Thursday, 6 April 2017
(10.35 am)
Submissions by MR ZACAROLI (continued)
LADY JUSTICE GLOSTER: Yes, Mr Zacaroli.
MR ZACAROLI: Picking up from yesterday on contingent debts, the one aspect I need to deal with is the fact that future debts are treated differently, and we accept that the judge was right about future debts.
Notwithstanding that there is no discounting back, the principal amount of the future debt, certainly if it's fallen due for payment before the dividend is payable, there is no discounting back if interest is payable from the date of the administration.
We submit the best explanation for that is that given by the judge in paragraph 215 of his judgment. This is where he is dealing with the future debt issue, and towards the end of that paragraph, the last five lines or so.
He says:
"True it is that this may produce an advantageous result in the particular circumstances instanced by Mr Trower, but it is difficult to construct a scheme which can produce a perfect solution in all circumstances, and given that, in reality, most future debts carry interest in the meantime, the injustice of

applying Mr Trower's submissions in those circumstances may well be considered to have ...(Reading to the words)... by him."
So the judge is picking up on the fact that with future debts one is likely to be talking about interest-bearing debts in the interim.
The same we would say cannot be said of a purely contingent debt because the idea of earning interest before the date on which you know whether the debt is to fall is unlikely.
LADY JUSTICE GLOSTER: But it's possible.
MR ZACAROLI: It's possible that the reverse is true in both situations. We would say in the paradigm instance of a future debt, you would expect interest to be accruing; contingent debt, not.
We are here in a world where both rules, rule 2.105 -- well, that rule and the rule as to estimated contingent debts, and indeed rule 2.88, are dealing with relatively blunt, or they are relatively blunt instruments for what's a complex area, where we accept there are a number of different possible scenarios to fit within it.
It's likely, therefore, that whether you adopt either result, that's our construction of rule 2.88 for contingent debts, that interest should only start

running from the date of contingency or you adopt the judge's approach, it's payable from the date of administration. There will be cases on either side which appear unfair, or perhaps illogical.
The question really comes down, we say, to which is the least illogical of the conclusions. We say that the most logical is when you consider the essential nature of a contingent debt, ie that one doesn't arise until some point in the future when the contingency has occurred. Then it's unlikely to be interest-bearing in the meantime, and it's most logical to apply a rule which prevents double accounting for that creditor or a windfall for the creditor, and says: well, outstanding in those circumstances means from the date the actual contingency arises.
Now, just a point to note. There was a supplemental issue 1(c), which this --
LORD JUSTICE BRIGGS: Just before you run on.
MR ZACAROLI: Yes.
LORD JUSTICE BRIGGS: If your construction or route for achieving that result lies in the way we discussed yesterday in 2.88(7), of saying, well, the period from the cut-off date -- I forget the precise language -- but only if the debt has become due.
MR ZACAROLI: Yes.

LORD JUSTICE BRIGGS: How do you construe that in a way that operates differently for contingent debts than it would do for future debts? In other words, even if you are right as a matter of logic in choosing the least unfair or the least illogical solution, at the moment, I am struggling to see how, within the construction of 2.88(7), you can actually do that.
MR ZACAROLI: I see my Lord's point. There is a issue that I have to accept. We do accept that the judge got it right.
LORD JUSTICE BRIGGS: Ultimately, we are not just fishing around in a pond and coming up with helpful solutions; we are trying to construe some fairly rigid rules.
MR ZACAROLI: The only solution we suggested below was that there is a provision in the future debts, essentially, for treating them as statutorily accelerated for the purposes of distribution by the discounting back in rule 2.105. That's the only answer to my Lord's question.
But I acknowledge the difficulties with that is that it's not actual acceleration; it's a sort of deemed acceleration for the purposes of calculating interest. It doesn't apply if the debt has fallen in for payment before the date of dividend. It's only in the prior period, but that is the only, I think, answer we can come up with.

Now, just to make the point I was going to make, which is to point out there is an issue 1(c) supplemental judgment of the judge at paragraphs 26 to 36.
LADY JUSTICE GLOSTER: What item are we?
MR ZACAROLI: We are not because it's not an appeal from it. This was one of the judge's findings. This concerned the question that when you are quantifying, the amount of interest which falls due under either the Judgments Act rate or the rate apart from administration under rule 2.88(9) to work at which is the greater, you don't start computing for that purpose the rate under the contract rate if it was a contingent debt until such time as the contingency arises. So effectively, it's a zero rate until the contingency occurs, then it's whatever contractual rate applied thereafter.
So let's say it's a five-year period. The Judgments Act rate is 8 per cent and it's £100 debt for those five years. If the contract was contingent and the debt didn't arise until the fourth year, then in comparing the two to see which is the greater, it's zero for four years and then whatever the contract rate is for the last year. In those circumstances, the Judgments Act rate would apply because the contract rate is not higher; that was his conclusion.

We say he was right. There is no appeal from that. All we says is he didn't carry the logic of that through to its logical end, which is that for the person who has a contingent debt where it doesn't arise at all until the fourth year --
LADY JUSTICE GLOSTER: He shouldn't have the interest in the meantime.
MR ZACAROLI: That's the short point.
Now, our fallback position, if we don't succeed on the construction of the rule is, we say, if indeed interest is payable on the contingent debt from the date of administration on that debt, it strongly suggests that certainly in relation to a contingent debt, which is not interest-bearing -- would generally not be interest-bearing -- there ought to be a discounting back to the date of administration to conclude this windfall that otherwise would arise. So this goes back to the two ways of getting out of the illogical circumstances that we first started with.
LORD JUSTICE BRIGGS: Just before we get there, under 1(c), as I understand it -- I have not been back to the passage in the judgment -- we are talking about 28.9 election.
MR ZACAROLI: That's right.
LORD JUSTICE BRIGGS: We're not talking about a reversion to

contract, strictly speaking.
MR ZACAROLI: No, that's right, not reversion to contract --
LORD JUSTICE BRIGGS: We're talking about 2.88(9).
MR ZACAROLI: Absolutely --
LORD JUSTICE BRIGGS: Can you remind me, it's supplementary judgment, which?
MR ZACAROLI: Paragraphs 26 to 36.
LORD JUSTICE BRIGGS: Thank you.
MR ZACAROLI: So just reverting to this fallback position, it has this advantage that it enables the solution to match more accurately the myriad circumstances which might arise because if the contingent debt does bear interest, then it may be inappropriate to discount back to the date of administration. But if it doesn't, there is every reason to do so.
And there are, we accept, a number of possibilities of contingency: contingency as to amount of date certain; contingent as to existence, but the date on which it would come into existence is certain. But it can cater for all those possibilities in a way which more closely fits the circumstances one has to deal with.
The final point on this --
LORD JUSTICE BRIGGS: Do you discount it back for the purpose of calculating interest or for proof as well?

MR ZACAROLI: Proof. If we are wrong about that, for the purposes of calculating interest, we would say, generally speaking, it should be discounted back (inaudible).
So the final point is this. If we are wrong about this -- and I did make this point in passing when I was dealing with the Bower v Marris issue earlier on. This an important example of creditors being given new rights under rule 2.88 of the statutory code for interest, which substantially differ and improve upon their rights under general law because the purely contingent creditor could never receive interest, but for administration on its debt before the contingency arose, nor could it obtain a judgment and therefore get Judgments Act interest before the contingency arose.
So to entitle this creditor to apply a Bower v Marris approach to calculating the statutory interest, which would be the inevitable approach if 2.88(7), as a matter of construction, incorporates Bower v Marris could never be justified on the basis of giving full satisfaction to the creditor of the rights it would have had, apart from the administration. And this, in a sense, is an extreme example of that point.
Now, my Lords, that's all I had to say on the issue in relation to contingent debts. With apologies, I need

to go back to two cases that I said I would come back to yesterday in the course of Bower v Marris, but I turned over two pages and therefore forgot --
LADY JUSTICE GLOSTER: The Canadian one and the Irish one.
MR ZACAROLI: I can do so shortly because the passages are fully set out in the judge's judgment.
LADY JUSTICE GLOSTER: Which issue are you referring to?
MR ZACAROLI: This issue --
LADY JUSTICE GLOSTER: Item first.
MR ZACAROLI: Item 1, yes. Issue 2.
LADY JUSTICE GLOSTER: Yes.
MR ZACAROLI: My learned friend didn't take you to the cases. I don't need to either because the passages are fully set out in the judgment. So far as the Irish case is concerned, Hibernian Transport Companies --
LADY JUSTICE GLOSTER: Give me the paragraph in the judgment.
MR ZACAROLI: 116 to 121. Noting this is a decision of Miss Justice Carroll, in which she, first of all, determined that the bankruptcy provision in relation to --
LADY JUSTICE GLOSTER: I think she is Mrs Justice Caroll, actually, if you look.
MR ZACAROLI: Well, in the Court of Appeal she's referred to as "Miss", but in the Court of Appeal case in Ireland --

LADY JUSTICE GLOSTER: I thought you said "Mr".
MR ZACAROLI: I said "Miss".
LADY JUSTICE GLOSTER: I don't care about "Miss" or "Mrs". Sorry.
MR ZACAROLI: Her decision was that the bankruptcy provision in Ireland for interest from a surplus applied in a liquidation, distinguishing the (inaudible) case in England. The Court of Appeal overturned her on that, so everything she said thereafter was relevant for the purposes of the Court of Appeal.

But in her first instance judgment, and in particular the second judgment the judge is referring to here, she did say that the principle in Bower v Marris would apply to calculate the post-liquidation interest, assuming the bankruptcy provision applied.

Now, the judge concluded, we say rightly, that one gets very little assistance from her decision. What she cited in support of the proposition was a report of the Commissioners in bankruptcy, and this is where the textbook reference I made earlier comes back in because the passage in that report, as the judge notes at paragraph 120 of the judgment, was lifted verbatim from that earlier English textbook, the textbook of Mr Wace in 1904, which just used the words, "It is conceived that". It's a very weak authority for the proposition

that she then relied upon.

So it's an example of Bower v Marris being said to apply to a statutory provision for interest which gave a fixed rate to everybody. That's right. The statutory provision is materially different from rule 2.88 anyway, but we say to the extent that it might be against us, it is really of no serious weight.

The Canadian case is dealt with by the judge, actually, in two places. The court was shown paragraphs 123 to 127 where substantial parts of the judgment of Mr Justice Blair are set out, but if you go on to paragraph 153, the judge does come back it to briefly. Perhaps you can read paragraph 153.
LADY JUSTICE GLOSTER: Yes.
MR ZACAROLI: So you can see the section being referred to at paragraph 123, section 95.2 of the relevant Canadian Act, it's in materially different terms to the English provision. As an authority on construction, it's of no relevance to the construction of rule 2.88.

A couple of other short points, though. The Canadian judge, Mr Justice Blair, stated at paragraph 29, which you will see in 126 of the judge's judgment, he referred to the traditional rule in insolvency situations being applied, dividends to interest in principal.

He then says:

"This is said to prevent in justice, promote equity amongst creditors and protect contractual relationship between the parties."

Now, he was dealing with a provision of an Act which purported to give a rate of interest across the board to one, whether or not they had interest-bearing debts, which suggests either he was thinking he was dealing only with contractual debts, contractual interest at that stage, or he was misunderstanding the concept in Bower v Marris and the decision itself, to refer to it supporting -- the fact he's relying on it being a provision which protects contractual rights is utterly irrelevant in the statutory context he was dealing with, so we would say he's misunderstood the essential nature of Bower v Marris.

We adopt the point the judge made, which is the level of arguments that were addressed to the judge in this case and the court are clearly way beyond the arguments that appear to have been addressed to the judge in that case. So again, if it's against us -- we say it's distinguishable but if it's against us -- it's not binding in any sense, you ought not to give it much authoritative weight.

My Lord, that just leaves one point I wanted to come

back to, which is a question that was asked me by Lord Justice Briggs, in relation to a creditor who has a claim in a foreign currency: can it elect to get judgment in sterling? Because if so, it would get 8 per cent.
LORD JUSTICE BRIGGS: Leaving aside insolvency?
MR ZACAROLI: Leaving aside insolvency --
LORD JUSTICE BRIGGS: Yes.
MR ZACAROLI: Just the question of (inaudible).
There is a note in the White Book and one case, and I am very sorry it hasn't arrived in paper copy. I think it's made its way to the electronic bundles --
LORD JUSTICE BRIGGS: Really.
MR ZACAROLI: Well, it's been sent electronically --
LORD JUSTICE BRIGGS: I am not sure it's got to be --
LADY JUSTICE GLOSTER: What number?
MR ZACAROLI: It will be bundle 2, tab 73A.
LORD JUSTICE BRIGGS: Yes, I've just got it.
LADY JUSTICE GLOSTER: No, I haven't got it yet.
MR ZACAROLI: Can I mention the point and, if necessary, we can come back --
LORD JUSTICE BRIGGS: Is it 73(a)?
MR ZACAROLI: Yes.
LORD JUSTICE BRIGGS: Yes, I've got it.
MR ZACAROLI: The point is simply this: the note in the

White Book is in the 2016 volume and, unfortunately, I haven't been updated yet. I have a new version --
LADY JUSTICE GLOSTER: What rule is it?
MR ZACAROLI: It's paragraph 40.2.2 in part 40, dealing with judgments and orders.
LADY JUSTICE GLOSTER: 40, it's actually a rule, is it?
MR ZACAROLI: No, its under rule --
LADY JUSTICE GLOSTER: It's a paragraph number, is it?
MR ZACAROLI: 40.2.2, that's under rule 40.2.
LADY JUSTICE GLOSTER: It's 40.2.3 at 12.34, "Entry of Judgment on Foreign Currency"; is that right?
MR ZACAROLI: Yes. Does my Lady have the 2017 version?
LADY JUSTICE GLOSTER: Yes.
MR ZACAROLI: Okay. I am sure it's still there --
LORD JUSTICE BRIGGS: 40.2.2 seems to be about Taylor v Lawrence.
LADY JUSTICE GLOSTER: No, it's the next one down.
MR ZACAROLI: The next one down, yes.
LADY JUSTICE GLOSTER: 40.2.3? Yes.
MR ZACAROLI: There is a paragraph, the sixth paragraph, which starts, "It's not clear whether ...".
LADY JUSTICE GLOSTER: Yes.
MR ZACAROLI: That paragraph. If my Lords could read that.
(Pause)
So that appears to be the position. It doesn't cite

any authority. As I say, it was there in exactly the same terms in the 1999 White Book, the last before the CPR came into effect. Again, no authority was cited. But the case we referred to, Rogers v Markel Corporation, which, as I say, we will certainly hand around.
For what it's worth, it refers to the rule. It doesn't apply the discretion in it because it says it doesn't apply in that particular case, but it refers to it without saying, "Well, that can't be right". So at least it has been referred to in a judgment without --
LADY JUSTICE GLOSTER: Which volume is it to go in? 73(a) is --
MR ZACAROLI: It's the case --
LORD JUSTICE BRIGGS: Yes, but which volume?
MR ZACAROLI: 2, and we are going to put the CPR reference in bundle 4 at 192D.
LADY JUSTICE GLOSTER: Yes.
MR ZACAROLI: Before I sit down, may I just make this one short comment, that the way the parties agreed to undertake this appeal was that, in relation to part A, the SCG would make all their arguments in relation to every issue and we would then follow.
LADY JUSTICE GLOSTER: Yes.
MR ZACAROLI: Now, in one respect in particular, we'd

slightly departed from that, in that my learned friend, Mr Dicker, was stopped short pretty early on in making submissions on offset between practical conversion claims and statutory interest.
LADY JUSTICE GLOSTER: You want a right of reply, potentially?
MR ZACAROLI: I reserve the right to ask for one.
LADY JUSTICE GLOSTER: Yes, certainly.
MR ZACAROLI: Thank you. I am grateful.
LADY JUSTICE GLOSTER: Thank you very much indeed, Mr Zacaroli.
Yes.
Submissions by MR BAYFIELD
MR BAYFIELD: My Lady, it's me next. As you know, I appear for the administrators of LBIE, and it was the administrators who issued the Waterfall II application in the first place, for directions to assist them to distribute the surplus in LBIE's estate, in accordance with the rights of the creditors under the statutory scheme.
As the judge recorded in paragraph 11 of his judgment, at first instance, the position that the administrators took was as follows.
Firstly, where the administrators considered that a common position taken by the other parties was

a common position to which there was an alternative argument, they made the alternative argument. The best example of that was issue 8, with future debts' argument in relation to statutory interest.

On those issues where the respondents adopted different positions, the administrators made submissions, only to the extent that they considered it necessary to do so, in the interests of ensuring all available arguments were before the court.

Now, in our skeleton argument before this court, what we've sought to do on the part A issues is to identify positions taken by each of the parties, so that there is in one document in summary form --

LADY JUSTICE GLOSTER: That was very helpful.

MR BAYFIELD: -- the alternative positions, and also briefly to state our own position.

Now, on the appeals, the position of the administrators is aligned on each and every issue with one party, or otherwise the administrators are neutral.

Given that my learned friends have made all of the competing arguments in a comprehensive way, it falls to me, at this stage, only to make very limited submissions indeed, and only in relation to issues where we have something independent to say.

LADY JUSTICE GLOSTER: Yes.

MR BAYFIELD: I will, of course, deal with any questions that the court has, but subject to those questions, I simply wish to deal with two short points.

The first one relates to item 4 on the SCG's table; that's declaration iv, issue 2A.

LADY JUSTICE GLOSTER: Declaration iv, in small Roman numerals?

MR BAYFIELD: Correct. And that concerns whether the creditors are entitled to compensation for delay in paying statutory interest.

Now, we mentioned in our skeleton argument that we would be in a position to update the court as to the progress made by the administrators --

LADY JUSTICE GLOSTER: Could you give me the paragraph number, please?

MR BAYFIELD: So the skeleton argument is at tab 18 of core volume A, and it's paragraph 19.

LADY JUSTICE GLOSTER: Thank you.

MR BAYFIELD: Where we said in the middle of the paragraph:

"The administrators will, at the hearing, be in a position to update the court as to the payments of debts proved and as to whether they have been able to make interim distributions of statutory interest."

I think it's probably worth giving the court a short update in that regard because it does, to a certain

extent, frame the debate in relation to item iv.

So turning first to proofs of debt, you will have seen from paragraph 7 of the judge's judgment that the administrators declared a fourth and final dividend in April 2014. That took the aggregate level of the dividends declared to 100p in the pound.

Creditors whose proofs have been admitted have received 100p in the pound on the principal amounts of their proved debts, and there are, as matters stand, 15 proofs, worth a claimed aggregate of £550 million, which have not yet been finally determined. Some of those are subject to proceedings; others are not. So that's the position in relation to proofs of debt.

Turning to the surplus, and the current best estimate of the amount of the surplus is £6.9 to £8 billion. The administrators --

LADY JUSTICE GLOSTER: 6.8 to 9 billion?

MR BAYFIELD: No, 6.9 billion to 8 billion.

LORD JUSTICE BRIGGS: Pounds?

MR BAYFIELD: Pounds.

LORD JUSTICE BRIGGS: That's the current best estimate?

