

<p>1 Thursday, 6 April 2017 2 (10.35 am) 3 Submissions by MR ZACAROLI (continued) 4 LADY JUSTICE GLOSTER: Yes, Mr Zacaroli. 5 MR ZACAROLI: Picking up from yesterday on contingent debts, 6 the one aspect I need to deal with is the fact that 7 future debts are treated differently, and we accept that 8 the judge was right about future debts. 9 Notwithstanding that there is no discounting back, 10 the principal amount of the future debt, certainly if 11 it's fallen due for payment before the dividend is 12 payable, there is no discounting back if interest is 13 payable from the date of the administration. 14 We submit the best explanation for that is that 15 given by the judge in paragraph 215 of his judgment. 16 This is where he is dealing with the future debt issue, 17 and towards the end of that paragraph, the last five 18 lines or so. 19 He says: 20 "True it is that this may produce an advantageous 21 result in the particular circumstances instanced by 22 Mr Trower, but it is difficult to construct a scheme 23 which can produce a perfect solution in all 24 circumstances, and given that, in reality, most future 25 debts carry interest in the meantime, the injustice of</p> <p style="text-align: center;">Page 1</p>	<p>1 running from the date of contingency or you adopt the 2 judge's approach, it's payable from the date of 3 administration. There will be cases on either side 4 which appear unfair, or perhaps illogical. 5 The question really comes down, we say, to which is 6 the least illogical of the conclusions. We say that the 7 most logical is when you consider the essential nature 8 of a contingent debt, ie that one doesn't arise until 9 some point in the future when the contingency has 10 occurred. Then it's unlikely to be interest-bearing in 11 the meantime, and it's most logical to apply a rule 12 which prevents double accounting for that creditor or 13 a windfall for the creditor, and says: well, outstanding 14 in those circumstances means from the date the actual 15 contingency arises. 16 Now, just a point to note. There was a supplemental 17 issue 1(c), which this -- 18 LORD JUSTICE BRIGGS: Just before you run on. 19 MR ZACAROLI: Yes. 20 LORD JUSTICE BRIGGS: If your construction or route for 21 achieving that result lies in the way we discussed 22 yesterday in 2.88(7), of saying, well, the period from 23 the cut-off date -- I forget the precise language -- but 24 only if the debt has become due. 25 MR ZACAROLI: Yes.</p> <p style="text-align: center;">Page 3</p>
<p>1 applying Mr Trower's submissions in those circumstances 2 may well be considered to have ...(Reading to the 3 words)... by him." 4 So the judge is picking up on the fact that with 5 future debts one is likely to be talking about 6 interest-bearing debts in the interim. 7 The same we would say cannot be said of a purely 8 contingent debt because the idea of earning interest 9 before the date on which you know whether the debt is to 10 fall is unlikely. 11 LADY JUSTICE GLOSTER: But it's possible. 12 MR ZACAROLI: It's possible that the reverse is true in both 13 situations. We would say in the paradigm instance of 14 a future debt, you would expect interest to be accruing; 15 contingent debt, not. 16 We are here in a world where both rules, rule 17 2.105 -- well, that rule and the rule as to estimated 18 contingent debts, and indeed rule 2.88, are dealing with 19 relatively blunt, or they are relatively blunt 20 instruments for what's a complex area, where we accept 21 there are a number of different possible scenarios to 22 fit within it. 23 It's likely, therefore, that whether you adopt 24 either result, that's our construction of rule 2.88 for 25 contingent debts, that interest should only start</p> <p style="text-align: center;">Page 2</p>	<p>1 LORD JUSTICE BRIGGS: How do you construe that in a way that 2 operates differently for contingent debts than it would 3 do for future debts? In other words, even if you are 4 right as a matter of logic in choosing the least unfair 5 or the least illogical solution, at the moment, I am 6 struggling to see how, within the construction of 7 2.88(7), you can actually do that. 8 MR ZACAROLI: I see my Lord's point. There is a issue that 9 I have to accept. We do accept that the judge got it 10 right. 11 LORD JUSTICE BRIGGS: Ultimately, we are not just fishing 12 around in a pond and coming up with helpful solutions; 13 we are trying to construe some fairly rigid rules. 14 MR ZACAROLI: The only solution we suggested below was that 15 there is a provision in the future debts, essentially, 16 for treating them as statutorily accelerated for the 17 purposes of distribution by the discounting back in rule 18 2.105. That's the only answer to my Lord's question. 19 But I acknowledge the difficulties with that is that 20 it's not actual acceleration; it's a sort of deemed 21 acceleration for the purposes of calculating interest. 22 It doesn't apply if the debt has fallen in for payment 23 before the date of dividend. It's only in the prior 24 period, but that is the only, I think, answer we can 25 come up with.</p> <p style="text-align: center;">Page 4</p>

