLI: I am about to show you those now. At tab 8 is  
 5 a document which contains the wrinkle preserving  
 6 statutory interest. The one we're looking at does not,  
 7 but my Lord is correct.  
 8 Tab 8 of the bundle is an admitted claims CDD with  
 9 a saving for statutory interest, which you'll see at  
 10 clause 2.2 on page 7 of the bundle.  
 11 LORD JUSTICE PATTEN: Did you say tab 8?  
 12 MR ZACAROLI: Tab 8, yes.  
 13 LORD JUSTICE PATTEN: Yes.  
 14 LADY JUSTICE GLOSTER: This is at a time when they think --  
 15 they anticipate there might be a surplus, is it?  
 16 MR ZACAROLI: I will come to -- if I may, I will find out  
 17 the answer to that precisely.  
 18 LORD JUSTICE BRIGGS: Sorry, where was that? 2.2?  
 19 MR ZACAROLI: 2.2.  
 20 LORD JUSTICE BRIGGS: I have it. "Not prejudice or effect  
 21 interest at ..." so it's statutory interest.  
 22 MR ZACAROLI: Yes.  
 23 LORD JUSTICE BRIGGS: Yes, yes.  
 24 The basis on which it is impliedly preserved in the  
 25 old (inaudible) one I suppose is something like because

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1 it's aimed at enabling the creditor to go and lodge  
2 dividends --  
3 MR ZACAROLI: Yes.  
4 LORD JUSTICE BRIGGS: -- with all the potential beneficial  
5 statutory consequences that may ensue.  
6 MR ZACAROLI: My Lord, exactly, yes. It is not intended to  
7 take away the very right --  
8 LADY JUSTICE GLOSTER: And do you accept that, by  
9 implication, the release does not exclude the claim to  
10 statutory interest on the first one?  
11 MR ZACAROLI: Yes, for the reasons my Lord  
12 Lord Justice Briggs was giving, which was the purpose of  
13 the deed was enable you to prove it.  
14 LADY JUSTICE GLOSTER: Yes. Everything that's attached to  
15 the proof of the admitted claim --  
16 MR ZACAROLI: Yes, that's right.  
17 LADY JUSTICE GLOSTER: -- by statute.  
18 MR ZACAROLI: Yes.  
19 I will come on to why that's different from the  
20 currency conversion claim later.  
21 Tab 9, then, if I may lastly --  
22 LORD JUSTICE PATTEN: But the fact that it deals with  
23 statutory interest suggests that the possibility of that  
24 sort of interest being payable had arisen by now.  
25 MR ZACAROLI: Yes, I'm sure that's right. We'll check --

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1 LORD JUSTICE PATTEN: Which is curious, because I think in  
2 the statement of facts, which I have only read very  
3 quickly, it was suggested it wasn't until 2013 that  
4 that --  
5 MR ZACAROLI: It is paragraph 3 of the statement of facts at  
6 tab 7, which is the Ex parte James.  
7 LORD JUSTICE PATTEN: I see.  
8 MR ZACAROLI: That says, "In early 2012, the possibility of  
9 a surplus was being discussed in the market."  
10 LORD JUSTICE PATTEN: Right.  
11 MR ZACAROLI: And this triggered (inaudible due to  
12 coughing). We don't know exactly when someone first  
13 thought of it.  
14 LORD JUSTICE PATTEN: No, no, of course not.  
15 MR ZACAROLI: Can I simply then show you the one at tab 9 of  
16 the bundle, the CDD at tab 9. This is the one which  
17 preserves both claims to statutory interest and currency  
18 conversion claims. This was entered into in March 2014.  
19 LORD JUSTICE PATTEN: Tab 12, did you say?  
20 MR ZACAROLI: Tab 9.  
21 LORD JUSTICE PATTEN: Oh, 9, sorry.  
22 MR ZACAROLI: 2.2 on page 8 of the bundle, page 7 of the  
23 document, is the statutory interest one and then 2.3 --  
24 LORD JUSTICE BRIGGS: Yes.  
25 MR ZACAROLI: -- you'll see a currency conversion claim is

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1 defined in the definitions, page 4 of the bundle.  
2 LORD JUSTICE BRIGGS: It is interesting to see how they  
3 define it. (Pause).  
4 Okay.  
5 MR ZACAROLI: I am about to turn to some more substantive  
6 argument. Is that a convenient moment or do you want me  
7 to --  
8 LADY JUSTICE GLOSTER: Oh, right, yes. It is so fascinating  
9 I hadn't seen the time. We're doing all right for time?  
10 MR ZACAROLI: Yes, we are.  
11 LADY JUSTICE GLOSTER: Right. 10.30 am tomorrow morning.  
12 (4.32 pm)  
13 (The court adjourned until 10.30 am  
14 on Tuesday, 11 April 2017)  
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23 document, is the statutory interest one and then 2.3 --  
24 LORD JUSTICE BRIGGS: Yes.  
25 MR ZACAROLI: -- you'll see a currency conversion claim is

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