MR BAYFIELD: That's right. The administrators have not yet made any distributions from that surplus. The reason for that is that there are significant legal uncertainties which are the subject matter of various

parts of the Waterfall litigation, which make it difficult for the administrators safely to make substantial distributions of the surplus.

The three principal sources of that uncertainty are, first, the issue raised in Waterfall I as to the ranking of the subordinated debt. Obviously, if the subordinated debt in fact ranks above statutory interest, the first £1 to £2 billion of the surplus is not available to pay statutory interest, and the Supreme Court's judgment will determine that issue once and for all.

The second uncertainty arises out of the issue before this court as to whether or not Bower v Marris has application at the stage of calculating statutory interest under rule 2.88(7). That issue may, ultimately, be destined for the Supreme Court as well. We will have to wait and see.

The third uncertainty is one that arises in the context of Waterfall II part C, which if resolved in favour of the SCG, may encourage claims to statutory interest at a rate above the Judgment Act rate.

In that part of Waterfall II, the SCG contends that default interest is the master agreement and similar agreements may be based on the cost of equity funding.

The judge, Mr Justice Hildyard, decided against them

on that issue. That is subject to an appeal which is in the process of being fixed at the moment and is likely to come before the Court of Appeal some time in 2018.

Notwithstanding those uncertainties, on 29 March 2017, so last week, the administrators announced the outline terms of a proposal to make an initial distribution of statutory interest, to follow the handing down of the Waterfall I judgment by the Supreme Court, and the proposal is premised on the Supreme Court not overturning the Court of Appeal in terms of the ranking of the subordinated debt.

The proposal is for an interim distribution of approximately £4.5 billion to be made to creditors through a CVA, based on all creditors receiving statutory interest on their proved debts at the rate of 8 per cent, at the Judgments Act rate and no higher.

In my submission, that does rather frame the arguments in relation to item 4. The administrators on that issue are aligned with Wentworth and support the decision of the judge, that creditors are not entitled to interest on statutory interest or damages for "late payments of statutory interest".

Firstly, there is nothing in rule 2.88 or elsewhere in the Insolvency Act or insolvency rules, which makes provision for any further interest to be paid. That's

the point made by the judge at paragraph 167 of his judgment. Further, it is clear, on the face of rule 2.88(7), that statutory interest is payable, firstly, only on the debts proved; and secondly, only in respect of the period during which they have been outstanding since the company entered administration. So there is no scope, in my submission, for rule 2.88(7) to extend to afford the creditors a right to have interest on their statutory interest.

As to damages for late payment of statutory interest, as Mr Zacaroli submitted and as the judge held at paragraph 166, the direction contained in rule 2.88(7) to apply the surplus to pay statutory interest imposes no time limit by which the surplus should be so applied and no question of damages arises.

Now, that doesn't leave creditors without a remedy. If a dissatisfied creditor considered that the administrator was sitting on his or her hands and should be paying statutory interest, then they would, of course, be entitled to make an application under, for example, paragraph 74 of Schedule B1 to the Insolvency Act, claiming that the creditors are being unfairly harmed by the failure to distribute, and the court would direct the administrators to make a distribution, if that was the appropriate thing to do.

So that is item 4, and an update in relation to distributions and also some supplementary submissions in relation to why the judge was correct in what he held.

The other item I wish briefly to turn to is item 7 on the SCG's table, that's declaration (vi), which relates to whether creditors have a non-provable claim to interest on non-provable claims on which interest is payable apart from the administration.

Now, in relation to this item, there is one potential source of very minor confusion potentially arising out of the skeleton arguments of Wentworth and the SCG, which it may be helpful for me, briefly, to address.

In their skeleton arguments, both Wentworth -- and that's at paragraph 7, subparagraph 3, 10 and 16 and the SCG at paragraph 15 -- refer to the judge as having decided that interest on non-provable claims runs from the date of administration.

Now, we suggest that that summary of what the judge held is not entirely precise. The first point is that it's correct that interest on non-provable claims cannot run from a date prior to the date of administration because pre-administration interest is provable as part of the provable debt. One sees that from the insolvency rule 2.88(1).

But the judge did not hold that interest on a non-provable debt necessarily runs from the date of administration. His declaration -- this is declaration (vi) -- is to the effect that interest on a non-provable claim will run for such period after the date of administration, as is provided for by the contract or other instrument, pursuant to which the creditor is entitled to interest.

We are in the realms here of remission to contractual rights and whilst interest may run from the date of administration, it will in fact turn on what the contractual, or other rights, that the creditor has dictate. One sees that not only from the declaration itself, but in my submission, it's clear from paragraph 169 of the judgment and also, for completeness, paragraph 19 of the judge's judgment on the supplemental issues.

Now, having discussed this issue with Mr Dicker, I am going to leave it to him to reply to Wentworth's submissions as to how the non-provable claim to interest is to be calculated on a currency conversion claim. That's something that you were addressed on by Mr Zacaroli, but I think it falls to Mr Dicker to deal with it, given it's his client that has the financial interest in the outcome of the issue.

LADY JUSTICE GLOSTER: You are, basically, neutral on this point, aren't you?
MR BAYFIELD: Well, we say that --
LADY JUSTICE GLOSTER: I was just looking at your skeleton.
MR BAYFIELD: -- we say the judge was right and we are aligned with the SCG on it, and therefore it's really for Mr Dicker to deal with this point.
LORD JUSTICE PATTEN: Why are you taking up a position on it at all?
MR BAYFIELD: My Lord, what we've sought to do is identify the positions that the administrators take, but not to duplicate submissions that are made. It may be that the court has little or no interest in the positions that the administrators take, but having issued the application in the first place and having taken positions before the judge, in the way that he described in paragraph 11 of his judgment, we have sought, in our skeleton argument, to marshal the parties' positions as well as set out our own.
LADY JUSTICE GLOSTER: Sorry, I got it wrong, I was reading paragraph 34 of your skeleton. I should have been looking at paragraph 30. You are submitting that the judge was right for the reasons he gave?
MR BAYFIELD: Precisely.
LADY JUSTICE GLOSTER: Why does it make any odds to you as

administrators?
MR BAYFIELD: It doesn't, which is why am not taking up the court's time merely trying to assist on a potential area of confusion that arises --
LADY JUSTICE GLOSTER: It is an intellectual view; it doesn't have any practical consequences for the administration either way?
MR BAYFIELD: The administrators issued the application for directions --
LADY JUSTICE GLOSTER: I know all that, but so far as the outcome is concerned, it doesn't create problems for the administrators whichever way this court decides this issue?
MR BAYFIELD: This issue?
LADY JUSTICE GLOSTER: Yes.
MR BAYFIELD: My Lady, that's right. In general terms, the administrators consider that the benefit of making the application was to enable them to have directions which would enable them, as a practical matter, to distribute the surplus.
LADY JUSTICE GLOSTER: There is no dispute about any of that.
MR BAYFIELD: The benefit of the position, in my submission, reached by the judge is that the answers that he has given to each of the issues do enable the administrators

to do just that. He has reached a position in relation to interest, generally, which is consistent with the court committee's plea for simplicity and certainty.
LADY JUSTICE GLOSTER: I know.
LORD JUSTICE PATTEN: But you are required, as an officeholder, to administer the estate in accordance with the law. And however convenient or inconvenient that may be, the only purpose of a directions application is to seek the court's assistance where the issues which go to the way in which you administer the estate, and how much you pay and so on, are in doubt and require a direction from the judge, from the court, as to how you should conduct that aspect of the administration. It may be that where, however, it is in doubt, but there are creditors who are prepared to put both sides of the argument, then, surely, your position is simply to wait until the court decides which of those two arguments is correct.
MR BAYFIELD: My Lord, as I was going to come on to say, of course --
LORD JUSTICE PATTEN: I don't understand why you are putting forward a positive case about this. I don't want to waste any time on it, but it puzzles me.
MR BAYFIELD: My Lord, I am trying not to waste the court's time and that's why I have dealt only with an update in

relation to one item and some confusion on another item. The administrators will, of course, distribute the surplus, in accordance with whatever directions they are given, and have set this application up to enable the issues that do arise and that the creditors have taken to be resolved.
LADY JUSTICE GLOSTER: Right.
MR BAYFIELD: So unless the court has any further questions from me, those are the submissions on the part A issues.
LADY JUSTICE GLOSTER: Thank you very much indeed, Mr Bayfield.
Yes.
Submissions by MR DICKER
MR DICKER: I think I am next.
By way of reply in relation to some issues, by way of response, strictly speaking, (inaudible), although I don't think in practice it's going to make an enormous amount of difference, but can I start with Bower v Marris, which is item one on the table of issues.
The starting point, of course, is outside of an insolvency a creditor can ensure that payments he receives are applied first in relation to interest rather than to the principal. That is the fair and just position.

When we talk about the rule or principle in Bower v Marris, one needs to be careful; all, essentially, one is doing is saying that approach, that outcome can also be taken in an insolvency, despite the fact that one of the requirements for the insolvency regime is that payments have already been made in respect of proved debts; therefore in respect of principal, perhaps with a small amount of interest up to the date of administration, but not in relation to post-insolvency interest.

Now, it's common ground between the parties that, at one stage, at least, this was the position in both liquidation and bankruptcy. But my learned friend says that, at some stage, for both, it disappeared. It appears to have disappeared in relation to liquidation in 1986; the bankruptcy, I will come on to in a second.

Now, I said in opening that it disappeared, despite the fact that no case had rejected its application, or indeed had ever criticised it in any Commonwealth jurisdiction we have found and at any stage, despite the fact that pre-legislative materials didn't criticise it or even refer to it.

I also said that the judge himself didn't provide a reason as to why the legislature might have sought to dis-apply it, and nor did my learned friend.

I will come back to policy and principle in due course, but it does appear that if Bower v Marris no longer applied post-1986, that appears to have been not as a result of a conscious and deliberate decision by the legislature, but essentially, an accident of the enactment of rule 2.88 or its wording.

Now, the question therefore is: did it cease to apply; and if so, precisely why. I want to take this in stages because, in our submission, it's important to understand the logic which underpins my learned friend's submissions as to why it ceased to apply.

The easiest way to do this is to deal with the two strands separately, so dealing first with a creditor who has an underlying right to interest. It doesn't matter whether it is contractual or statutory, and then to come back and deal with a creditor whose only right to interest is under the rules.

So I start with the first. To make it easy, imagine a creditor with a contractual right to interest and an express right to appropriate any payments, first to interest, and then to principal.

Now, we know that the principal in Bower v Marris applied in such a situation for the entirety of history of the liquidations between 1869 and 1986. And we also know it applied in bankruptcy between 1743 and 1883;

that's common ground between the parties.

Now, that's despite the fact that in each regime for those periods, the statutory regime required dividends be paid in respect of proved debts, ie principal. So that when one got to the stage of talking about distribution in respect of interest, the statutory regime had already made payments in respect of principal.

So that is 100 and so years of liquidation, and a similar period in relation to bankruptcy, although earlier.

Now, my learned friend says Bower v Marris stopped operating in 1986 in relation to liquidation, as a result of the introduction of rule 2.88. Now, again just taking this in stages, the first point we made was: why did rule 2.88 dis-apply the principle in Bower v Marris when it is common ground that the introduction of section 132 of the Bankruptcy Act did not?

Now, it's common ground that following the introduction of section 132, Bower v Marris applied, at least in relation to the first limb of 132; in other words, a creditor who had a right to interest at law.

So, we have two statutory provisions, section 132 and rule 2.88, which permit a creditor in the event of

a surplus to receive the interest that he was entitled to at law, section 132, or interest at the rate applicable to the debt apart from the administration, and that's rule 2.88.

Now, why did rule 2.88 dis-apply Bower v Marris, but it's common ground section 132 did not, in relation to a creditor who has a contractual right to interest? I made that submission in opening; my learned friend didn't accede to answer it.

Now, what my learned friend did say was: well, Lord Cottenham in Bower v Marris didn't really consider section 132; he didn't really consider section 132 because 132 wasn't retrospective. That, in our submission, doesn't help him because it's common ground that Bower v Marris did apply after the introduction of section 132, through to at least 1883, in relation to creditors with contractual right to interest. That is common ground.

The judge agreed, paragraph 65, he said:

"I do not doubt that approach in Bower v Marris was accepted as correct, at least until the Bankruptcy Act 1883."

LORD JUSTICE BRIGGS: Sorry, which paragraph of the judgment?

MR DICKER: 65.

LORD JUSTICE BRIGGS: Than you.
MR DICKER: One needs to bear in mind, at this stage I am only dealing with creditors who have a contractual right to interest. As I said, section 132 is introduced; it has two limbs. The first limb deals with creditors who are entitled to interest at law. As I say, it's common ground that in relation to that limb of section 132, Bower v Marris --
LADY JUSTICE GLOSTER: Can you just give me the tab number in bundle 4 for section 132, where I see it?
MR DICKER: It is 118.
LADY JUSTICE GLOSTER: Thank you.
MR DICKER: Now, as your Lordships know, Lord Cottenham did in fact refer to section 132 in Bower v Marris. Bower v Marris post-dated its introduction by some 10 years.
Then there is the paragraph that you saw where he dealt with it. Can I just take you quickly back to that, and to one other line? I am not sure that you were specifically referred to it. So if you go to the authorities, bundle 1, tab 6, it deals, as you know, in bundle 1, tab 6, at page 357, in the last half of the page, with section 132. I won't go back through that; you've seen it.
He then, over the page, deals with the authorities,

pre-dating its introduction. That's at 358. Halfway down, or a third of the way down, he says:
"The order [referring to Bromley v Goodere] indeed appears to have been framed by himself ...(Reading to the words)... this was the opinion of that great judge of the justice of the case without the aid which the statute now affords."
In other words, there is an indication in Bower v Marris that Lord Cottenham thought the same applied under section 132 as had previously applied as a matter of judge made law.
My first point is simply a comparison between 132 and rule 2.88. They are doing, essentially, the same. If it applies in relation to a creditor with a contractual right to interest in the context of 132, why doesn't it apply in the context of rule 2.88?
Now, the next point is this: if even leaving aside that comparison, in our submission, there is nothing in my learned friend's point that the introduction of rule 2.88 is inconsistent with the continued application of Bower v Marris.
Again, focusing at the moment just on a creditor with a contractual right to interest. Now, the first point he made was: well, for Bower v Marris to apply, you need to have had interest accruing throughout. So

that when you come to the stage of notionally appropriating the dividend payments that were previously made and you look back, you can see that there were two debts accrued due at the time, one principal, one interest, and you can, essentially, choose to notionally apply it in relation to interest.
Now, my learned friend's argument is: well, that ceased when rule 2.88 was introduced. Because he says all you have then is a statutory right under rule 2.88. Interest isn't accruing under that right from day-to-day. You only have a right to interest in the event that surplus exists. So the first time you have any right to interest is when surplus has been identified.
Now, again just thinking of this in the context of a creditor with a contractual right to interest, we say rule 2.88 raises no problem in relation to the concept of appropriation or the requirement that interest had to be due.
The reason I say that is that, if you go back to Lord Hoffmann and Wight v Eckhardt, we know that the collective process of execution doesn't discharge the underlying debt. So the underlying debt remains in existence and a creditor with an underlying debt on which he's entitled to interest does have a claim

accruing interest throughout.
So when you ask: are there two debts, in the sense of was interest accruing due at the time? The obvious answer is "yes". We have an underlying contractual right on which interest accrues, and at the relevant date that creditor was entitled to say, "I had interest accrued and I am now in a position, looking back, to appropriate to interest notionally rather than to principal".
So that leads to this: it's a necessary step, in my learned friend's argument, so far as a creditor with a contractual right to interest is concerned, that underlying right has been extinguished. It is only if it's been extinguished is he able to say: the only right you have is the right under rule 2.88, and that right doesn't involve interest accruing; therefore, on his approach to Bower v Marris, no room for appropriation and no room for a misapplication.
So the next necessary step in his argument is that 2.88 has somehow extinguished the underlying right to interest.
Now, the way my learned friend sought to deal with this in submissions was to say: well, rule 2.72 and 2.88(1) operated together to extinguish any claim to post-insolvency interest.

The argument, as I understand it, was, as he put it, "proving" just means "claiming", and that those rules are therefore saying you can only claim for pre-insolvency interest, so any other claim has been extinguished.

With the greatest respect to my learned friend, in our submission, that's hopeless. Rule 2.72 is concerned with identifying what you can prove for. It's headed "Proving a Debt". It's concerned with the priority level of proving debts, assets of an insolvent company are to be distributed pari passu in respect of its proved debts and proved debts do not include post-insolvency interest.

So one has a rule certainly which says this is what you can prove for, but we know that the rules which say what you can prove for do not extinguish the balance of your claim.

The contrary is unarguable. I said we know the rules as to what you can prove for do not extinguish the balance of your claim because we know that you couldn't prove the post-insolvency interest prior to 1986, but that didn't extinguish a claim for post-insolvency interest in the event of a surplus.

We know that the rules in relation to proof, so far as foreign currency debt is concerned, require them to

be converted into sterling, but we know from the judgment of this court in Waterfall I that that doesn't extinguish the balance of the underlying claim either.

Now, all rule 2.88 did, so far as the contractual interest was concerned, was codify previous judge-made law. In liquidation 1869 to 1986, it was, as a matter of judge made law, the position that in the event of surplus creditors with contractual right of interest could recover the interest they would have been able to receive under they contract had there been no insolvency.

We say all rule 2.88 was intending to do, so far as they were concerned, was to codify that. One can see this pattern of judge-made law being codified, having taken place throughout history of insolvency.

If one goes back to Bromley v Goodere, I think mentioned in opening there were two or three examples of exactly that having happened. Now, if the legislature had intended to extinguish any underlying right to interest, we say it would not have sought to do it in the way suggested by my learned friend through rule 2.72, dealing generally with proof and 2.88. It would have used language similar to that you find in relation to disclaimer, which is one of the very few exceptions to Lord Hoffmann's general principle.

There is a power to disclaim onerous obligations. The underlying claim is extinguished and replaced with a statutory claim for damages, essentially, in the identical amount, but the language of the statutory provision in relation to the disclaimer makes it perfectly plain that that is what is going on.

So just in relation to the creditor with a contractual right to interest, there is no issue, we say, in relation to appropriation. His underlying claim exists. Interest was due on his underlying claim at the date of the dividend and there is no problem now with looking back and notionally saying, "We will treat the payments you received as payments first in respect of interest."

So appropriation and the requirement for interest having been due is not an issue in relation to a creditor with a contractual right to interest. The argument, as I say, only gets off the ground if somehow that underlying right has been extinguished, so that one is looking solely at the statutory right under 2.88, which point, as I say and my learned friend says: this is the only right to interest you now have and under this right, interest doesn't accrue day by day.

LADY JUSTICE GLOSTER: You really are going back to Lord Hoffmann in Eckhardt, aren't we? I mean, it's a basic

conceptual proposition your problem.

MR DICKER: One of the interesting things is you will see from a comment -- Mr Justice Dixon, in one of the Australian cases my learned friend showed you, had a similar issue, in a sense, to an issue that this court had in Waterfall I. He was looking at the Australian statutory provision, which seemed to say: you pay proved debts in full and then you distribute to members. And he seemed to leave no room for non-provable liabilities in the middle.