<p>1 Now, just to make the point I was going to make, 2 which is to point out there is an issue 1(c) 3 supplemental judgment of the judge at paragraphs 26 to 4 36. 5 LADY JUSTICE GLOSTER: What item are we? 6 MR ZACAROLI: We are not because it's not an appeal from it. 7 This was one of the judge's findings. This concerned 8 the question that when you are quantifying, the amount 9 of interest which falls due under either the Judgments 10 Act rate or the rate apart from administration under 11 rule 2.88(9) to work at which is the greater, you don't 12 start computing for that purpose the rate under the 13 contract rate if it was a contingent debt until such 14 time as the contingency arises. So effectively, it's 15 a zero rate until the contingency occurs, then it's 16 whatever contractual rate applied thereafter. 17 So let's say it's a five-year period. The Judgments 18 Act rate is 8 per cent and it's £100 debt for those 19 five years. If the contract was contingent and the debt 20 didn't arise until the fourth year, then in comparing 21 the two to see which is the greater, it's zero for 22 four years and then whatever the contract rate is for 23 the last year. In those circumstances, the 24 Judgments Act rate would apply because the contract rate 25 is not higher; that was his conclusion.</p> <p style="text-align: center;">Page 5</p>	<p>1 contract, strictly speaking. 2 MR ZACAROLI: No, that's right, not reversion to contract -- 3 LORD JUSTICE BRIGGS: We're talking about 2.88(9). 4 MR ZACAROLI: Absolutely -- 5 LORD JUSTICE BRIGGS: Can you remind me, it's supplementary 6 judgment, which? 7 MR ZACAROLI: Paragraphs 26 to 36. 8 LORD JUSTICE BRIGGS: Thank you. 9 MR ZACAROLI: So just reverting to this fallback position, 10 it has this advantage that it enables the solution to 11 match more accurately the myriad circumstances which 12 might arise because if the contingent debt does bear 13 interest, then it may be inappropriate to discount back 14 to the date of administration. But if it doesn't, there 15 is every reason to do so. 16 And there are, we accept, a number of possibilities 17 of contingency: contingency as to amount of date 18 certain; contingent as to existence, but the date on 19 which it would come into existence is certain. But 20 it can cater for all those possibilities in a way which 21 more closely fits the circumstances one has to deal 22 with. 23 The final point on this -- 24 LORD JUSTICE BRIGGS: Do you discount it back for the 25 purpose of calculating interest or for proof as well?</p> <p style="text-align: center;">Page 7</p>
<p>1 We say he was right. There is no appeal from that. 2 All we says is he didn't carry the logic of that through 3 to its logical end, which is that for the person who has 4 a contingent debt where it doesn't arise at all until 5 the fourth year -- 6 LADY JUSTICE GLOSTER: He shouldn't have the interest in the 7 meantime. 8 MR ZACAROLI: That's the short point. 9 Now, our fallback position, if we don't succeed on 10 the construction of the rule is, we say, if indeed 11 interest is payable on the contingent debt from the date 12 of administration on that debt, it strongly suggests 13 that certainly in relation to a contingent debt, which 14 is not interest-bearing -- would generally not be 15 interest-bearing -- there ought to be a discounting back 16 to the date of administration to conclude this windfall 17 that otherwise would arise. So this goes back to the 18 two ways of getting out of the illogical circumstances 19 that we first started with. 20 LORD JUSTICE BRIGGS: Just before we get there, under 1(c), 21 as I understand it -- I have not been back to the 22 passage in the judgment -- we are talking about 28.9 23 election. 24 MR ZACAROLI: That's right. 25 LORD JUSTICE BRIGGS: We're not talking about a reversion to</p> <p style="text-align: center;">Page 6</p>	<p>1 MR ZACAROLI: Proof. If we are wrong about that, for the 2 purposes of calculating interest, we would say, 3 generally speaking, it should be discounted back 4 (inaudible). 5 So the final point is this. If we are wrong about 6 this -- and I did make this point in passing when I was 7 dealing with the Bower v Marris issue earlier on. This 8 an important example of creditors being given new rights 9 under rule 2.88 of the statutory code for interest, 10 which substantially differ and improve upon their rights 11 under general law because the purely contingent creditor 12 could never receive interest, but for administration on 13 its debt before the contingency arose, nor could it 14 obtain a judgment and therefore get Judgments Act 15 interest before the contingency arose. 16 So to entitle this creditor to apply a Bower v 17 Marris approach to calculating the statutory interest, 18 which would be the inevitable approach if 2.88(7), as 19 a matter of construction, incorporates Bower v Marris 20 could never be justified on the basis of giving full 21 satisfaction to the creditor of the rights it would have 22 had, apart from the administration. And this, in 23 a sense, is an extreme example of that point. 24 Now, my Lords, that's all I had to say on the issue 25 in relation to contingent debts. With apologies, I need</p> <p style="text-align: center;">Page 8</p>

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

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1 LADY JUSTICE GLOSTER: I thought you said "Mr".