He said: well, that's fine. But if look at the history, you look at the way it's developed and you construe the Act in a sensible fashion, having regard to fundamental policies and principles of insolvency law, it's plain there is this thing in the middles, and this is how we read it. I will show you the passage later.

One of the features of insolvency law is we have an iterative process. The law has been developed in this context, in part, through the judges. Parliament has, on occasions, codified the judge's decision. On occasions, Parliament has simply rolled forward the statutory language, no doubt on basis that the way it was interpreted by the judge, even if not, initially, the most obvious reading, is one which Parliament is content with.

Again, it's another point made by Mr Justice Dixon. When you look at the Australian legislation, it's quite hard to see how you find room for non-provable liabilities.

This is intellectual freight. It's one thing to say, of course the 1986 Act changed the law. You have to be very careful, in our submission, to work out in what respects and why, and to ensure that when you come to construe its wording, you do so with adequate regard to what preceded it.

So that is the position in relation to creditors with a contractual right to interest. Can I turn now and deal with the second strand, which is creditors whose only right to interest is at the judgment at rate; in other words, they have no underlying rate of interest. The only right is the right they are given under 2.88(7) and (9), and the only thing they are entitled to is interest at judgment at rate.

Now, at this point, I obviously cannot rely on any underlying right; I can't rely on Lord Hoffmann's analysis in Wight v Eckhardt; I can't find any interest that was due, essentially, behind the scenes.

So my learned friend is able to say: look at this statutory provision, to say -- at least to submit that -- interest under that statutory provision only

falls due in the event of surplus. And that this is inconsistent with the operation of Bower v Marris.

Now, the real question is whether such a statutory provision is inconsistent with the operation of Bower v Marris, and we say it's not.

Now, my learned friend's position in relation to this is, if one goes back to section 132 and focuses on the second limb of 132, which gave creditors second-ranking priority, 4 per cent interest, even if they weren't otherwise entitled to interest.

My learned friend's case is Bower v Marris never applied to the second limb of section 132 because it was giving you a right to interest, which you never had before, and which obviously wouldn't have accrued during the course of payments of dividends.

So he says, at this stage, Bower v Marris didn't apply in 1832, didn't apply in 1883, and effectively, never applied in bankruptcy up to 1986.

Now, we say that's wrong. Before dealing briefly with the cases my learned friend referred you to, three points. First of all, we say it would be rather odd if Bower v Marris applied to the first limb, but not to the second.

So if one goes back to section 132, we know Bower v Marris applied in the case of creditors with

a contractual right to interest. We say it would be slightly odd if it applied to them, but didn't apply all also to those who were given a right of interest, effectively, as we would later say, as if they had a judgment.

The second point is: there is no obvious reason why it can't or shouldn't apply in that context. If the effect of giving creditors who don't otherwise have a right to interest, a right to interest at the judgment at rate, if the reason for that is that the moratorium has prevented them from getting a judgment, we ought to treat them as if they had a judgment, the logic then would be: well, if they had a judgment and, again, unless it were County Court judgment, Bower v Marris would apply, so why doesn't Bower v Marris apply in this situation as well?

The third point is this. Whether the legislature is intending to provide creditors with interest at 4 per cent, as in section 132, or 8 per cent, as in rule 2.88(9), that is a rate which the legislature has said creditors should receive.

Now, if Bower v Marris doesn't apply, what the creditor will end up getting is not an effective rate of either 4 or 8 per cent; and the reason for that, as I submitted before, is simply interest accrues for

a period but then is frozen, and if it's paid one year, two years, three years later, they won't end up getting interest at the effective rate. So in our submission, there is no reason why Parliament would have wanted to achieve such a result.

Now, against that background, there are authorities which indicate that Bower v Marris can apply to such a provision. The most important one, so far as this jurisdiction is concerned, is obviously Whittingstall v Grover.

Now, my learned friends said: well, that case was different. He said that the decree for the administration of the estate operates as a judgment in favour of creditors, which itself gives rise to a right to interest. So he says that's different because you have a decree. That operates as a judgment in equity. That judgment gives you the right to interest. So it's another Judgment Act case where Bower v Marris normally applies, so of course it applied in Whittingstall v Grover.

We say that doesn't explain Whittingstall v Grover for three reasons. First of all, a decree is not a judgment which itself gives rise to a right to interest. That is because, firstly, if one goes to section 18 of the Judgments Act -- it's authorities

bundle 4, tab 120, volume 4, 120 -- section 17 deals with judgment debts; section 18 deals with decrees at orders of court in equity. You will note, four lines down:

"These are decrees and orders of court of equity whereby any sum of money or any costs, charges or expenses shall be payable to any person. Those decrees, but only those decrees, shall have the effect of judgments in superior courts at common law."

Dropping two lines:

"... and they shall be deemed judgment creditors within the meaning of the Act."

The first point is a decree of court in equity is not an order whereby any sum of money or any costs, charges or expenses shall be payable to any person, so as to entitle the creditor to interest.

The second point is we know that, for the simple reason that paragraph 46 of the order of 1841 was enacted. If a decree entitled you to interest, as my learned friend said, it wouldn't have been necessary to enact the 1841 order, which gave you a right to interest. You already would have had one.

One can also see that the decree didn't give everyone a right to interest because when one comes to the 1841 order, the right wasn't given to all creditors

of the deceased debtor, which is what would have happened if it had arisen because the decree was a judgment.

Under the 1841 order, the right to interest was only given to those creditors whose debts did not carry interest. So you cannot explain Whittingstall v Grover on the basis that this was just a Judgment Act case; an unusual one in that it involved a decree in equity, but a decree in equity is a judgment which entitles you to interest.

It didn't. What entitled you to interest was the 1841 order, subsequently order 52, rules 62 and 63, which my learned friend referred you to. Now, once you get to that stage, we say that you have a provision that's analytically the same as section 132 of the 1825 Act, rule 2.88(7); in other words, a provision which says you get interest if, and only if, there is a surplus, regardless of whether you had an underlying right to interest; in other words, the point my learned friend makes that under 2.88 interest doesn't accrue day-by-day can equally be made, if right, in the context of the 1841 order. On that basis, Bower v Marris should not have been capable of applying Whittingstall v Grover.

Now, it's interesting to note that

Mr Justice Chitty's explanation or justification for applying Bower v Marris was not couched in terms of whether interest had become due, or anything of that sort. The explanation which you will recall was simply that the moratorium that prevented them from obtaining a judgment, equity should treat them as if they had a judgment. That is what the order of 1841 was intended to achieve, and given you were treating them as if they had a judgment, like a judgment creditor, generally, Bower v Marris applied.

I wonder whether that would be a convenient moment? I had rather lost sight of the time.

LADY JUSTICE GLOSTER: Certainly. I am sorry?

MR DICKER: I had rather lost sight of the time.

LADY JUSTICE GLOSTER: Five minutes, then.

(11.55 am)

(A short break)

(12.00 pm)

MR DICKER: Now, my learned friend submits that whatever may be the position in relation to the administration of the deceased estate, insolvent's estates, the position was different in relation to winding up, and he referred you to Herefordshire Banking Company. Can I just show you that? It's authorities 1, tab 13.

It's important to bear in mind when considering

Lord Romilly's judgment that this case concerned the winding up of a partnership which carried on a banking business, and the winding up was, essentially, intended to settle the equities been the partners and to wind up the affairs of the partnership.

You will see that at 252, over the page to 253. The last four lines of 252, Romilly says:

"Although a winding up order is a decree in equity and therefore a judgment, it is a judgment in degree of a different character. It is, in point of fact, a degree amongst a great number of co-partners to settle their equities among themselves to wind up the affairs of the partnership, but that does not give the creditors co-partners, partners a judgment against the company or entitle them to any interest in respect of it."

Now, that may be a fair thing to say about a proceeding which is designed to settle the equities between a number of co-partners and wind up the partnership, essentially, where creditors are not affected. But in our submission, it's very difficult to read that description of a winding up as equally applicable to the sort of winding up that we are talking about.

The sort of winding up we are talking about is, in our submission, much closer to what was going on in

Whittingstall v Grover; namely, that you have a debtor who is insolvent and whose assets need to be distributed amongst its creditors, which involves a moratorium preventing them from getting judgment, and which, as a result, should entitle them to be treated as if they have a judgment.

So although Lord Romilly was referring to a winding up order, he was obviously thinking about that in the context of the particular case with which he was dealing.

Just for your note, there is a good description of the operation of the Banking Act, governing the formation and structure of the bank in the Herefordshire Banking Company case in the judgments of the House of Lords in Oakes v Tuquand, pages 358 to 359. That's volume 1, tab 14 of the authorities.

Now, there are two other authorities in other jurisdictions where Bower v Marris has been applied to similar statutory provisions. The first, my learned friend mentioned, re Hibernian, I don't think need to say any more about that; and the second is Attorney General of Canada v Federation Trust case.

Now, in relation to this, my learned friend took you to the judge's judgment. As you know, he dealt with Attorney General of Canada case in two places. First of

all, he cited upon it at some length, 123 to 128, where he says:

"The decision and its reasoning clearly provide support for the submissions made on behalf of SCG and York, and that the submissions indeed are powerful submissions, but I have concluded an application of the principal is incompatible with the regime established by rule 2.88."

Then he goes on to deal with that. As my learned friend said, he comes back to Attorney General of Canada at 153. Just to note, if I may respectfully say, that the subtlety of some of the distinctions the judge draws between that case and this -- he says:

"I note, however, the statutory provision in that case was not identical to rule 2.88. It does not expressly refer to the surplus as remaining after payment of the debts proved, nor does it specify the end date of the period in respect of which interest is to be paid."

Now just, for example, taking that first point, "does not expressly refer to the surplus as remaining after payment of the debts proved", if you go back to 123, where he sets out section 95 of the Canadian Act, (1) says:

"The court shall distribute among the persons

entitled thereto any surplus that remains after to satisfaction of the debts in liabilities of the company ...

"(2): Any surplus referred to in subsection 1 shall first be applied in payment of interest."

We do, respectfully, ask in what sense does section 95 not expressly refer to the surplus as remaining after payment of the debts proved? It's true it doesn't use that precise phrase, but section 95.1 expressly states the obligation is to distribute to the persons entitled thereto any surplus that remains after satisfaction of the debts and liabilities of the company; in other words, after the debts have been proved.

Now --

LORD JUSTICE BRIGGS: There may be slightly more substance in the judge's second point of distinction though because he says --

MR DICKER: He doesn't expressly say for how long.

LORD JUSTICE BRIGGS: He doesn't specify the end date.

MR DICKER: The end date.

LORD JUSTICE BRIGGS: The end of period.

MR DICKER: Yes, but again has to ask what's 2.88(7) doing in that respect? We are saying it's just saying you pay interest for the period for which the debts have been

outstanding. I will come back to this. It's not saying how you calculate the amount of (inaudible). I will come back this. It's an interesting -- one of the consequences of the judge's, in our respectful submission, overly literal approach to 2.88 is it leads to consequences which make no sense. You can see that in the context of issue 3 relating to compound interest. The point is much better made when I come to issue 3.

A more general point in relation to appropriation is this. My learned friend says, "Well, when you read the cases, the vast majority of the cases talk about Bower v Marris and talk about notional application of dividends to interest due." My learned friend repeatedly emphasised the word "due", and that is absolutely right. The simple reason for that is that those cases, most of them, the more recent ones being liquidation cases, or pre-section 132 of the Bankruptcy Act cases, were concerned with creditors who had an underlying right to interest. So there is nothing surprising in the court describing the principle operating in a way which reflects those underlying rights.

Now, it's plain that that is sufficient for the principle to operate. It does not follow that it's necessary for it to do so. Whittingstall v Grover,

Attorney General of Canada, et cetera, indicate that it's not.

It's a little like the fallacy one I think was taught when one was learning law. Donoghue v Stevenson: if someone goes for advice and says, "Could I be liable", the answer is no because your facts don't involve a snail in a ginger beer bottle. I mean, it is a frivolous example, but what is sufficient isn't the same as what is necessary.

Why should appropriation be essential? You have seen Lord Hoffmann in Bower v Marris saying it didn't depend on appropriation. There is one other passage I wanted to show you in this respect. It's from an Australian case called Midland Montagu: authorities volume 2, tab 61. The passage on the judgment of Chief Justice McLelland(?) is at 326. You will see the reference about two-thirds of the way down the top half to Joint Stock Discount Company, Warrant Finance Companies case; that's Humber Ironworks.

It's the last two sentences where he says:

"This depends on the applicable principles of appropriation of payments. However, principles of appropriation applicable to consensual payments founded upon the express or implied intention of the payer or payee do not govern payments made in the course of

administration provided for by law."

Then there is a long discussion of Bower v Marris which continues to 328. Just noting at 328, about ten lines down, he refers to Bromley v Goodere. He says:

"He has always proceeded upon the same rules as he would ...(Reading to the words)... that an equitable rule ought to be followed in giving interest in these bankruptcy cases."

Then there is a discussion of Humber Ironworks which I won't take you through.

Whether one calls it a rule in Bower v Marris or a principle in Bower v Marris or what simply Bower v Marris does, the cases have consistently described it as a means of achieving a fair or just result. It's not something that depends on technical rules of appropriation, interest having become due or anything of that sort. It's to ensure creditors are compensated to the extent intended for a period of delay.

Given all that, why and how did Bower v Marris cease to apply, having applied, certainly in liquidation, for the previous hundred years, in 1986? My learned friend's submission, as I understood it, was that, in effect, Bower v Marris, having been decided in 1841, promptly disappeared from view. It may be that the

draftsman wasn't aware of it and didn't expressly intend to dis-apply it, but that is the consequence of the wording that he chose to using 2.88.

Now, we say that is a submission which one needs to assess in the light of the history. My learned friend says no reported case applying Bower v Marris in England after 1841 when it was decided. Well, firstly, absence of reported cases between 1841, certainly 1869, 1883, in our submission, is of little significance. Lord Cottenham in Bower v Marris, you will recall, described it as a well recognised rule that was "so well understood as not to be the subject of question". So if there isn't another reported case it may simply be that no one thought there was an issue here worth litigating about. It is certainly, in our respectful submission, ridiculous to suggest that it is lost to view. That's apparent from Humber Ironworks. Whatever extent to which parties may have thought about Bower v Marris, Humber Ironworks is a classic insolvency case.

LADY JUSTICE GLOSTER: Which has been in the textbooks.

MR DICKER: It's been in every textbook in every edition ever since it was decided.

Now, it may be that Bower v Marris was effectively only preserved through the decision in Re Humber Ironworks, and it may be that occasionally those who

read Humber Ironworks read it for the purposes of working out what happens when a company is insolvent and skip over the bit where Lord Selwyn says, "This is what happens if it's solvent", but that no doubt was where Mr Potts, Mr Stubbs, whoever sourced it from for the purposes of Re Lines Bros -- and Humber Ironworks, it's not merely referred to in the textbooks, but it's cited in pretty much all the leading authorities. It comes up in Re Dynamics, Re Lines Bros, there is a discussion of it by Lord Hoffmann in Wight v Eckhardt.

Now, my learned friend said, "Well, there are other authorities but they are in Commonwealth jurisdictions." There are 11 authorities in the bundles, I am not going to take you through them, in respect of other Commonwealth jurisdictions. What I will say is this. Reading them, it is interesting to note that they do not simply contain a short reference to and application of Bower v Marris. Pretty much all of them have a long, well-reasoned discussion of Bromley v Goodere, Bower v Marris, Humber Ironworks, and the relevant statutes in England before considering the position in the relevant foreign jurisdiction. Three, in particular, which I think it is important the court should at some stage read, just to identify them. Re Langstaff, an early decision, 1851. It's authorities

1, tab 9. It contains a length --
LADY JUSTICE GLOSTER: Where is that one?
MR DICKER: It's Canada, my Lady. As I say, it contains a lengthy discussion both of the English statutes and Bower v Marris. The second is Mackenzie v Rees, which is authorities 1, tab 38. There was one passage I did want to show you in that. If I can ask you to turn up authorities 1, tab 38. It's from Mr Justice Dixon's judgment and it's at pages 10 and 11.
Just picking it up in the last five lines of the first paragraph, so about halfway down the page, he says:
"The principle which stops interest upon debts for the purposes of proof of assets so that the rights of creditors may be equitably adjusted ...(Reading to the words)... has been applied on the winding up of companies."
He says:
"The principle has long received statutory recognition and, to some extent, expression."
Then he refers to section 132 of the 1825 Act. Then the discussion that follows in relation to the Australian legislation we say is worthy of note. If you could perhaps continue reading down to over the page, on 11: for those who have hole punches, down to the first

hole punch; for those who don't, to the end of the sentence before the sentence that refers to section 60(2), et cetera.
LADY JUSTICE GLOSTER: Sorry, where did you want us to go down to?
MR DICKER: Down to the first hole punch or before the sentence that starts 15 lines down. It starts, "Section 60(2)", et cetera. So the first 15 or so lines on page 11. I said I would show you that. In our submission, it's interesting to note that is Mr Justice Dixon saying:
"Some difficulty may be felt in reconciling the operation of the principle as part of our law of bankruptcy with the express language of some provisions."
This is dealing with how non-provable claims fit in. He finds a way of doing so.
The third case again which I would suggest is one which needs to be read is Midland Montagu v Harkness. It's rather more recent. It's 1994. It's authorities 2, tab 61.
Now, my learned friend referred you to the Cork Report and the White Paper. In our submission, it's useful to have in mind the precise chronology. If I can indicate what, in our submission, that was. One

starts with a judgment of Mr Justice Slade in Lines Bros No 1, which was decided on 15 April 1981. Humber Ironworks was considered. Bower v Marris was cited. This was the first instance decision that went on to the Court of Appeal.
One then has as the next stage, so after that, the Cork Report. Now it's recorded as having reported on 30 April 1981, so very shortly after Mr Justice Slade's judgment had been given. Although it is fair to say the report was not published or laid before Parliament in June 1982. You can see that from the front sheet. We know from certain other passages in the report that additions were made after April 1981 because there are three references to events prior to the end of December 1981. Just to give you the references, paragraph 1586 refers to a case called Re MR Shoes Limited, a judgment delivered 4 December 1981. Paragraph 1791 refers to a provision of the Companies Act which only came into operation on 22 December 1981. Paragraph 1918 refers to a report of the House of Lords Select Committee, dated 22 October --
LORD JUSTICE BRIGGS: Sorry, what was that paragraph?
MR DICKER: Sorry, paragraph 1918.
LORD JUSTICE BRIGGS: 1918, thank you.
MR DICKER: A report of the House of Lords Select Committee,

22 October 1981. We can't find anything in the Cork Report that postdates the end of 1981. Although, as I say, the report was not in fact published or laid before Parliament until June 1982.
Now, one then gets Lines Bros No 1 in the Court of Appeal, and that's 11 February 1982. There was an issue which we debated in the context of Waterfall I before this court as to whether or not the Cork Committee had seen that before the Cork Report was actually finally published in June 1982. There isn't a clear answer to that. I think Lord Justice Lewison considered it was more likely that it had not been.
So one has the Cork Report. One then has Lines Bros in the Court of Appeal. Humber Ironworks considered. Bower v Marris cited. By this stage, obviously Bower v Marris was clearly in play, if I may put it that way. Two years later, we have Lines Bros No 2, which was a decision of Mr Justice Mervyn Davies, argued in December 1983 and decided in January 1984. Finally, we have the White Paper published in February 1984.
Now, something, we say, prompted the authors of the White Paper to add the reference to the rate applicable to the debt apart from the administration, because that wasn't part of the recommendations of the Cork Committee. We say the obvious explanation for the

inclusion of those words is that by the time the White Paper was published, some two years after the Court of Appeal had given judgment in Lines Bros No 1, they were aware of how post-insolvency interest was dealt with in a liquidation, including the application of the principle in Bower v Marris. What they essentially said was, "That's how it has worked in liquidation. We think, unlike the Cork Committee, the rules need to blend the two strands, and to provide those creditors who have an underlying right to interest with the interest they would have received absent the insolvency."

Now, just one small point on the Cork Report. My learned friend showed you paragraphs 1383 to 1386.

LORD JUSTICE BRIGGS: Just remind me of the reference.

MR DICKER: If you would not mind taking that up, it's authorities bundle 5, tab 2/11. It's paragraphs 383 to 386.

LADY JUSTICE GLOSTER: 383?

MR DICKER: I am sorry, 1383.

LADY JUSTICE GLOSTER: Yes.

MR DICKER: To 1386, I am sorry. Our submission here in fact it's probably more of a plea. It is simply that one doesn't construe the report as if it was a statute. One is sensitive to what, in substance, the authors were

dealing with. What, in substance, the authors were dealing with here was the regime in bankruptcy was different from that in liquidation. The conclusion in 1386 was simply:

"Our attention has been drawn to this anomaly between the two insolvency orders by a number of bodies, who suggest there should be a common code of rules for situations which occur both in personal insolvency and in winding up proceedings and, in particular, interest should be payable on debts in the same way in both administrations. We agree."

That's what they were focusing on. They weren't focusing on the precise way in which post-insolvency interest was being dealt with in bankruptcy and they certainly weren't in 1383 seeking to resolve the construction of sections 40(5) and section 65 of the 1883 Act.

Now, finally on this, so far as construction of rule 2.88 is concerned, I have made my submissions and I don't intend to repeat them. The critical point is obviously to remember that Bower v Marris is a calculation methodology. There is nothing in it that subverts the statutory scheme. Dividends have been paid pari passu in respect of proved debts. We are now just concerned with calculating how much interest is payable.

Now, so far as the three aspects of the rules that my learned friend referred to, we say 2.88(7) established the priority of post-insolvency interest, it comes after proved debts and before non-provable liabilities. It establishes interest is to be paid in respect of the periods during which they have been outstanding and it tells you that they can have interest at the greater of Judgment Act rate and the rate applicable to the debt apart from administration. Nothing there tells you how you calculate the amount of interest which should be paid. Do you calculate it on the basis the principal has been paid or by notionally treating those payments as having been paid first in respect of interest?

Now, we say the learned judge's approach to construction and my learned friend's just takes too narrow and too literal an approach. He focused on three main points; first of all, the reference to "those debts". He says that's a reference to the proved debts, not the underlying debts. But actually, if one thinks about it, the phrase is potentially ambiguous. It could equally be referring more broadly to the debt in respect of which the creditor has proved. Indeed, my learned friend made precisely that submission later in his submissions in the context of contingent claims.

Secondly, so far as outstanding is concerned, my learned friend says, "Well, proved debts were only outstanding until the dividends are paid", but, in our submission, this leads you to oddities like those the judge reached in issue 3 in relation to compound interest where compound interest stops running when principal has been repaid, even though the interest is still outstanding, contrary to the basic nature of compound interest. It reduces the right as neither one thing, nor another.

One other small point. My learned friend repeatedly said the rule required you to pay interest "for" the period the debt was outstanding. The words the rule in fact uses are "in respect of", which are slightly more general in relation.

Finally, my learned friend says the rule is concerned with applying surplus and payment of interest. Bower v Marris would result in the surplus being used to pay principal, which then, if one bears in mind Bower v Marris, is simply a notional calculation as to the amount to be paid and doesn't in fact subvert the priority regime. There is no issue there.

Now, he also referred to the reference to rate. This is obviously a point of construction that's only relevant to creditors with an underlying right to

interest. He says the concept of the word "rate" can't encompass Bower v Marris.

Now, again I referred to section 132 of the Bankruptcy Act in opening which uses the phrase "the rate of interest". It's common ground that in that statute that word did -- that was wide enough to cover Bower v Marris. If it was wide enough to cover Bower v Marris there, there is no reason why it isn't in the context of rule 2.88.

As we say, this phrase in 2.88(9) is simply intended to ensure creditors with an underlying right to interest receive the interest they would have received absent administration. Now, perhaps slightly unfairly, but that was a phrase I picked up from the judge's own supplemental judgment at paragraph 34, but we do say he was right in that context. That is precisely what that phrase is intended to achieve.

Now, my learned friend referred you to Fine Industrial Commodities, Mr Justice Vaisey, and I think the court picked up Mr Justice Vaisey's comment that if a company turns out to be solvent you treat it as if it always was solvent.

LADY JUSTICE GLOSTER: Yes.

MR DICKER: It's another way of describing the way in which liquidation worked prior to 1986, which was essentially,

whether one calls it remission to rights, whether one calls it treating the company as if it always had been solvent, or whether one simply says you ensure that creditors receive their full entitlement before any distributions are made to shareholders doesn't matter, but the thrust of it is the same. We've now essentially reached a different stage and before the shareholders could get anything the creditors have to be paid in full, and that's certainly one rather graphic image of how one achieves that.

That's all I was going to say on item one. I can be rather shorter I think in relation to the remaining issues. Item two is compound interest. Now, there are a number of points here. The first is what did the judge actually decide? Can I take you back to paragraph 26 of his judgment. This is part A, core bundle 1, tab 2, paragraph 26. The last six lines contain his decision.

He says:

"For the reasons given there, I consider interest is not compound following the payment in full of the principal amount because, under the terms of rule 2.88(7), interest, whether simple or compound, is payable only for the period that the proved debt or part of it is outstanding."

Now, we read that as meaning compound interest only stops running when the proved debt has been paid in full, as the judge says, thus giving rise to our leaving £1 outstanding example. Now, Wentworth say that's not what the judge decided; what the judge decided is effectively that compound interest stops running on a particular bit of principal as and when that principal has been repaid.

Now, just assuming for present purposes, that is what the judge decided, Wentworth illustrated that in the table. I am not sure where you have it but it's --

LADY JUSTICE GLOSTER: We have it loose.

MR DICKER: Now, the difference between this and the judge's approach is of course that on the judge's approach sums continue to -- interest continues to compound until the principal has been -- our interpretation of the judge's approach is that interest continues to compound on interest for so long as any part of the principal debt is outstanding. Wentworth take a different approach. They say essentially you look at each pound of principal separately. Now, obviously this produces an even lower rate of return than the judge's approach, but it also has other consequences because it is even further away from the way in which compound interest would normally operate.

Now, I say that because if you imagine you have a sum of principal, say £100, it's outstanding for a year, and during that year £10 of interest was earned, compound interest means you are entitled to interest on principal and interest until the entirety has been repaid. Wentworth says, "Well, imagine at the end of the year the £100 is repaid." There is still £10 of interest left outstanding, but they say the consequence of repaying the £100 principal is that essentially the right to compound interest, ie interest on interest, is turned off. So what they say the legislature effectively intended was to give the debtor a right to turn off the creditor's right to compound interest by repaying the principal.

Now, if one is looking for illogical halfway houses which are neither one thing nor another, of the type the judge described in paragraph 24, we, in our submission, say that this is a prime example. This is not a right to compound interest. It's certainly not in any normal sense. The one thing that's clear from Wentworth's diagram is that, whereas a right to compound interest entitles you to interest on interest, in other words it doesn't matter that the principal has been repaid, your interest outstanding continues to accrue interest, on Wentworth's chart that's simply not what happens.

Now, why would the legislature want to achieve this result? It is one thing to say creditors with a right to compound interest should get the amount of compound interest they otherwise would have got, but why require a calculation of this court? No explanation is given. There can't be, in our submission, a sensible reason. The reason why Wentworth end up with this conclusion, and why the judge ends up with this conclusion, is because it's a logical consequence of his construction of rule 2.88. That's the only reason why one gets there. Once you say rule 2.88 says you only get interest on proved debts for the period the proved debts are outstanding, my learned friend is able to argue, "Well, the proved debts, that's the principal, that's no longer outstanding. So under the rules compound interest can no longer apply."

So it's a logical consequence of the judge's construction that you end up with results like this. Again, we say it throws real doubt as to whether or not this is what the legislature was trying to achieve.

LADY JUSTICE GLOSTER: It's also predicated, isn't it, the declaration here, on the assumption or presumption that there has been payment in full of the principal amount through dividends? Whereas in fact, on your argument, all that has been paid is what has been proved, an

amount equivalent to what has been proved? It isn't necessarily the same thing, is it?

MR DICKER: No. We say, certainly when you come to -- forgive me, I am not sure, are we now in the world of Bower v Marris?

LADY JUSTICE GLOSTER: If we go back to Bower v Marris, obviously this declaration is on the basis, isn't it, that Bower v Marris doesn't apply? Is that right?

MR DICKER: Correct.

LADY JUSTICE GLOSTER: Well, if that's right, if I am on the right hypothesis here, I still don't quite understand the wording of the declaration, if we are in that scenario, because it seems to me that the words of the declaration assume that there has been payment in full of the debt. I mean, you may say that's the same as applying Bower v Marris.

MR DICKER: I think the declaration obviously seeks to encapsulate the judge's judgment.

LADY JUSTICE GLOSTER: Yes.

MR DICKER: And did so in a form that the judge was happy reflected his judgment. I think it's simply that the logic is that you -- he says rule 2.88 provides for interest on proved debts so long as the proved debt is outstanding. Now, he says you are entitled to that interest on a compound rate but within the constraints

of rule 2.88.

LADY JUSTICE GLOSTER: Yes.

MR DICKER: You only get it for so long as the proved debt is outstanding. He then says, "Okay, there is no possible hypothetical world. I am in the world of looking at what in fact has happened. The proved debt has been paid. Ergo, compound interest must have stopped running."

LADY JUSTICE GLOSTER: Yes.

LORD JUSTICE BRIGGS: I mean, in a way you read declaration 8 I think it is in the light of declaration 3 because it's lower down the list of declarations. It's probably speculation what the judge's answer would have been if he'd come to the opposite view on declaration 3.

MR DICKER: Yes.

LORD JUSTICE BRIGGS: That said, I think his reasoning is 2.88(7) sets out what the periods are, and even if you are using Bower v Marris as a notional way of recalculating interest it doesn't alter the periods laid down by 2.88(7). But it is speculation because he didn't have to ask himself that question.

MR DICKER: Yes. As you know, our essential point in relation to this is if you follow the judge's construction through, although the judge says Parliament

obviously intended everyone should have compound interest, that's within the word "rate". For some reason, they don't actually get --

LORD JUSTICE BRIGGS: They get it, but only for a period shorter than you would have got it if you really had compound interest as your --

MR DICKER: Imagine the creditors reaction to having been told, "It's fine. Rule 2.88 entitles you to your right to compound interest", subsequently to receive a sum which bears no resemblance to what that right would actually have provided them with.

One other point. On my learned friend's approach, it's also right that for a period the creditor with a right to compound interest is entitled to interest on interest under rule 2.88. That necessarily follows from the fact that compound interest is permitted, albeit only for a period. That's despite the fact that, on my learned friend's rigorous approach to construing 2.88, the rule only entitles you to interest on the proved debt which is principal. It's unclear to us how, in the light of that construction, you actually got to this point. If you construe rule 2.88 and you say, "Look, what is going on here", what is going on here is you are getting interest on your proved debt. On the judge's approach, there has been a breach in that construction

because for a period, whether the period identified by Wentworth or the period which we assumed the judge meant, the longer period, you are not simply getting interest on your proved debt, you are also getting interest on interest, for which you never had a right to proof.

It's another illustration, in our submission, of the difficulties in taking what, in our respectful submission, is an unduly literal narrow approach to the construction of 2.88. You end up with consequences which can't have been intended, at which point it is much easier to stand back: what is 2.88 trying to do? In substance, the same as in section 132: set out a priority regime, entitle you to post-insolvency interest on two different bases, and leaves open the calculation methodology to the ordinary approach which is adopted outside of insolvency and which, prior to 1986, was also adopted inside the insolvency, namely Bower v Marris.

Now, the next issue is non-provable claims which is item three. I can deal with this I think very shortly. The same or similar points can be made here as I made in the context of the creditor with a contractual right to interest under rule 2.88. Again one starts with Lord Hoffmann and Wight v Eckhardt: underlying claims

are not affected. Rule 2.88 doesn't affect that, any more than the ordinary rules of proof affect that, although both can equally be said in one sense to cut across creditor's rights. So the cutting across doesn't take one anywhere. You have to find something which extinguishes the underlying right. That takes one back to rule 2.72 and 2.88(1) and my learned friend's submissions that if you are proving you are claiming, and if the rules say you are not entitled to prove it follows you are not entitled to claim and the consequence is you can never claim.

In our respectful submission, that's nonsense. Take currency conversion claims: the rules say you can only prove in a sterling amount, but that doesn't stop you coming back similarly.

LADY JUSTICE GLOSTER: It's the same old point really, isn't it?

MR DICKER: He made one further point on construction in this context. He said the reference to the surplus being applied in payment of statutory interest is that it's to be applied before being applied "for any other purpose". He said, "Well, it's presently being applied in respect of interest, so it must necessarily follow that, whatever you then do with it, it can't involve being applied to another bit of interest."

LADY JUSTICE GLOSTER: What do you say about the corresponding provision of the Act in section 189?

MR DICKER: The same point.

LADY JUSTICE GLOSTER: Yes.

MR DICKER: The same point is simply this. The purpose --

LADY JUSTICE GLOSTER: You say it doesn't make any difference whether the word "other" is there or not.

MR DICKER: Again the purpose is that it must be first used for the payment of interest in accordance with rule 2.88(7) and (9).

Now, if you have used it for that purpose, in other words providing creditors with whatever they are entitled to receive under 2.88(7) and (9), you are applying it for a different purpose. If you then say you are going to apply it in respect of non-provable claims, that's anyone who hasn't been paid in full and that happens to pick up creditors with an unpaid claim for interest.

You can imagine starker examples where -- and you have seen the Cork Report's recommendation which is construed by my learned friend had been accepted which simply said interest is 4 per cent, and that is the first purpose for which the surplus has to be applied. There is nothing inconsistent with that and coming back later and saying, "Well, I am now applying it in respect

of non-provable liabilities, which is everything over and above that."

Policy and principal I think I need say very little in relation to. In our submission, none of the points made by my learned friend provided any sensible reason why the legislature might have wanted to leave creditors with a shortfall and reward shareholders with a windfall. It simply doesn't help to describe those with a credit exposure to the company as "investors". It is probably not how a trade creditor would regard himself, but in any event the subordinated creditors and shareholders agreed to rank after unsecured creditors and cannot complain if everyone else is paid out in full first. That's the short answer to that.

But it is worth noting there is a real potential moral hazard here. If we are talking about between 6.8 and 8 billion, I don't know in what form that currently takes, but just assuming it's on account and earning interest, the consequence of Wentworth's submission is the longer this process goes on the longer that they would continue to receive interest earned on that sum, even if that sum is eventually distributed entirely to the unsecured creditors.

Mr Bayfield explained the difficulties the administrators have had and may continue to have in

making substantial interim payments by way of interest out of the surplus.

There are a variety of moral hazards. I mean, one other is that there is a potential incentive to creditors, either in a members' voluntary liquidation which is plainly solvent or anticipating a solvent liquidation, essentially to delay submission of their proof to avoid receiving a dividend and thereby freezing their right to interest. Logically, they would do a lot better overall if they delayed their submission of proof and continued to accrue interest in the meantime so that when they were eventually paid the sum they were owed they wouldn't lose part of it potentially through the time value of money.

Now, one example that was raised I think by the court concerned foreign currency creditors who did not prove and just wanted to be paid prior to any distribution to shareholders. I think this was a question my Ladyship raised. The short answer is the creditor will be entitled to be paid in full the amount he is owed, principal and interest, but it is wrong to say he has to prove.

LADY JUSTICE GLOSTER: Yes.

MR DICKER: Indeed, there is something illogical in saying that, because if he tries to prove he will be told he's

not entitled to the extent that what he's claiming is a non-provable claim.

But ignoring that, if you look at the passage from Re T&N which I showed you in opening, what the court is likely to do is to permit the creditor, if necessary, to execute against the assets to ensure that it is paid ahead of any distribution being made to shareholders. There is an example of that. It is not in the bundles at the moment. It was cited to the Supreme Court in the Waterfall 1 appeal, but a case called Gerard v Worth of Paris Limited. We can let you have a copy. 1936, 2 All England, 905.

The short point is the Court of Appeal in that case refused to grant a stay of garnishee proceedings against a company in a members; voluntary liquidation which appeared to be solvent.

Lord Justice Slosser saying:

"So far as we know, there are no other creditors and that fact alone seems to me to be a sufficient reason."

That is one approach. The other approach, and the reason why I said if necessary creditors can do that, is that indicated by the majority of the Court of Appeal in Waterfall I, which is it's part of the liquidator's duty to discharge extant claims before making a distribution.

LADY JUSTICE GLOSTER: You are being passed a note from

behind.

MR DICKER: I think my learned junior is hungry.

LADY JUSTICE GLOSTER: Right. Well, maybe we all are. 2 o'clock.

(1.00 pm)

(The luncheon adjournment)

(2.00 pm)

LADY JUSTICE GLOSTER: We have the video back in the next court.

MR DICKER: I hope to be relatively brief. I was going turn to issues that relate to currency conversion rights, but before turning to the specific issues, can I make the following general point? We say it's enormously important to bear in mind precisely what we call a currency conversion claim is.

One of the submissions my learned friend makes is that you can't calculate the amount of a currency conversion claim, or interest from a currency conversion claim, unless and until the final dividend's been paid, and he uses that to support a submission that therefore interest can only be paid from the date of the final dividend.

Now, what we say, and certainly I learnt through bitter experience in this case, is that confusion arises

if you think of a currency conversion claim in terms of loss.

LADY JUSTICE GLOSTER: Right.

MR DICKER: It is only the unpaid balance of the foreign conversion claim.

LADY JUSTICE GLOSTER: That's what the Court of Appeal decided and when I was talking about claims for damages, I was ill-advised or not advised at all.