 2 MR ZACAROLI: I said "Miss".
 3 LADY JUSTICE GLOSTER: I don't care about "Miss" or "Mrs".
 4 Sorry.
 5 MR ZACAROLI: Her decision was that the bankruptcy provision
 6 in Ireland for interest from a surplus applied in
 7 a liquidation, distinguishing the (inaudible) case in
 8 England. The Court of Appeal overturned her on that, so
 9 everything she said thereafter was relevant for the
 10 purposes of the Court of Appeal.
 11 But in her first instance judgment, and in
 12 particular the second judgment the judge is referring to
 13 here, she did say that the principle in Bower v Marris
 14 would apply to calculate the post-liquidation interest,
 15 assuming the bankruptcy provision applied.
 16 Now, the judge concluded, we say rightly, that one
 17 gets very little assistance from her decision. What she
 18 cited in support of the proposition was a report of the
 19 Commissioners in bankruptcy, and this is where the
 20 textbook reference I made earlier comes back in because
 21 the passage in that report, as the judge notes at
 22 paragraph 120 of the judgment, was lifted verbatim from
 23 that earlier English textbook, the textbook of Mr Wace
 24 in 1904, which just used the words, "It is conceived
 25 that". It's a very weak authority for the proposition

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1 that she then relied upon.
 2 So it's an example of Bower v Marris being said to
 3 apply to a statutory provision for interest which gave
 4 a fixed rate to everybody. That's right. The statutory
 5 provision is materially different from rule 2.88 anyway,
 6 but we say to the extent that it might be against us, it
 7 is really of no serious weight.
 8 The Canadian case is dealt with by the judge,
 9 actually, in two places. The court was shown
 10 paragraphs 123 to 127 where substantial parts of the
 11 judgment of Mr Justice Blair are set out, but if you go
 12 on to paragraph 153, the judge does come back to it
 13 briefly. Perhaps you can read paragraph 153.
 14 LADY JUSTICE GLOSTER: Yes.
 15 MR ZACAROLI: So you can see the section being referred to
 16 at paragraph 123, section 95.2 of the relevant Canadian
 17 Act, it's in materially different terms to the English
 18 provision. As an authority on construction, it's of no
 19 relevance to the construction of rule 2.88.
 20 A couple of other short points, though. The
 21 Canadian judge, Mr Justice Blair, stated at
 22 paragraph 29, which you will see in 126 of the judge's
 23 judgment, he referred to the traditional rule in
 24 insolvency situations being applied, dividends to
 25 interest in principal.

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1 He then says:
 2 "This is said to prevent in justice, promote equity
 3 amongst creditors and protect contractual relationship
 4 between the parties."
 5 Now, he was dealing with a provision of an Act which
 6 purported to give a rate of interest across the board to
 7 one, whether or not they had interest-bearing debts,
 8 which suggests either he was thinking he was dealing
 9 only with contractual debts, contractual interest at
 10 that stage, or he was misunderstanding the concept in
 11 Bower v Marris and the decision itself, to refer to it
 12 supporting -- the fact he's relying on it being
 13 a provision which protects contractual rights is utterly
 14 irrelevant in the statutory context he was dealing with,
 15 so we would say he's misunderstood the essential nature
 16 of Bower v Marris.