MR DICKER: Since Miliangos a claim in debt, which the English court will recognise and, for the purposes of a non-provable claim, it's simply the balance of the debt which has not been paid. So if one imagines one has the underlying foreign currency debt -- per Lord Hoffmann in Wight v Eckhardt not affected -- imagine a foreign currency debt is a claim which attracts interest and, going on in background, you have principal earning interest; you then have this process of collective execution, which can be regarded as, essentially, a black box which, from time to time, spits out a sterling sign which a creditor receives, either converts or is to be treated as having been converted into a foreign currency, at which point whatever sum he was owed is now reduced pro tanto, interest continues to run on that balance, going forward. So at the end of the day, you see how much he has left, which is the

total of his contractual rights in respect of principal and interest, and that's his non-provable --
LADY JUSTICE GLOSTER: What about the interim position, when you get an interim dividend? I can quite see the way in which you calculate the foreign currency claim or the debt is -- you get interest or -- you notionally drew interest on the debt at its foreign rate in foreign currency throughout the life; as and when interim dividend is paid, what happens then?
MR DICKER: The interim dividend is, of course, in respect of his sterling proved debt, equal with every other creditor.
LADY JUSTICE GLOSTER: But out of the black box comes a £100.
MR DICKER: Comes a sterling sum, so at that point, a creditor says to himself: for the purposes of any possible non-provable liability in due course, what has now happened is what I'm presently owed today, in terms of foreign currency, is 120 US dollars --
LADY JUSTICE GLOSTER: Which is a hundred principal and 20 --
MR DICKER: What I've received in sterling is the equivalent of 100 US dollars. It doesn't matter what the sum is. What is left is his unpaid balance, as at that date. If he goes on and receives further dividends, which

essentially satisfies his contractual claim in full, he will not have an unprovable claim, obviously; if there is a shortfall, he will.
LORD JUSTICE BRIGGS: Are you just talking about principal at the moment, or interest?
MR DICKER: I'm talking interest as well.
LORD JUSTICE BRIGGS: Right.
MR DICKER: So it's no more than the balance, the unpaid balance from time to time, and if it's an interest-bearing claim, and obviously it's an unpaid balance which is continuing to accrue interest.
LADY JUSTICE GLOSTER: But if you get a £100 sterling out of your interim dividend in your hands, you have to notionally convert it at that date.
MR DICKER: Correct.
LADY JUSTICE GLOSTER: You accept that?
MR DICKER: Yes.
LORD JUSTICE BRIGGS: I'm finding it (inaudible) there can be any real room for dispute about how you do this. And yet there appears to be, because there are all sort of argument about set-off and whether you have to give credit for interest received on your -- for statutory interest against your interest claim under the foreign currency claim. But as I see it, you just carry out an account in the foreign currency and you treat

anything that comes out of what you call the "black box" -- that's the UK insolvency process -- whether it comes out as a dividend or a statutory interest payment, there's a payment on account against your foreign currency claim by converting into dollars at the date of payment. And you probably do it on a Bower v Marris basis if your foreign contract enables you to do so, which probably it usually will.
And at the end of the day, when there's nothing more to come out of the black box, you know where your shortfall is and you claim it. So where is all the room for -- I mean, I agree if you cut this all down into tiny chunks, you can get into terrible rows about how each little chunk works.
MR DICKER: Correct. Your Lordship is right. We say it follows that -- my learned friend says interest on the foreign currency claim, for the purposes of a non-provable claim, can only effectively run from the date of the final dividend because it's only then you know you have a foreign currency claim, and therefore it's only then you have anything on which interest could be accruing, we say is wrong.
LORD JUSTICE BRIGGS: I said he might have my credit number 2 problem --
LORD JUSTICE PATTEN: How do you accommodate changes in the

exchange rates that are favourable to the creditor?
MR DICKER: That was an issue that the Court of Appeal dealt with in Waterfall I. There are two points. As a matter of accounting, it doesn't change the position; it simply, as it were, changes the figures in the books. So creditor receives a sum of sterling, it may be worth more or less when he receives it; receives a subsequent dividend, again it may be worth more or less, depending on what's happened to exchange rates in the meantime, notionally converted and it reduces(?) pro tanto.
If the consequence of exchange rate movements is such that sterling has appreciated rather than depreciated, then it will necessarily follow that the foreign currency creditor has received in his hands as part of stage 1 of the Waterfalls -- we've been referring to it -- more than he is entitled to as a matter of contract.
LORD JUSTICE PATTEN: Not necessarily.
MR DICKER: That is a consequence, which the Court of Appeal held in Waterfall I, of the requirement to distribute the assets pari passu. So the first stage you have to go through before you can get to any other stage is ascertain the claims -- the foreign currency claims have to be converted into sterling -- and distribute the assets pari passu in respect of those claims, including

claims converted into sterling. It's equality of treatment at that stage.

And if the consequence of equality of treatment is that the foreign currency creditor ends up getting more than his underlying sum in the foreign currency doing the accounting exercise, then that's simply a consequence of the requirement for pari passu distribution.

LADY JUSTICE GLOSTER: The liquidators can't keep it all till the end and then work it out at the rate then.

MR DICKER: The result may be different if they do.

LADY JUSTICE GLOSTER: Yes. On the assumption they make a pari passu interim dividend, this is the inevitable consequence.

MR DICKER: No, it all depends on what happens --

LADY JUSTICE GLOSTER: Sorry, on where the currency goes.

MR DICKER: You end up, essentially, aggregating the payments in respect of principal that they have received and if there's a shortfall, they have a currency conversion claim; if they end up receiving a sum, which when converted into a currency conversion claim is more than their contractual entitlement --

LORD JUSTICE PATTEN: They don't have to cough up.

MR DICKER: They don't have to cough up. That's simply a necessary consequence of pari passu distribution.

LORD JUSTICE BRIGGS: Yes, that was held in Waterfall 1, wasn't it?

MR DICKER: Yes.

The one additional element which is relevant here when one's dealing with offset concerns the additional statutory right to interest at the judgment at rate, whether or not you entitled to interest. We say, to avoid trying to answer questions which weren't really argued below, and certainly weren't addressed by the judge and weren't raised by the issue in the declaration, it is enormously important for this question to focus on what the declaration is actually concerned with.

LADY JUSTICE GLOSTER: Yes, and which one are we looking at?

MR DICKER: It's item 6, declaration 17.

LORD JUSTICE BRIGGS: Issue? 10.

MR DICKER: This declaration deals with a particular situation. It says:

"The calculation of a non-provable claim ..."

Then importantly:

"... excluding any non-provable claims to interest as to which no declaration is made, including though not limited to, a currency conversion claim should not take into account nor therefore be reduced by the statutory interest paid to a relevant creditor."

So the declaration is concerned with a non-provable claim, which does not include a non-provable claim to interest. That's why I can started by saying: imagine a situation in which you have a claim for principal, the creditor is not entitled to post-insolvency interest because this declaration isn't concerned with post-insolvency claims to interest. Just --

LADY JUSTICE GLOSTER: Again, I'm not following this. Just explain why, in the examples, you've just been discussing, you don't bring into account interest.

MR DICKER: Can I take it in stages? We deal with this in our skeleton argument and reply, and that sets out our position. Just so you have the reference, it's bundle 1, tab 15, paragraphs 42 to 61.

What we do, essentially, is take it in stages and deal, first -- rather it needs to be taken in stages. The issue which we say is raised by this declaration, essentially, concerns -- and it's easiest considered by reference to a claim for principal. Forget about interest afterwards, just think of a creditor whose only claim is to principal.

LORD JUSTICE BRIGGS: I'm trying to get my mind round the concept, but okay. In a foreign currency situation?

MR DICKER: Yes. So we have a creditor with a foreign currency claim, which doesn't accrue interest. So he

converts it into sterling for the purposes of proof. And the issue is whether, after you've gone through payment of dividends, payment of statutory interest, when he comes to calculate his non-provable claim in respect of principal, because that's the only underlying claim he has, he has to give credit for statutory interest.

And the answer I gave you in opening to remind you was a comparison between two creditors. The first was a sterling creditor who had a claim to principal, no entitlement to interest. He gets paid the full amount of his principal, as part of priority level 1, and he gets paid 8 per cent of the Judgment at rate as part of priority level 2 because he has no other right to interest.

So he receives payment in full, his underlying claim, plus interest at 8 per cent, regardless of the fact that he has no other right to interest because it's an additional statutory right, which is given under the scheme's compensation for delay. No question of having to give credit for it, obviously. If he had to give credit for it, he wouldn't end up receiving the compensation for delay which the rule intends to provide him with.

The next stage is to say: okay, how does it work in

relation to a foreign currency creditor? Priority level 1: his claim is converted into sterling because that's what the rules require; he's paid the full amount of his proved debt, ie the sterling equivalent at the date of administration, as part of level 1.

Assume sterling is depreciated, there's a balance still unpaid of principal. There's nothing he can do with that at this stage because that's a non-provable claim. You have to exhaust the first stage before getting down to the second, and therefore getting down to the third.

So at the second stage, the statute says he is entitled to 8 per cent on his sterling proved debt, along with everyone else, whether or not he has a right to interest as compensation for delay. That's a separate right which the statute gives him. Again, no question of offset at this stage, any more than there would be in relation to the sterling creditor.

We then come to the third stage. At the third stage, he says: okay I've received my proved debt in full and that didn't repay all my principal; I have received the interest which statute says I should also receive, regardless of the fact I don't have any right to interest under rule 2.88, but I now have some principal still unpaid.

Now, we say he's entitled to claim that unpaid part of principal as a non-provable claim without giving credit for statutory interest he's received.

LADY JUSTICE GLOSTER: Even in circumstances where sterling has appreciated against the dollar? So in fact, in interest terms, maybe he's collected more than he would have done.

MR DICKER: Well --

LADY JUSTICE GLOSTER: I mean, are you saying it doesn't all come out of in the wash at the end of the day calculation?

MR DICKER: It's really difficult if one starts introducing -- one obviously needs to deal with more complicated --

LADY JUSTICE GLOSTER: It could go in and dip in and out, couldn't it, depending on the volatility of sterling against the dollar, or whatever the foreign currency?

MR DICKER: Coming back to the question in a moment, if I may. Our point at this stage, which is essentially the issue raised by the --

LADY JUSTICE GLOSTER: Question.

MR DICKER: -- the question and the answer which we say should be given to it and which, in substance, the judge gave to it -- it's essentially at this point we say that the creditor turns up and says, "Look, I haven't been

paid the full amount of my principal". You can't, at that point, say to him, "Ah yes, but you have to give credit for the statutory interest that you have received".

LADY JUSTICE GLOSTER: I can see that.

MR DICKER: So it makes no sense to have an offset, just in relation to that question.

LORD JUSTICE BRIGGS: It depends what you are trying to do, doesn't it? If you stand back and say: well, actually what you are trying to do is to make sure that your foreign creditor, who here hasn't got a right to interest, is no worse off than if he reverted to his contractual rights; then if the shortfall in principal is made good by the statutory interest, he is no worse off than if he reverted to his contractual rights.

MR DICKER: You then have the --

LORD JUSTICE BRIGGS: If that's what you're trying to do, I don't see how your submission addresses that.

MR DICKER: The way it addresses that is, essentially, by saying you can't use the same sum of money for two purposes. So I take your Lordship's point that one way of approaching the money he has received by way of statutory interest is to say: okay, we'll treat that as if it's payment of your underlying principal for these purposes.

But where then does that leave the creditor? That leaves the creditor, essentially, he's been paid principal in full, but he has not effectively been paid any compensation for delay, which the statute says he is to receive equally with everyone else.

LORD JUSTICE BRIGGS: Even though he didn't have a right to interest, but he has got everything he would have got under his foreign contract right.

MR DICKER: Well, our point is the statute gives you two things. First of all, you're entitled to interest on your sterling proved debt, whether or not you have a right to interest. That's something the statute gives you and cannot, in substance, be taken away from you because otherwise, at this stage of the Waterfall, you are not being treated equally with everyone else.

LADY JUSTICE GLOSTER: That I can see, but it's at the end of the day whether you are having your cake and eating it.

MR DICKER: We say not because the statute is, essentially, doing two things, we say. This may be the difference between us. We say it is intended to ensure everyone is paid in full before any distribution is made to shareholders. There shouldn't be any dispute about that. That's creditors first; members last.

We also say that the statute says: forget about

whether you've been paid in full, in the sense of have you received all of your principal for which you were entitled, because the statute says you ought to get something as well as your principal.
LORD JUSTICE BRIGGS: Isn't that just having your cake and eating it? You have to take the whole statute. The statute requires you to convert your Forex into, and only enable you to prove on a sterling version, as at the cut-off date, and it gives you statutory interest, you might say, partly as a quid pro quo for that thoroughly tough arrangement if you happen to be a foreign currency creditor.
But if the comparator is what you would have got apart from the administration, and if the statutory interest fully repays your shortfall of principal converted back into dollars at the appropriate date, I don't see how the underlying principle that this is designed to enable you to revert to your contractual rights helps you.
MR DICKER: No, but only at the price of subverting, we say, the other bit of the scheme --
LORD JUSTICE BRIGGS: Well, if you ignore the fact that that bit is only applied to your sterling provable debt.
MR DICKER: It doesn't, in our submission, matter. It doesn't matter what it's applied to. The point is it's

a statutory right given to all creditors, something they're entitled to keep and put in their pocket over and above payment in full of their underlying debt.
Once you say: I'm going to use that sum and, effectively, apply it to discharge of principle, you are necessarily saying you are no longer, in substance, being treated equally with everyone else in the sense that you are not getting compensation for --
LORD JUSTICE BRIGGS: I understand the submission.
MR DICKER: Yes. And one sees how it ends up, so far as the creditor is concerned. The foreign currency creditor, he gets paid in full, but he gets paid in full perhaps ten years after the debt should have been paid.
LORD JUSTICE BRIGGS: His debt didn't carry interest.
MR DICKER: No, but unlike everyone else whose debts didn't carry interest, he doesn't get compensation for delay which everyone else got, in substance, because he's been obliged to give credited for that against his principal.
And the judge said those are, essentially, two separate things. One is a statutory right to interest, which is given to everyone, sterling or foreign, which you're entitled to keep, and you can't require an offset against principal without, in substance, depriving people of that separate statutory right which they have been given.

LADY JUSTICE GLOSTER: It seems to me it goes to reduce your currency conversion claim. And you're saying that doesn't happen, so even if, depending on the volatility of sterling against the dollar, or vice versa, in fact because you've been receiving statutory interest, you don't have a currency conversion claim; you say, if you set off the two against the other, you can bring a currency conversion; is that right?
MR DICKER: When you imagine, at the first stage, the black box, (inaudible) payments, those are payments in respect of principal. They, undoubtedly, reduce principal that's outstanding.
Now, imagine somewhere else in the system the liquidator is dealing with something different, which is --
LADY JUSTICE GLOSTER: Interest.
MR DICKER: -- a separate right to interest. It happens to be interest, in a sense it could be any separate statutory right the statute just says you should get, and he make as payment. That's not a payment in respect of principal. The payments which are made in respect of principal are made by way of dividend, at stage 1; payment that is made at stage 2 is not a payment in respect of principal at all.
LADY JUSTICE GLOSTER: I could see that.

MR DICKER: It's a payment pursuant to a second statutory right.
LORD JUSTICE PATTEN: As I understand it, the right to statutory interest in relation to creditors who don't have contractual right to interest is simply given to them as quid pro quo being kept out of the their money by moratorium on enforcement of the debt.
MR DICKER: Correct.
LORD JUSTICE PATTEN: Now, on the hypothesis you are operating on, let's assume on a straight-line basis throughout the relevant period, there is a diminution in the value of what they can prove for by reason of an adverse change in the rate of exchange, you are going to be getting statutory interest on a lesser sum than you are entitled to contractually.
MR DICKER: Yes.
LORD JUSTICE PATTEN: That will compensate you for being kept out of at least the sum in respect of which you can prove. The balance of your currency claim is simply the other part of your contractual claim which you would have been able to prove for, had you been able to prove in a foreign currency rather than in sterling.
MR DICKER: The question --
LORD JUSTICE PATTEN: And on that basis, would have then become entitled to receive statutory interest in

a larger sum than you've actually been able to recover statutory interest for on the sterling amount.

So your argument is simply that you shouldn't have to give credit for what you've been paid, by way of statutory interest, for being kept out of the amount you proved for, in order to finance the loss that you've suffered in respect of the amount you can't prove for.

MR DICKER: Correct. These are not payments -- another way of putting it is payments of statutory interest are not payments in respect of principal. They're not.

LADY JUSTICE GLOSTER: Why shouldn't you have to offset against the interest that you are claiming under your currency conversion claim? Because that seems to me to be logical.

MR DICKER: I said this can lead to considerably more complicated issues. What this declaration, however, is concerned with is at least trying to sort out the right answer to the simple question --

LADY JUSTICE GLOSTER: But it's not. It's not, Mr Dicker. The declaration is not limited to reduction of statutory interest against conversion claim for principal.

MR DICKER: It ignores --

LADY JUSTICE GLOSTER: Excluding any non-provable claims to interest.

MR DICKER: In other words, this is not an offset between

a non-provable claim to interest and statutory interest.

LADY JUSTICE GLOSTER: Right.

MR DICKER: That's not what the declaration is --

LORD JUSTICE BRIGGS: It's an offset between statutory interest and an unprovable claim to principal because that, on your hypothesis, is all your foreign creditor can prove for. I can quite understand that if the reason for a currency conversion claim was to somehow put right an equitable injustice caused by not being able to prove in dollars, you would have a very strong argument. But as I understand it, the underlying reason for a currency conversion claim is simply, and has always been, a reversion to contractual rights. And what troubles me about your submission is that you get more than your contractual rights if you're right on this argument.

MR DICKER: To which the short answer is: only in the sense that the sterling creditor gets more than his contractual rights.

LORD JUSTICE BRIGGS: I agree, but if the sole basis for your claim is that if there had been no insolvency, you have suffered a shortfall in what you would otherwise recover -- and you had no right to interest --

MR DICKER: Because that's not the creditor's only claim. The creditor has two claims. He has his underlying

claim. He's entitled to say: I am entitled to payment of that claim in full. He is also entitled to say, equally, with every other creditor: and I'm entitled to compensation for delay. It's the "and" that's vital.

LORD JUSTICE BRIGGS: Yes.

LADY JUSTICE GLOSTER: Why was it dealt with without dealing with the question of interest? A currency conversion claim for interest? It seems to me that you are leaving out --

LORD JUSTICE BRIGGS: It's a rather unlikely kind of claim --

MR DICKER: Because matters at that point start becoming increasingly complicated. The submission we made --

LADY JUSTICE GLOSTER: So we shouldn't be bothered with them, you mean?

MR DICKER: No, I don't think that's right. I mean the submission we made to the judge below was focus on this, decide, you know -- this at least is an issue which one is capable of getting one's head round, otherwise it becomes enormously difficult to work through all of the possible implications. And our submission to the judge below was: decide this and then hopefully we can work out what consequences flow.

And plainly, where you are talking about a claim to interest, contractual interest on the one hand, and

offsetting against statutory interest on the other hand, different issues potentially arise. Because in that context, you can say --

LADY JUSTICE GLOSTER: You are comparing like-with-like.

MR DICKER: -you are comparing like-with-like. The statutory interest for compensation for delay, and that is like you are serving the same function as your contractual claim to interest, so that can potentially raise different issues.

LADY JUSTICE GLOSTER: Yes --

MR DICKER: One of those more complicated situations was addressed by the judge in supplemental issue 3, and you've seen that. If you remember the diagram, that was the underlying claim split into a provable and a non-provable bit. 2.88, he says, gives you interest on a provable bit, not a non-provable bit.

He also went on in supplemental issue 3 to hold a non-provable claim to interest on a currency claim is not to be reduced by statutory interest. Again, the reasoning is entirely different because here is simply compensation for your provable claim, not for your non-provable claim. That was a second issue the judge dealt with in this context.

LADY JUSTICE GLOSTER: Yes.

MR DICKER: And the short point, your Lordships have it,

I think, is that you can't make the same sum of money satisfy both rights. He has an underlying right to payment in full, the principal -- the statute also says he has a right to compensation for delay; they are two separate things. And aside from one of those individual (inaudible) one sees on Oxford street with the three carts, moving the beam around -- you can't make the same sum of money, effectively, satisfying both.

My learned friend dealt with this particular situation very, very shortly in his submissions, if you recall. He really only had two points. First of all, he said liquidation is a matter of benefit and burden, to which we say this is nothing to do with benefit and burden. The creditor is given both his rights and you have to work through the statutory scheme and see how they operate.

He also said a foreign currency creditor is given statutory interest, as he said, a quid pro quo for having his claim converted into sterling. We say that's not right; statutory interest is given to all creditors, it can't conceivably be seen as a quid pro quo (inaudible) conversion. It's a separate right, compensation for delay.

LORD JUSTICE PATTEN: Even if it was a quid pro quo, I don't understand why you would set it off. All it would mean

is -- you follow the logic of that, you simply won't have a currency conversion claim.

MR DICKER: Yes, I suppose it depends on -- he would say, presumably, the extent of the quid pro quo.

That's all I was going to say in relation to currency conversion claims and offset.

The next thing I can deal with very shortly is item 11, issue 4, in relation to foreign judgments. Just one short point in relation to this. It concerns a foreign judgment, which has actually been returned(?). The question is whether the interest entitlement under that judgment can give rise to a non-provable claim.

And my learned friend said that was impossible because it would involve you proving twice, which we say is simply wrong. And the relevant right is, by definition, one in respect of which you could not have proved because it's dealing with post-insolvency interest.

It's also inconsistent with the point my learned friend relied on earlier, which is the underlying debt is different from the technical point; the underlying debt is different from the judgment debt.

The substantive point is someone has acquired a right, a post-administration order, for interest. He can't prove for that because it's post-administration

interest, but it's a right he has to a payment. We say he has a non-provable claim in that respect.

And in our submission, it really shouldn't matter whether this right to interest arises under a contract which predates the administration order or is acquired pursuant to a judgment, which is actually obtained afterwards.

I think my learned friend suggested that somehow all of this is enormously unfair and an attempt to gain excessive interest rates. It's worth observing that the New York Judgment Act rate during this period happens to be 9 per cent, so that's what one's talking about.

The final topic I need to deal with are contingent claims, which are item 5.

LADY JUSTICE GLOSTER: Do you want to say anything more about 11B, that's to say, punitive claims --

MR DICKER: No.

LADY JUSTICE GLOSTER: -- to foreign judgment?

MR DICKER: No.

So item 5, contingent claims. This, obviously, concerns the date from which they attract interest. My learned friend's approach obviously is to use the illustration of contingent debt basis during the course of the administration to drive his analysis, which we say, in a sense, is the tail wagging the dog.

Any contingent claims will be admitted for an amount reflecting their estimated value, as at the date of administration, including a discount for maturity, which the judge indicated. And they will be paid without the contingency having occurred; in other words, they'll be discounted to present value and compensation should be given for the delay in paying that present value equally with everyone else.

Where the contingency does vest during the course of the administration, there are, essentially, two approaches which can be taken. The first is the judge's approach, whereby the vested contingent right is admitted at the full undiscounted amount.

LADY JUSTICE GLOSTER: From the date of the administration?

MR DICKER: On the date of the administration. And we say that's justified for the reasons the judge gave. It's, essentially, a rough-and-ready approach. It fits with how the legislature has, for whatever reason, treated future debts which mature prior to the date of administration.

My learned friend said with the future debts are different because many future debts will bear interest. One can equally say, certainly in this case, that many contingent debts will also bear interest. If one thinks of an ISDA closeout claim, my learned friend's clients'

position is that's a contingent claim for their purposes. Although once it is closed out in value, interest runs from the early termination date. So that's an interest bearing claim, obviously after the closeout amount and runs as payment is made at the default rate.

So we have an example of a contingent claim which bears interest. And can you well imagine that in a case involving a financial company like LBIE, many of the claims will involve closeout provisions, and therefore contingent, given the nature of those claims they are also claims which will bear interest.

LADY JUSTICE GLOSTER: Yes.

MR DICKER: The second approach is for vested contingent claims to be admitted to proof, discounted back to the date of administration. And as I understand it, Wentworth wouldn't be, it's not unfair to say, unhappy if that were the solution.

And my learned friend is absolutely right, as I indicated in opening, that that was in fact the solution --

LADY JUSTICE GLOSTER: That was the fall-back solution you proposed.

MR DICKER: It was in fact the solution we proposed. Below we submitted --

LADY JUSTICE GLOSTER: That's logical, isn't it? Why did the judge not agree to that?

MR DICKER: Well, the judge said -- I think I dealt with this briefly in opening just to --

LADY JUSTICE GLOSTER: Just remind me.

MR DICKER: Sorry. He said, first of all, rule 2.81 simply doesn't permit discounting of a contingent claim where the contingency has crystallised, because 2.81 talks about estimating the value of a claim, the value of which is a matter of opinion. And his starting point was: well, it's no longer a matter of opinion; contingency has crystallised, I know what it's value is.

The second point he made was this: well, if you try and argue that it is still of uncertain value because although the contingency is crystallised, what you now conceive you have is a future claim, and what you are required to do is give it a present value.

He said: well, it would be -- Parliament could not have sensibly intended that where you have a future claim that was never contingent you don't discount back in this situation because that is what rule 2.105 says.

He said Parliament cannot sensibly have intended the position is different for what you can now see is a future claim, which was previously contingent.

What you now have is, essentially, the same thing,

is a loan repayable in ten years unless something happened. Something is now clear isn't going to happen; it's repayable in ten years. The judge's point was: well, if you treat that as a future claim, logically you really should be doing exactly the same as you would be doing with any other future claim.

LADY JUSTICE GLOSTER: To which you respond?

MR DICKER: To which we responded below by saying we can see the force of that, but there are the authority we referred to in our skeleton argument that suggests that there are cases in which, nevertheless, contingent claims appear to have been given a present value in that sort of situation. The judge deals with those in his judgment, and says either they're not clear or they're based on earlier legislation.

LORD JUSTICE BRIGGS: As I see it, it's not a case where there isn't what I think Mr Moss once memorably called "a gut-feel fair solution", on which you and Mr Zacaroli would agree; the trouble is trying to fit it within the rules.

MR DICKER: When you talk about a "gut-feel --"

LORD JUSTICE BRIGGS: He said it in Nortel.

MR DICKER: Yes.

LORD JUSTICE BRIGGS: I'm afraid I put it in the judgment, but it did strike me as a wonderful expression.

MR DICKER: Your Lordship was constrained from reaching the gut.

LORD JUSTICE BRIGGS: I was, but the Supreme Court wasn't.

MR DICKER: I was given the luxury of being able to argue in the Supreme Court, contrary to the submission I was arguing for below, to achieve that.

The only hesitation I would have about the gut-feel approach here --

LORD JUSTICE BRIGGS: I'm talking about when the contingency occurs, discounting in fact at the cut-off date.

MR DICKER: I understand that, and the judge's response to that was: well, your gut-feel needs to be guided by statutory framework.

LORD JUSTICE BRIGGS: Exactly.

MR DICKER: He says, in a sense, it's Parliament's gut that matters. You can you tell what Parliament intends from 2.105.

He also made the point, again, I think, acknowledged by my learned friend, that if you are dealing with either a future or a contingent claim which carries interest, then if you discount back principal, there is a risk, certainly if you don't provide any interest, for a creditor losing out twice, even if you provide interest under the statutory regime still losing out once.

Pre-1986 there was a case -- I think I mentioned Brown and Wingrove(?) -- where again, as a matter of judge-made law, you are effectively entitled to set out of the discounting rate against your contractual right to interest, which rather neatly resolved that. That doesn't seem to be something that's open on the rules as drafted and no one suggested that it is.

The final point in relation to this is this is another of these questions I think, inevitably, on application like this, where there is at least a potential risk of trying to answer every question, which requires one to envisage every possible scenario.

We made the point below that we weren't quite sure what was a contingent claim or what wasn't for these purposes, and there are very many different types of contingent claims, and one's gut-feel may differ, depending on the nature of the claim.

LORD JUSTICE BRIGGS: Unfortunately, we have to find a one-cap-fits-all solution, don't we?

MR DICKER: Can I just say, if in trying to work out what the one-cap-fits-all solution feels it should be, there is a witness statement, relatively short, of Mr Zambelli. It's in part B, supplemental bundle, tab 14. Just if your Lordships want some, as it were, practical illustrations of the different kinds of

contingent claims and possible scenarios that might affect them, there are a very clear, if I may say, relatively short series of examples, just setting out applications -- as I say, I think best thought of as a sort of tool to enable one to test particular gut-feels.

LADY JUSTICE GLOSTER: So this is the examples he gives -- worked examples of contingent claims? And was this filed on your behalf?

MR DICKER: Yes. I mean there may be other examples. I think Mr Lomas, in one of his witness statements, gives an example that Mr Zambelli deals with. It's just to try and give a slightly more --

LADY JUSTICE GLOSTER: Yes, that would be helpful, but there's no point going through them now.

MR DICKER: I wasn't intending to --

LADY JUSTICE GLOSTER: -- sort of "work round your head stuff", isn't it, rather than doing it in court.

MR DICKER: They will need to be worked through; it will not help if I just talk them out.

LADY JUSTICE GLOSTER: No.

MR DICKER: That's all I was going to say in relation to contingent claims and, subject to the court, that's all I was going to say by way of reply.

LADY JUSTICE GLOSTER: Thank you very much. Indeed.

Submissions in reply by MR SMITH

MR SMITH: We have just three points to make, very briefly, by way of reply, if we may. Firstly, in relation to Bower v Marris, item 1, issue 2, and to respond to what Mr Zacaroli said in relation to our submissions on order 55, rules 62 and 63. As you will recall, those were the rules under which entitlement to interest arose in Whittingstall v Grover.

If I could just take you back to that, if I may, it's in the authorities bundle 4, tab 151, just over the page in the tab. Mr Zacaroli's suggestion in relation to this, in relation to these two rules was that in the case of the creditor whose debt does not carry interest at law, the right to interest arose under rule 62, not rule 63, and he said that for the purposes of then submitting that the right to interest under the rule arose from the date of the decree and therefore he could say it was an accruing continuing right, as from the date of the decree.

Now, in our submission, Mr Zacaroli has incorrectly construed rule 62 and rule 63. You need to take a little care in looking at what the two rules are doing and what the purpose of each rule is.

Now, so far as rule 62 is concerned, in our submission, that's concerned with the question of the

applicable rate; in effect, it's the analogue of rule 2.88(9). And you can see that in particular from the wording at the beginning of the third line:

"Interest shall be computed ..."

That's the operative word. What it is effectively doing is providing that the applicable rate, in the case of a debt which carries interest at law, to whatever that rate debt carries is; and secondly, in case of a debt which does not carry interest at law is 4 per cent. So it's rather similar to rule 2.88(9). It's telling what you the applicable rate is in the two cases.

Now, it's rule 63, in our submission, which then confers the entitlement of a creditor whose debt does not otherwise bear interest at law to interest in the administration of the deceased's estate, and it also deals with priority.

You see that again from the wording, in particular at the beginning of the fourth line:

"Shall be entitled to interest ..."

So the drafting isn't particularly elegant, but you can see, in my submission, from reading those carefully, that rule 62 is dealing with working out what the rate is and rule 63 is dealing with the question of entitlement and the question of priority.

And indeed, if you construe the rules in the way

that Mr Zacaroli does, there's a tautology between rule 62 and rule 63 because both rules, on his construction, provide for an entitlement -- my learned friend said -- to interest where the debt does not otherwise bear interest.

So in my submission, Mr Zacaroli's submission on that is wrong and our construction is correct. On that basis our submission, which we made to you on Tuesday, remains good, and the effect of rule 63 was that in the case of a creditor whose debt does not bear interest at law, the entitlement to the interest only arose once the principal debts has been paid in full.

And as you know, the relevance of that is that we submit that's very close to the position under rule 2.88. But nevertheless there was no reason why Bower v Marris couldn't be applied, which is the calculation of that interest, as Mr Justice Chitty held. That was the first point.

LORD JUSTICE PATTEN: I'm a bit puzzled by this. I mean, 62 is concerned with an order for an account, an account of debts, which is a specific type of order, and provides that unless otherwise ordered, interest then follows at the rate prescribed in relation to an order for an account. But 63 is not concerned with that, it's concerned with somebody who comes in in relation to

a specific claim and establishes that under a judgment or order of the court.

MR SMITH: Yes.

LORD JUSTICE PATTEN: Then he gets interest at 4 per cent on that judgment. I mean, it seems to me to be dealing with two completely different things.

MR SMITH: What we know from the judgment in Whittingstall v Grover is Mr Justice Chitty, I think, refers to both rules together --

LORD JUSTICE PATTEN: Yes.

MR SMITH: -- as conferring the right to interest in that case, and the reference he makes in the judgment is to order --

LORD JUSTICE PATTEN: -- because you could have a situation where the administration of the estate of a deceased person, ultimately, gave rise to an order for an account to which 62 would apply, but some of the debts could be debts that have already been established by a judgment which will bear interest at the prescribed rate under 63 in their own right.

But I'm not persuaded, I think, that the two are -- that you know -- I mean, I think your argument that 62 is a sort of parasitic on -- the scope of 62 is simply to prescribe the rate for purposes of 63, but I think that's quite difficult to square with the type of orders

that they're relating to.

MR SMITH: What we do know, in my submission, is rule 63 is certainly dealing with the question of the priority.

LORD JUSTICE PATTEN: Yes.

MR SMITH: Because it's dealing with priority of rights to interest and, in particular, the priority of the debts established. So one knows that rule 63 is at least dealing with the question of priority and provides for the priority that Mr Justice Chitty discussed. You pay the principal first, then there's creditors who are entitled to interest at law and then the creditors who are entitled to interest under the rule.

So rule 63 applies at least to that term first. And in our submission, taking it to its logical conclusion, it also applies for the purpose of conferring the entitlement, and it may be sufficient, in my submission, to establish the application of rule 63 for the purposes of priority. Because what follows from that is the entitlement to interest in the case of creditors whose debt does not bear interest at law, only arises once the principal debts, in a sense, have been paid in full.

LORD JUSTICE PATTEN: I've put it away now, but which is the second one? 63.

MR SMITH: 63.

LORD JUSTICE PATTEN: 63 is concerned with judgment

creditors. You are right, it does since set out your priority, but it's concerned with judgment approaches, whereas an order for an account of the debts of a deceased person would comprehend people who were creditors, who didn't necessarily have a judgment at all. And they, I think, then get interest under those provisions, assuming their debts don't carry contractual interest already.

MR SMITH: I can see that, although you are still then left with the position that it's the second half of 63, which deals with priority --

LORD JUSTICE PATTEN: I agree it's not crystal clear but ...

MR SMITH: So my Lord -- and that, I suggest, is probably sufficient for our purposes, as I say, because that part of the rule establishes that the right to interest for someone who's debt does not bear interest at all, only comes into effect once the principal debt has been paid in full. So that was the first point.

The second point, again in relation to item 1, issue 2, concerns the suggestion which was made that the argument that it would be unfair not to apply Bower v Marris does not apply in the case of creditors who would not have a contractual or other right to interest as at the commencement of the administration. That's, obviously, a point particularly close to our

hearts and, in our submission, it's wrong.
The reason it's wrong, we suggest, is that the effect of the moratorium imposed by an administration or liquidation is to prevent such creditors from obtaining a judgment on their debts. That's clearly the effect of the administration moratorium in relation to obtaining judgments in England. And in relation to obtaining judgments elsewhere, creditors may, in practice, be prevented from doing that by injunction or similar measure.
If the creditor had been able to obtain a judgment, then he would also have obtained a right to interest on that judgment. There's no reason why the Bower v Marris principle would not have applied to calculation of that interest. So even in relation to creditors whose debts do not bear interest at the commencement of the administration, the effect of the administration, we suggest, is to deprive them of the rights which they would otherwise have been able to obtain to a judgment which carried with it a right to interest, calculated in in accordance with Bower v Marris.
It's worth bearing in mind in this context, in our submission, that the rationale for conferring the right to statutory interest on creditors whose debts do not bear interest is because the creditor is deprived of the

ability to obtain a judgment.
It might be worth reminding you that that is a point that Mr Justice David Richards make in Waterfall I, authorities 3, tab 100, paragraph 163, page 55. Just below D, he made the very point that the justification for statutory interest, even in those cases where the debts do not already carry a right to interest, is that creditors are prevented by the liquidation regime from obtaining judgment against the company which would then carry interest at the judgment rate.
So that's the justification for statutory interest. There is, we submit, an unfairness in not allowing a creditor whose debt does not bear interest to have interest calculated under rule 2.88 on a Bower v Marris basis. That is particularly so if you see rule 2.88 as compensation for the rights which the creditor would otherwise have had, if he had been able to obtain a judgment. Because if he had otherwise been able to obtain a judgment, he would have the right to interest on that judgment; he would have right to apply Bower v Marris in relation to that judgment.
Just for your note -- I don't think we need to turn it up -- the judge made a similar comment in his Waterfall II judgment at paragraph 207, referring back to what he'd said in Waterfall I.

A related point to this concerns Mr Zacaroli's fall-back suggestion, that if Bower v Marris is to be applied at all, it should only be given effect to as a non-provable claim available to those creditors who have an existing right to interest on their debt. That's I think his final level of fall-back.
As we already submitted that would be an odd result and would give rise to the difference in the treatment of creditors whose debts bear interest and those who don't. And in our submission, the whole purpose of the changes made to corporate insolvency in 1986 was essentially to put those two categories of creditors on a broadly equal footing.
So far as entitlements to interest in administration and liquidation were concerned, you have already seen the references in the Cork Report at paragraphs 13.85 and 13.86, removing the anomaly between bankruptcy, corporate insolvency and between creditors whose debts bear interest and those who don't.
The other point that's worth bearing in mind is that if that was right, it would actually provide a very significant incentive for creditors whose debts do not bear interest to rush off once the administration or liquidation had commenced, and seek to obtain a judgment.