 17 We adopt the point the judge made, which is the
 18 level of arguments that were addressed to the judge in
 19 this case and the court are clearly way beyond the
 20 arguments that appear to have been addressed to the
 21 judge in that case. So again, if it's against us -- we
 22 say it's distinguishable but if it's against us -- it's
 23 not binding in any sense, you ought not to give it much
 24 authoritative weight.
 25 My Lord, that just leaves one point I wanted to come

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<p>1 back to, which is a question that was asked me by 2 Lord Justice Briggs, in relation to a creditor who has 3 a claim in a foreign currency: can it elect to get 4 judgment in sterling? Because if so, it would get 5 8 per cent. 6 LORD JUSTICE BRIGGS: Leaving aside insolvency? 7 MR ZACAROLI: Leaving aside insolvency -- 8 LORD JUSTICE BRIGGS: Yes. 9 MR ZACAROLI: Just the question of (inaudible). 10 There is a note in the White Book and one case, and 11 I am very sorry it hasn't arrived in paper copy. 12 I think it's made its way to the electronic bundles -- 13 LORD JUSTICE BRIGGS: Really. 14 MR ZACAROLI: Well, it's been sent electronically -- 15 LORD JUSTICE BRIGGS: I am not sure it's got to be -- 16 LADY JUSTICE GLOSTER: What number? 17 MR ZACAROLI: It will be bundle 2, tab 73A. 18 LORD JUSTICE BRIGGS: Yes, I've just got it. 19 LADY JUSTICE GLOSTER: No, I haven't got it yet. 20 MR ZACAROLI: Can I mention the point and, if necessary, we 21 can come back -- 22 LORD JUSTICE BRIGGS: Is it 73(a)? 23 MR ZACAROLI: Yes. 24 LORD JUSTICE BRIGGS: Yes, I've got it. 25 MR ZACAROLI: The point is simply this: the note in the</p> <p style="text-align: center;">Page 13</p>	<p>1 any authority. As I say, it was there in exactly the 2 same terms in the 1999 White Book, the last before the 3 CPR came into effect. Again, no authority was cited. 4 But the case we referred to, Rogers v Markel 5 Corporation, which, as I say, we will certainly hand 6 around. 7 For what it's worth, it refers to the rule. It 8 doesn't apply the discretion in it because it says it 9 doesn't apply in that particular case, but it refers to 10 it without saying, "Well, that can't be right". So at 11 least it has been referred to in a judgment without -- 12 LADY JUSTICE GLOSTER: Which volume is it to go in? 73(a) 13 is -- 14 MR ZACAROLI: It's the case -- 15 LORD JUSTICE BRIGGS: Yes, but which volume? 16 MR ZACAROLI: 2, and we are going to put the CPR reference 17 in bundle 4 at 192D. 18 LADY JUSTICE GLOSTER: Yes. 19 MR ZACAROLI: Before I sit down, may I just make this one 20 short comment, that the way the parties agreed to 21 undertake this appeal was that, in relation to part A, 22 the SCG would make all their arguments in relation to 23 every issue and we would then follow. 24 LADY JUSTICE GLOSTER: Yes. 25 MR ZACAROLI: Now, in one respect in particular, we'd</p> <p style="text-align: center;">Page 15</p>
<p>1 White Book is in the 2016 volume and, unfortunately, 2 I haven't been updated yet. I have a new version -- 3 LADY JUSTICE GLOSTER: What rule is it? 4 MR ZACAROLI: It's paragraph 40.2.2 in part 40, dealing with 5 judgments and orders. 6 LADY JUSTICE GLOSTER: 40, it's actually a rule, is it? 7 MR ZACAROLI: No, it's under rule -- 8 LADY JUSTICE GLOSTER: It's a paragraph number, is it? 9 MR ZACAROLI: 40.2.2, that's under rule 40.2. 10 LADY JUSTICE GLOSTER: It's 40.2.3 at 12.34, "Entry of 11 Judgment on Foreign Currency"; is that right? 12 MR ZACAROLI: Yes. Does my Lady have the 2017 version? 13 LADY JUSTICE GLOSTER: Yes. 14 MR ZACAROLI: Okay. I am sure it's still there -- 15 LORD JUSTICE BRIGGS: 40.2.2 seems to be about 16 Taylor v Lawrence. 17 LADY JUSTICE GLOSTER: No, it's the next one down. 18 MR ZACAROLI: The next one down, yes. 19 LADY JUSTICE GLOSTER: 40.2.3? Yes. 20 MR ZACAROLI: There is a paragraph, the sixth paragraph, 21 which starts, "It's not clear whether ...". 