Because the natural reaction would be that if you are faced with an insolvency where there's any prospect whatsoever of a surplus, you would want to have a judgment in your back pocket. So that if it came to the question of a non-provable claim, you had a judgment in which you could rely on.
Now, it's difficult to see how incentivising and encouraging creditors to take that course could be intended as a matter of policy. Obviously, it would give rise to practical difficulties. The court might be faced with various applications to lift moratorium, and so on.
So that suggests itself that this can't be the right solution and does, we submit, support the submission that Bower v Marris should be given effect in relation to the calculation of statutory interest under rule 2.88.
Finally, just very briefly in relation to issue 7, item 5, which is the day from which interest on contingent debts runs, on which you've just been hearing submissions from Mr Dicker. You may already have these points on board -- I suspect you do -- if I could just add them by way of emphasis. It is very important, we suggest, to test Mr Zacaroli's submissions in relation to contingent debts against the established position in

relation to future debts, which one can (inaudible).
There are two ways in which that's particularly important. The first is the meaning of outstanding in rule 2.88(7), because clearly once you accept that a future debt is outstanding from the date of the administration, notwithstanding it's only payable in the future, you ask yourself: well, how sensibly can it be said the position is any different in relation to contingent debts? And really, we suggest Mr Zacaroli's submission for that reason doesn't really get off the ground.
LORD JUSTICE BRIGGS: That's a point I put to him.
MR SMITH: Exactly. In our submission, that really is a critical point on that.
The second point is the discounting of future debts, and the point in relation to that is the one Mr Dicker made a moment ago, is that if you look at rule 2.15 a clear decision has been made not to discount matured future debts. That is obviously a policy decision, for whatever reason.
It seems very difficult for a court then in effect to insert a new rule into the 1986 rules, which provides for discounting of matured contingent debts. So not only is the court, in effect, being invited to insert a new rule dealing with discounting contingent debts, it

is also being invited to insert a rule which takes diametrically the opposite approach from matured contingent debts as the rules at present take in relation to matured future debts.
So really, for both those reasons, we submit when you test the position against the position in relation to future debts, the submissions made by Wentworth don't get off the ground. Those are the only points we would like to make by way of apply.
LADY JUSTICE GLOSTER: Thank you very much.
Mr Zacaroli, I was going to take the break now. On your timetable we have come to the end of day 4, I think, anyway. You are now asking for a right to reply?
MR ZACAROLI: Just five minutes.
LADY JUSTICE GLOSTER: We will do that after the break.
(3.12 pm)
(A short break)
(3.17 pm)
Submissions in reply by MR ZACAROLI
MR ZACAROLI: On the question of offset, turning to item 6 on the list, dealing with the point that the declaration there set out, declaration 17, refers only to principal. The reason for that is the judge's conclusion that rule 2.88 is a complete code, therefore there is no

subsisting rights to interest thereafter, whether you are an English creditor or a foreign currency creditor. That is paragraph 228 of the judgment.
It flows from that --
LADY JUSTICE GLOSTER: The parentheticals there, "excluding any non-provable claims ..."?
MR ZACAROLI: Exactly because if there isn't one, there is no possible claim for such a thing. That is why this point is directly linked to two other declarations, which you see in items 9 and 10, as I mentioned when opening this whole debate, where he declines to find that there is any currency conversion claim, in relation to post-administration interest on either bases, either based on your contractual rights or what you would have get under a judgment rate.
LORD JUSTICE BRIGGS: Because it's a complete code?
MR ZACAROLI: Because of the complete code.
LADY JUSTICE GLOSTER: I see.
MR ZACAROLI: We have dealt with --
LORD JUSTICE BRIGGS: Which were those two, 19 and 20?
MR ZACAROLI: Declarations 18 and 19, yes.
When I opened this, I mentioned the argument may be slightly different if there is a complete code or if there is not. The point about how offset is to be calculated, or how a currency conversion claim is to be

calculated in a world where there isn't a complete code -- we dealt with in paragraphs 62 to 66 of our skeleton at tab 3 of core bundle A -- so we certainly foreshadowed this in the skeleton.
And our point is it's an aggregated approach you would take. You look at what you are contractual rights were, absent the administration, and see if those had been satisfied by what comes out of the insolvency process.
The second short point is that the essence of the SCG's case -- and we say the flaw in it -- is the conclusion that our contention was to offset results in foreign currency creditors not getting statutory interest to which they are entitled. We say that's not so because there are two separate questions here.
The first is your debt is converted into sterling and you get the statutory interest on that sterling debt at the full amount. We have never said any of that should be clawed back. That remains an entitlement which is paid in full.
The second and completely different question is once you have gone through this whole process, the dividends and interest have been paid in full, the question which then arises is the creditor is remitted to their contractual rights, the foreign creditor has a right to

be paid, say, in dollars, and the question is: do they have in their back pocket the dollars to which they are entitled to, having run through the whole statutory scheme? And if they do, they don't have a currency conversion claim. It's as simple as that.

Now, if I may make two points of clarification which aren't on the offset point, rather than jumping up during reply submissions.

The first point is this: my learned friend repeated the submission that it is common ground that Bower v Marris applied to bankruptcy prior to the 1883 Act. I won't repeat my submission, but just to make the point that I dealt with what I meant by common ground, day 3 of the transcript, page 10, line 25 to page 11, line 24, and then page 13, lines 8 to 18.

Finally, a very short point on -- it's the declaration in relation -- it's item 2 on the list of issues, declaration 8. A point that was raised by my Lady, Lady Justice Gloster, that in the declaration there's a reference at the end to interest not continuing to compound following payment in full of the principal amount.

LADY JUSTICE GLOSTER: Yes.

MR ZACAROLI: When you look at the declarations in order, you will see the previous one for declaration 3 -- it's

the previous item on the list -- the judge defines it in these terms in relation to Bower v Marris:

"You allocate dividends, first, the reduction(?) of principal, ie the proved debt ..."

So when he uses the word "principal", what he means is the proved debt, and it's clear from that, as it were, defining that term in the earlier declaration.

LADY JUSTICE GLOSTER: Yes, I see, so I don't need to worry about what he's actually saying there?

MR ZACAROLI: No.

My Lords, that's what I want to say by way of reply or rejoinder.

LADY JUSTICE GLOSTER: Thank you.

Well, we are about half a day ahead, aren't we?

MR SMITH: We are, my Lady.

LADY JUSTICE GLOSTER: Mr Smith, you have three-quarters of an hour.

Further submissions by Mr SMITH

MR SMITH: Thank you, my Lady.

It falls to me, therefore, to deal with two of the supplemental issues. First of all, supplemental issue 1A, then supplemental issue 2. I'm going to start with supplemental issue 1A, which is item 12 on the issues list.

Broadly, what this issue concerns is the rate of

statutory interest which is applicable to a provable debt, which is a closeout sum under a contract, where the closeout sum only arose due to action taken after the commencement of the administration.

I'll explain in a moment a little more what those closeout sums are in practice. It's, essentially, early termination amounts which arise under ISDA master agreements.

This supplemental issue was actually dealt with by Mr Justice Hildyard, not Mr Justice David Richards, as it was considered that it related more closely to the issues concerning interest on claims under ISDA master agreements, which he was dealing with as part of Waterfall IIC. So there's a different judgment and it was dealt with by a different judge. Everyone is agreed that, for the purposes of this appeal, it belongs more conveniently together with the other issues, which are before this court.

Now, as you'll see from the issue, it concerns rule 2.88(9) of the rules. Specifically the question is whether the concept of a rate applicable to the debt, apart from the administration in rule 2.88(9), includes a contractual rating applicable to a closeout sum, which only arose after the administration had commenced.

Now, as I said, the closeout sums which we're

concerned with are, essentially, the early termination amounts, which arise under ISDA master agreements and similar agreements.

I'm sure your Lordships will be aware and familiar with these. They, essentially, arise where there's open derivative transactions, whether they're swaps or so on. They're terminated following the occurrence of an event of default, and there's then a net early termination amount --

LADY JUSTICE GLOSTER: Does it matter which method of calculating the amount --

MR SMITH: No.

LADY JUSTICE GLOSTER: We're not into any of that?

MR SMITH: No, thankfully, we are not getting into any of these questions for these purposes. It's just a construction of rule 2.88(9) against the background of these early termination amounts.

In the case of LBIE, the early termination amounts which we're concerned with for the purposes of this issue will only have fallen due as a result of action taken by creditors after commencement of LBIE's administration. So that will, typically, be where there's been an event of default, as a result of LBIE going into administration. At some point afterwards, the creditor has then served an early termination

notice.
Under the terms of the ISDA master agreement, only at that point do you get early termination and an early termination amount falls due, and that sum then attracts a rate of contractual interest under the terms of the master agreement.
Now, Mr Justice Hildyard held that the contractual interest rate applicable to the early termination amount, even though it only kicks into effect after the commencement of the administration, was nevertheless a rate applicable for purposes of rule 2.88(9).
Just to mention, finally by way of introduction, this is not -- it sounds like a somewhat more esoteric point. It's not merely of academic interest. You will appreciate it's of quite practical significance and importance because the number of claims in LBIE's estate, which are early termination amounts, is considerable, when you think about £4.4 billion.
And depending on the contractual rate of interest which applies to those claims, this issue is potentially -- it's certainly at least worth hundreds of millions, quite possibly billions, of pounds, so although it is a somewhat esoteric issue on one view, it is a point of practical significance.
Now, you will appreciate this issue is, obviously,

very closely related to issue 4 on which my learned friend, Mr Dicker, has already addressed your Lordships.
LADY JUSTICE GLOSTER: Issue 4, not item 4.
MR SMITH: Yes, sorry. I have written down the item number.
LORD JUSTICE BRIGGS: It's item 11.
MR SMITH: That's right.
LORD JUSTICE BRIGGS: That's where you get a foreign judgment after the cut-off date.
MR SMITH: Absolutely. So issue 4 includes the question of whether an interest rate applicable to foreign judgment obtained after the commencement of the administration is capable of being a rate applicable for the purposes of rule 2.88(9).
As you know, and as you heard from Mr Dicker, Mr Justice David Richards held that it did not, essentially because such an interest rate was not in fact applicable to the debt, as at the commencement of the administration.
Now, it's right to make clear at the outset, if the appeal, in relation to that part of issue 4 is successful, so if Mr Dicker succeeds in persuading you that the judge was wrong on that point, then we would accept that it would necessarily follow that supplemental issue 1A was also correctly decided by Mr Justice Hildyard. So if you like, our appeal on

issue 1A is in some sense a contingent appeal.
LADY JUSTICE GLOSTER: Supplemental 1A.
MR SMITH: Yes. Indeed. So our appeal in relation to supplemental issue 1A, is in a sense a contingent appeal, because it only arises if the appeal in relation to foreign judgment part of issue 4 is unsuccessful and that this court holds that issue 4 was rightly decided by Mr Justice David Richards.
Now if the court concludes that Mr Justice David Richards was right, then in our submission it follows, as I will seek to explain, that supplemental issue 1A was wrongly decided by Mr Justice Hildyard. Because essentially, in very broad terms what our submission is is that Mr Justice Hildyard wrongly applied the logic of Mr Justice David Richards' judgment on issue 4. And if you apply that logic correctly to supplemental issue 1A it leads to a different result from that which Mr Justice Hildyard found.
And in particular, we would say if it's right that a rate of interest applicable to a foreign judgment obtained after the commencement of the administration was not a rate applicable, then we say it's equally the case that a rate of interest applicable to an early termination amount which arises after the commencement

of the administration is also not a rate applicable. We say the two situations are analogous, and one applies the same logic in relation to each --
LADY JUSTICE GLOSTER: You and the SCG are not in the same camp on this.
MR SMITH: No. This is an issue where actually we are the opposing parties. Supplemental issue 1A is essentially between --
LADY JUSTICE GLOSTER: Even though you were both appellants on the earlier one.
MR SMITH: That's right. So in a sense, as I say, this issue only arises contingently if the appeal on that part of issue 4 is wrong. And what we say --
LADY JUSTICE GLOSTER: It fails, you mean.
MR SMITH: Yes. That part of the appeal fails. And then there's an argument essentially between myself and Mr Dicker as to what the consequences are of that in relation to interest which arises under the closeout amounts. Because what we broadly say is that issue 4, and supplemental --
LORD JUSTICE PATTEN: Mr Dicker on this issue is arguing to the opposite effect of his submissions on issue 4; is that right?
MR SMITH: I think in fairness we are both approaching this issue on the footing that the judge's conclusions on

issue 4 are upheld. So one's always looking at it against that framework. And what the real question is if the judge is right on issue 4, what are the consequences of that for issue 1A.

LORD JUSTICE BRIGGS: Yes. You say they follow as night follows day.

MR SMITH: Yes.

LORD JUSTICE BRIGGS: But I think those who are going to oppose you say well no they don't, and they are distinguishable.

MR SMITH: Indeed. And indeed Mr Justice Hildyard said they were distinguishable and we say he was wrong.

LORD JUSTICE BRIGGS: Yes.

MR SMITH: Essentially the broad question is whether it's right there's an analogy and whether it's right, as the judge held, that one can draw a distinction.

Now, it may be helpful to begin just by reminding ourselves of the relevant features of early termination amounts just so the legal structure is understood. This is common ground, and was summarised by the judge at paragraph 478 of his judgment at A2, tab 2, page 119. There's a very helpful summary by the judge at 478. As I say, this was common ground below and I think it remains common ground. Just to take you through it very quickly, in subparagraph (1) you'll see that under the

master agreement:

"Early termination may occur where there has been an event of default."

LADY JUSTICE GLOSTER: Sorry, what's the paragraph number?

MR SMITH: It's paragraph 478 and starting with subparagraph (1), I can deal with it quickly. 478(1):

"Early termination may occur where there has been an event of default."

There are basically two forms: where automatic early termination has not been specified, and where automatic early termination has been specified. I will come back to that difference in a moment.

Subparagraph (2) the events of default are defined. They include the appointment of an administrator.

Subparagraph (3) is important because it makes the point that until you have an early termination date the obligations on the party are the relevant payment or delivery obligations under the outstanding swaps.

Then subparagraph (4) also important:

"Until there has been a default in performance there is no contractual right to interest on such payments or right to compensation."

So until you have a default there isn't any contractual right to interest. But where an event of default has occurred, then the other party may specify

an early termination date.

Then subparagraph (5) upon the occurrence of the early termination date all transactions entered into are terminated. No more payments or deliveries are required to be made, and the amount due in respect of the early termination date is then to be calculated.

Then subparagraph (6), there was then a payment date which is specified.

And then importantly subparagraph (7):

The contractual right to interest only accrues or begins to accrue on the early termination amount from the early termination date.

So that's the first time your contractual right to interest kicks in. And really that is the central point for present purposes, that where you get an early termination amount which accrues post-administration the interest rate only kicks in for the first time post-administration.

Now to be clear about one point, in paragraph 479 the judge points out, rightly, there's a distinction between cases where automatic early termination has been specified and where automatic early termination has not been specified.

We are concerned, for the purposes of this issue, only with cases where automatic early termination is not

specified. We know where it was, the entry of LBIE into administration would automatically have terminated at that point giving rise to an early termination amount as at the date of administration.

LORD JUSTICE BRIGGS: So the interest would run from the cut-off date.

MR SMITH: Exactly. So we are not concerned with those cases for the purposes of this issue. And indeed we accept, that in relation to those cases clearly the contractual rate applicable as at the date of administration was the rate due under the ISDA Master Agreement.

Before considering the reasoning of Mr Justice Hildyard in relation to supplemental issue 1A --

LORD JUSTICE BRIGGS: Can I just check one thing?

MR SMITH: Yes.

LORD JUSTICE BRIGGS: If the party in default is in the money, interest still runs on the termination payment to be made by the non-defaulting party presumably.

MR SMITH: Yes.

LORD JUSTICE BRIGGS: So where it says "Unless there has been a default in performance there is no contractual right to interest", it doesn't mean that only the non-defaulting party gets interest; it's just that --

what the judge is there summarising is a time point.
MR SMITH: Yes.
LORD JUSTICE BRIGGS: Yes.
MR SMITH: The contractual right to interest under the ISDA Master Agreement only arises on the early termination amount.
LORD JUSTICE BRIGGS: Yes.
MR SMITH: So that's going to be due one way or the other.
LORD JUSTICE BRIGGS: Yes. But it has nothing to do with who is in default.
MR SMITH: No.
LORD JUSTICE BRIGGS: It's just who is in the money.
MR SMITH: Exactly. The balance is going to be due one way or the other. To whomever the balance is due is entitled to interest on that, absolutely.
Before looking at what Mr Justice Hildyard said I think I need to start by looking at what Mr Justice David Richards said in relation to issue 4, because as I submitted a moment ago the central point here concerns whether we are right that the logic of Mr Justice David Richards on issue 4 applies equally to supplemental issue 1A.
He dealt with the relevant part of issue 4 at paragraph 171 of his judgment, A1, tab 2, page 41. We just pick it up at paragraph 173. He noted there were

in fact two sub-issues, or questions if you like, in relation to issue 4, the first of which concerns the case where the creditor had in fact obtained a foreign judgment after the commencement of the administration. And it's that part of issue 4 which we are concerned with in this case, not the second question -- sorry, my apologies, it's the second question we are concerned with concerning the situation where the creditor in fact obtained a foreign judgment in the course of the administration. And that's obviously part of the question on which Mr Dicker's submissions have focused.
Mr Justice David Richards obviously answered that question in the negative, and he dealt with that point at paragraph 178 and onwards of his judgment.
LADY JUSTICE GLOSTER: We've seen all that.
MR SMITH: Yes. If I can just very briefly emphasise the points which we say are relevant for the determination of supplemental issue 1A. Firstly, he accepted Wentworth's submission recorded in the first sentence of paragraph 179 that, for the purposes of determining the rate applicable you look at the rights of the creditor as at the commencement of the administration.
And if you look at the final sentence of paragraph 179 he made the point that the logic did not apply to a creditor who obtained a judgment after the

commencement of the administration because at the date of the administration he had no right to interest at the relevant judgment rate. So what he's concerned with is looking at what are the rights of the creditor as at the commencement of the administration.
Paragraph 180, just over the page on page 44, just to pick up on one point there he made in the penultimate and final sentences, which is:
"If the creditor does not have a judgment at the date of the administration the debt proved by the creditor is not ...(Reading to the words)... is not the judgment debt which is the subject of the proof."
Now in our submission that logic applies equally to an early termination amount which arises post-administration.
Then paragraph 182 is important for present purposes, because he explicitly rejected the submission that a contingent right to interest was sufficient for the purposes of rate applicable. Because the argument was put to him that it may be said that a creditor has a contingent right to judgment interest as at the date of the administration, and he rejected that as being sufficient for the purposes of the rate applicable. And as we understand it he's saying a contingent right is not sufficient for the purposes of rule 2.88(9).

Now, in our submission if the reasoning of Mr Justice David Richards is correct then it applies equally to the rate of interest applicable to an early termination amount which only arises after the commencement of the administration. The two situations are directly analogous. The foreign judgment and the early termination amount both arise after the commencement of the administration. At the commencement of the administration neither of those debts in fact existed; and more importantly, in both cases, so far as interest is concerned, as at the commencement of the administration the only right which the creditor had was a contingent right to interest on the relevant debt as and when it arose.
So if you think about the case of the foreign judgment creditor, someone who subsequently obtains the foreign judgment, as at the date of his administration he merely has a contingent right to interest. He may have had a contractual debt but --
LORD JUSTICE PATTEN: The interest the judge is talking about is the interest that stems from the judgment, isn't it, in this example? I mean, his right to interest depends on his getting judgment; it has nothing to do with his contractual position at the time of the administration.

MR SMITH: Absolutely. So far as a foreign judgment creditor, that's right, but if you look at what rights or interests he has, as at the date of administration, all he has is a contingent right to interest which arises if and when he obtains a foreign judgment.

Now, in our submission --

LORD JUSTICE PATTEN: I mean, I'm not sure it's necessary -- I'm not sure -- why is it a contingent right to interest? I mean, it's a contingency, undoubtedly, in the sense it could occur, but in what sense is it a contingent right?

MR SMITH: Well, because if he's in a position whereby something occurs, ie the obtaining of a judgment, at that point he has a right to interest, so he has a right which is subject --

LORD JUSTICE PATTEN: That's like saying if you have are run down in six months' time, you have a right to damages -- it doesn't mean you have a contingent right to damages.

MR SMITH: We will come to it in a moment. If you look at the definition of contingent rights, they are rather broadly defined by the Supreme Court in Nortel.

But however one defines it, the question for our purposes is where there is a proper comparison between the situation of the creditor in respect of the foreign judgment and the creditor in respect of the early

termination.

In the case of the foreign judgment creditor, certainly he has no right to interest until foreign judgment accrues post-administration.

In the case of the early termination amount creditor, the position is the same, we say, because he has no right to interest unless and until an early termination amount arises post-administration. In our submission, the logic of the two positions is the same.

And if the judge, Mr Justice David Richards, was right to say that a right to interest, which at the date of commencement of the administration was merely contingent, does not amount to an applicable rate for the purposes of rule 2.88(9). And that logic applies equally to early termination amounts, as it does to foreign judgments.

Now, if we turn to the reasoning of Mr Justice Hildyard, he dealt with this really at paragraphs 516 to 520 of his judgment in bundle A2 at tab 2. It begins on page 130, and really, the essence of his conclusion and his reasoning is at paragraphs 518 to 520.

His reasoning, essentially, was that he considered there was a distinction between a rate of interest applicable to an early termination amount and a rate of

interest applicable to a foreign judgment, and he founded that distinction on the source of the right.

He said that in the former case, the early termination amount, the source of the right was contractual; whereas in the latter case, the foreign judgment creditor, the source of the rate and the right to interest is the judgment itself and the relevant Rules of Court.

So what he basically decided was that because in the case of early termination amounts to the source of the right was contractual, the right to interest could be said to be in existence at the commencement of the administration, even though it only applied once when the early termination amount had arisen after the commencement of the administration.

He distinguished that in paragraph 520 from the position in relation to a foreign judgment, where he said the right to interest, basically, did not exist as at the date the administration, even as a contingent future right. So he's, basically, making a distinction on the basis of the source of the right.

Now, in our submission, the distinction drawn by Mr Justice Hildyard is not a proper basis for construing rule 2.88(9). Firstly, in our submission, his analysis at paragraph 520 of his judgment was wrong. He

implies -- and certainly this is inherent in his reasoning -- that in the case of a foreign judgment obtained after the commencement of the administration, the creditor has no contingent right to interest, as at the date of commencement of the administration.

Now, in our submission, that's wrong. The creditor does have a contingent right to such interest, as at the commencement of the administration.

If you take the position of a creditor who has a debt claim against the company in administration, as at the commencement of the administration, he would be entitled to obtain a judgment in respect of that claim, which would attract a rate of interest. And as at the date of the administration, the only contingency to which that right to interest is subject is the obtaining of the relevant judgment. In our submission, such a creditor does have a contingent right to interest.

Indeed Mr Justice David Richards didn't disagree with that. The relevant paragraph of his judgment in Waterfall II part A is paragraph 182, where he didn't say such creditor does not have a contingent right to interest; rather he said a contingent right to interest is not sufficient for the purposes of being --

LADY JUSTICE GLOSTER: He calls it the rather ethereal contingent --

MR SMITH: He does. He qualifies, if you like, the nature of the contingency. He regards this type of contingent right to be rather ethereal. In our submission, that is not necessarily correct. If you take the example which I was just positing of someone who has an accrued debt claim at the commencement of the administration, they only have to go through one further step of getting a judgment on that and in order to acquire a right to interest.

But the relevant point here is he's not saying that creditor does not have a contingent right; he's just saying a contingent right isn't sufficient to qualify for the purposes of rule 2.88(9).

You'll be aware of cases like Nortel and Re Sutherland, which considered the nature of a contingent liability. Contingent liability is very widely described; it's not dependent on there being an existing legal liability. All that's required, taking the definition in Re Sutherland, is that the relevant person is in a position whereby a liability will arise or come into being, one or more certain events occur or do not occur.

LADY JUSTICE GLOSTER: What's the tab number for Sutherland?

MR SMITH: Re Sutherland is authorities bundle 1, tab 41A.

LORD JUSTICE PATTEN: Just tell me -- probably my fault for

not having read the skeletons -- the creditors that Mr Justice Hildyard was concerned with, what have they proved for on the basis of the closeout, the amount that became payable on the closeout?

MR SMITH: Well, I don't think the particular proofs were in evidence, and there's some suggestion, I think, in the skeleton argument of the SCG that different creditors may have proved --

LORD JUSTICE PATTEN: They must have proved something because I don't see how this point arose, considering we are concerned here with statutory interest on the debts that they proved for. So, the debt was what?

MR SMITH: I don't think the actual proofs themselves were in evidence. But in our submission, as a matter of law, what they were proving for was the debt as it stood as at the date of the administration, as quantified by the subsequently obtained early termination amount. In our submission, the position is the same as Mr Justice David Richards describes in relation to the creditor --

LORD JUSTICE PATTEN: Was what they were entitled to, under the contract?

MR SMITH: As at the date of the administration.

LORD JUSTICE PATTEN: Yes.

MR SMITH: No, in our submission, the position is the same.

LORD JUSTICE PATTEN: They weren't proving for a contingent or future debt, were they, or what; or were they?

MR SMITH: I suspect, in practice, they probably proved some way down the line after the early termination amount had taken place. One knows in the case of LBIE, the administration occurred in September 2008 and turned into a --

LORD JUSTICE PATTEN: What they were proving for is the amount that became payable on the closeout; that was the debt on which statutory interest became payable?

MR SMITH: In our submission, not, because if you go back to paragraph 180 of Mr Justice David Richards in Waterfall 2A, and he describes the position of a creditor who had a debt as at the date of commencement of the administration and then subsequently obtains a foreign judgment, that creditor does not prove for the foreign judgment.

LORD JUSTICE PATTEN: Exactly. Exactly. But that's the distinction, because if you get a subsequent foreign judgment, you are not proving for the foreign judgment; you've already proved in the example that he was dealing with for the contractual debt.

MR SMITH: Yes.

LORD JUSTICE PATTEN: And that's what you're doing here, isn't it?

MR SMITH: Well, in our submission, there's no real distinction between the two situations because, in both cases, you're in a position whereby as at the date of administration the creditor has certain contractual rights, and subsequently those rights are then transformed into a different set of rights because he obtains either an early termination amount or a foreign judgment.

Applying the logic of the judge, which we say is right, in both cases, what the creditor is proving for are his rights, as they exist as at the date of administration, as quantified by the subsequent judgment or early termination.

LORD JUSTICE BRIGGS: There's a difference between having a certain contractual right on the cutoff date, which is merely recognised and confirmed as such a right by the later judgment --

MR SMITH: Yes.

LORD JUSTICE BRIGGS: -- and the judgment they quantified, but it quantifies the right as it always was. In this situation, at the cutoff date, as I understand it, all the ISDA counterparty with LBIE had was the usual non-interest-bearing right to payments, if he was in the money, on each payment date -- to the difference between the two payments, depending on the nature of the swap we

are talking about.
MR SMITH: Yes.
LORD JUSTICE BRIGGS: But what happened in the case of an early termination was that something else has happened after the cutoff date, which has given rise to a debt, and I'm assuming that they were proving for their termination elements as debts which had been contingent at the cutoff date, but which had matured.
MR SMITH: Yes.
LORD JUSTICE BRIGGS: I don't know.
MR SMITH: We haven't got the proofs in evidence and, as I say, I think there's some suggestion in the SCG skeleton argument on this point, that different creditors may have proved in different ways and it would be a question of fact in each case. But in our submission, there isn't really a distinction between the two situations.
In the case of the early termination amount, then what, in substance, it is doing is valuing the rights as they stood as at the date of the early termination and netting them off to produce a net liquidated balance. It is, in effect, valuing the net position, as it stood as at the date of the administration.
So we do submit there isn't really a difference, but in any sense --

LORD JUSTICE PATTEN: But it looked to me as if what you were arguing in front of Mr Justice Hildyard was that the only alternative contractual rate that you could apply under sub-rule 9 was the one that was actually, so to speak, running at the time of the cutoff date.
MR SMITH: Yes, absolutely.
LORD JUSTICE PATTEN: And is that what you are saying?
MR SMITH: It is. That's the essential point.
LORD JUSTICE PATTEN: So you have a contractual right to have 12 per cent, or something like that, but you say it's not enough to have the contractual right to have that. You have to have reached the point in time in which interest has begun to run at that rate, is that what you're saying?
MR SMITH: Yes, what we're saying is that a right to interest, which is merely contingent as at the date of administration, isn't enough. If you have a right to interest, but as at the date of administration, it's merely a contingent right, that's not enough. We say that is what Mr Justice David Richards, basically, held in paragraph 182 in relation to a foreign judgment creditor.
LORD JUSTICE PATTEN: If you can prove for a contingent debt, why can't you prove for the rate of interest that's applicable?

LORD JUSTICE BRIGGS: Yes, quite.
MR SMITH: That's a slightly separate question because you are then distinguishing between -- you have to draw the distinction then between rule 2.88(7) and rule 2.88(9). If you have a contingent debt, no doubt can you prove for it. It is outstanding as at the date administration. It attracts statutory interest, but as per issue 1C, which is agreed, you only get the judgments rate on that until the contingency actually kicks in.
That was supplemental issue 1C, which was touched on this morning. So you can prove for a contingent debt, and if you do, you get the 8 per cent judgment rate, is the position.
The question we are concerned with is whether when you prove for a contingent debt or a contingent right to interest, you get the higher contractual rate. And that takes you --
LORD JUSTICE BRIGGS: Sorry to interrupt. You say it's agreed that if you prove for a contingent debt where the contingency hasn't matured, you get Judgment Act rate interest --
MR SMITH: That was issue 1C.
LORD JUSTICE BRIGGS: But what you if you prove for a contingent debt where the contingency has occurred?

MR SMITH: As at the date of the administration?
LORD JUSTICE BRIGGS: No, no, where it has occurred before a dividend is paid.
MR SMITH: Well, subject to this issue, you certainly get Judgment Act interest.
LORD JUSTICE BRIGGS: My question --
MR SMITH: That example ties into exactly the issue we are debating.
LORD JUSTICE BRIGGS: If the contingent carries its own built-in rate of interest, you don't get that; you still only get the judgment rate, you say?
MR SMITH: Yes.
LORD JUSTICE BRIGGS: Even if a contingency has matured?
MR SMITH: Yes, because that's the question, and that is exactly the question, which is: what is the rate applicable? In our submission, you look at that as at the date of administration; you look at what is the rate applicable to the debt as at the date of administration; that is what Mr Justice David Richards held. And what you need in order to be entitled to the higher rate under rule 2.88(9) is an accrued right to interest as at that date, not merely a contingent right.
LORD JUSTICE BRIGGS: Which is the agreed issue; what is the number of it?
MR SMITH: Supplemental issue 1C. I say it's agreed; it was

argued below and there's no appeal from it, is there, which is the position?
LADY JUSTICE GLOSTER: It's not on our schedule 1C.
MR SMITH: No, it's not one that's being appealed from. It was argued below.
LADY JUSTICE GLOSTER: You have to go back to the older --
MR SMITH: Yes, it's in Mr Justice David Richards' judgment, dealing with the supplemental issues.
Now --
LADY JUSTICE GLOSTER: I'm not sure I am understanding commercially why it's in your interest to argue this.
MR SMITH: Well, because we are --
LADY JUSTICE GLOSTER: Just explain to me why.
MR SMITH: Yes, so we are a prime brokerage creditor, so we are creditor under a prime brokerage agreement. Prime brokerage agreements do not carry contractual rights to interest.
LADY JUSTICE GLOSTER: Right.
MR SMITH: But we are potentially competing with people who do carry contractual rights to interest --
LADY JUSTICE GLOSTER: Right, that's why you want to do the ISDA people with no automatic early termination date down?
MR SMITH: Yes. Some of the rates of interest are, potentially, enormous, if you're talking about

15 per cent compounded on these massive claims.
LADY JUSTICE GLOSTER: I see.
MR SMITH: It's very much in our interest.
LADY JUSTICE GLOSTER: To knock them down.
MR SMITH: Yes --
LADY JUSTICE GLOSTER: Knock them back to judgment rate, basically.
MR SMITH: Yes, exactly.
LADY JUSTICE GLOSTER: I see.
MR SMITH: Which is the position we're, basically, in.
LADY JUSTICE GLOSTER: Yes, I see.
MR SMITH: Now, as we say, in the case of both the foreign judgment --
LORD JUSTICE PATTEN: Sorry, I mean, you'll be creditors of -- both unsecured creditors taking it at the same stage, won't you?
MR SMITH: Yes, that's right.
LORD JUSTICE PATTEN: There's no suggestion, is there, that there won't be enough to satisfy both of the claims, even if they've got the interest claim that you're opposing?
MR SMITH: I don't know the answer to that, I have to say. We don't have access to enough --
LORD JUSTICE PATTEN: I didn't think anything said to us this morning suggested that.

MR SMITH: I think it may depend --
MR BAYFIELD: My Lord, I think it depends on a number of things. The outcome of Waterfall, for one, in relation to whether the subject comes out for statutory interest; whether Bower v Marris is applicable, which might give people --
LORD JUSTICE PATTEN: So you might run out of money.
MR BAYFIELD: -- more interest, and also part 2C, which is where the cost of equity can come into the default rate of interest. So it is possible there won't be enough in the surplus to discharge statutory interest in full. Possibly.
LORD JUSTICE PATTEN: Thank you.
MR SMITH: It may also, of course, affect the amount of money available for currency conversion.
LORD JUSTICE PATTEN: It may be important.
MR SMITH: Yes. As I say, the sums involved are quite large.
Now, as I say, our essential point on this is to say that in the case of both a foreign judgment and an early termination amount, the creditor has a contingent right to interest as at the date of the commencement of the administration. And Mr Justice Hildyard was wrong in paragraph 520 of his judgment to suggest that the foreign judgment creditor does not have that contingent

right.
Now, in fact --
LADY JUSTICE GLOSTER: I think it's 519.
MR SMITH: You are right, then he draws on the (inaudible) in 520.
LORD JUSTICE BRIGGS: I'm sorry to keep niggling away at issue supplementary 1C; can you just tell me -- you needn't take me to it -- the paragraph of, I assume it's Mr Justice David Richards' judgment --
MR SMITH: It is.
LORD JUSTICE BRIGGS: -- where he deals with that?
MR SMITH: He does. He deals with it at paragraph 26 of his supplemental judgment, which is in bundle --
LORD JUSTICE BRIGGS: Don't take me there, but if you just tell me it's in supplement 1C, paragraph 26, I can go and read it.
MR SMITH: Bundle A2, divider 1, paragraphs 26 through to 36.
As I say, the position is that in the case of both the foreign judgment and an early termination, the creditor has a contingent right to interest at the date of commencement of administration.
And it follows, in our submission, that the distinction Mr Justice Hildyard was in fact drawing was contingent rights, which arises by virtue of an existing

contract, and a contingent right which arises otherwise than by virtue of an existing contract.

He was, basically, drawing a distinction, we would submit, between different types of contingent rights. He was, in effect, saying that if you have a contingent right which arises out of a contract in place, as at the date of administration, that is sufficient. But if it arises otherwise, because of the right to go and obtain a foreign judgment, that isn't sufficient.

Now, we respectfully suggest there isn't any basis for that distinction between different types of contingent rights to interest. There's clearly no basis for it in the wording of rule 2.88(9). There's no other indication that the drafters of the rules intended there to be any such distinction.

You ask yourself why, as a matter of policy, should there be any distinction between different types of contingent rights --

LORD JUSTICE PATTEN: I think it comes back to the point that I put to you a little while -- this is paragraph 519 of his judgment and what he is drawing a distinction between is your right to interest of whatever it is on closeout, which is a term of the contract that exists at the date of administration in this case, and your right to interest under a judgment, which is after all, what

Mr Justice David Richards was interested in, which arises under the judgment by virtue of the Judgment Act.

That is nothing to do with any contractual rights -- he is not contrasting it with your right or entitlement to seek a judgment for the debt. That's not the right -- it's not the right comparator.

The comparison is between a contractual right to interest, which exists at the date of administration, albeit contingent on one or two things happening, and the right to interest in relation to some future obtained judgment. It doesn't matter whether you have a claim which would entitle you to seek a judgment; you don't, in any sense, have a right to interest until you get the judgment.

MR SMITH: Well, I mean, I think I agree with most of what you put to me, but in my submission, the true analysis is that, in both cases, there is a contingent right to interest, as at the date of the administration. In the case of the early termination amount, the contingent rights arises out of the terms of the contract. In the case of the foreign judgment creditor, the contingent right doesn't arise out of the terms of any contract, it arises out of the fact he was in a position whereby he can go off and obtain foreign judgment in due course.

Now, those are both contingent rights, as at the

date of administration. The source of the right, contingent right, is obviously different. In one case, it's the contractual contingent right; in the other case, it isn't.

Now, in my submission, there's no warrant for distinguishing between different types of contingent right to interest. The correct approach, in our submission, is simply to ask whether the words "the rate applicable to the debt", apart from the administration in rule 2.88(9), are capable of including rights to interest which are contingent, as at the date of the administration.

LORD JUSTICE BRIGGS: What I don't understand is why you are not relying on paragraph 34 of Mr Justice David Richards supplemental judgment, which is, on the face of it, far more analogous than trying to line it up with his view about judgments.

MR SMITH: I was going to come to that in a minute, but I agree.

LORD JUSTICE BRIGGS: Because there may be all the difference in the world between an existing contractual right to interest at a certain rate on a future or contingent date and a judgment, which might depend on whatever the Judgments Act at a related date says about the interest rate that comes out of the judgment. But

paragraph 34, he really is comparing like-with-like, isn't he?

MR SMITH: Yes, absolutely. I was going to come to his supplemental issue 1C because I agree and it does support our argument.

LADY JUSTICE GLOSTER: I think we might leave that until tomorrow morning.

MR SMITH: Is it Monday morning?

LADY JUSTICE GLOSTER: You are quite right, it's Monday morning. We will sit 10.30 on Monday morning.

(4.00 pm)

(The hearing was adjourned until Monday, 10 April 2017 at 10.30 am)

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