22 LADY JUSTICE GLOSTER: Yes. 23 MR ZACAROLI: That paragraph. If my Lords could read that. 24 (Pause) 25 So that appears to be the position. It doesn't cite</p> <p style="text-align: center;">Page 14</p>	<p>1 slightly departed from that, in that my learned friend, 2 Mr Dicker, was stopped short pretty early on in making 3 submissions on offset between practical conversion 4 claims and statutory interest. 5 LADY JUSTICE GLOSTER: You want a right of reply, 6 potentially? 7 MR ZACAROLI: I reserve the right to ask for one. 8 LADY JUSTICE GLOSTER: Yes, certainly. 9 MR ZACAROLI: Thank you. I am grateful. 10 LADY JUSTICE GLOSTER: Thank you very much indeed, 11 Mr Zacaroli. 12 Yes. 13 Submissions by MR BAYFIELD 14 MR BAYFIELD: My Lady, it's me next. As you know, I appear 15 for the administrators of LBIE, and it was the 16 administrators who issued the Waterfall II application 17 in the first place, for directions to assist them to 18 distribute the surplus in LBIE's estate, in accordance 19 with the rights of the creditors under the statutory 20 scheme. 21 As the judge recorded in paragraph 11 of his 22 judgment, at first instance, the position that the 23 administrators took was as follows. 24 Firstly, where the administrators considered that 25 a common position taken by the other parties was</p> <p style="text-align: center;">Page 16</p>

<p>1 a common position to which there was an alternative 2 argument, they made the alternative argument. The best 3 example of that was issue 8, with future debts' argument 4 in relation to statutory interest.</p> <p>5 On those issues where the respondents adopted 6 different positions, the administrators made 7 submissions, only to the extent that they considered it 8 necessary to do so, in the interests of ensuring all 9 available arguments were before the court.</p> <p>10 Now, in our skeleton argument before this court, 11 what we've sought to do on the part A issues is to 12 identify positions taken by each of the parties, so that 13 there is in one document in summary form --</p> <p>14 LADY JUSTICE GLOSTER: That was very helpful.</p> <p>15 MR BAYFIELD: -- the alternative positions, and also briefly 16 to state our own position.</p> <p>17 Now, on the appeals, the position of the 18 administrators is aligned on each and every issue with 19 one party, or otherwise the administrators are neutral.</p> <p>20 Given that my learned friends have made all of the 21 competing arguments in a comprehensive way, it falls to 22 me, at this stage, only to make very limited submissions 23 indeed, and only in relation to issues where we have 24 something independent to say.</p> <p>25 LADY JUSTICE GLOSTER: Yes.</p> <p style="text-align: center;">Page 17</p>	<p>1 extent, frame the debate in relation to item iv.</p> <p>2 So turning first to proofs of debt, you will have 3 seen from paragraph 7 of the judge's judgment that the 4 administrators declared a fourth and final dividend in 5 April 2014. That took the aggregate level of the 6 dividends declared to 100p in the pound.</p> <p>7 Creditors whose proofs have been admitted have 8 received 100p in the pound on the principal amounts of 9 their proved debts, and there are, as matters stand, 15 10 proofs, worth a claimed aggregate of £550 million, which 11 have not yet been finally determined. Some of those are 12 subject to proceedings; others are not. So that's the 13 position in relation to proofs of debt.</p> <p>14 Turning to the surplus, and the current best 15 estimate of the amount of the surplus is £6.9 to 16 £8 billion. The administrators --</p> <p>17 LADY JUSTICE GLOSTER: 6.8 to 9 billion?</p> <p>18 MR BAYFIELD: No, 6.9 billion to 8 billion.</p> <p>19 LORD JUSTICE BRIGGS: Pounds?</p> <p>20 MR BAYFIELD: Pounds.</p> <p>21 LORD JUSTICE BRIGGS: That's the current best estimate?</p> <p>22 MR BAYFIELD: That's right. The administrators have not yet 23 made any distributions from that surplus. The reason 24 for that is that there are significant legal 25 uncertainties which are the subject matter of various</p> <p style="text-align: center;">Page 19</p>
<p>1 MR BAYFIELD: I will, of course, deal with any questions 2 that the court has, but subject to those questions, I 3 simply wish to deal with two short points.</p> <p>4 The first one relates to item 4 on the SCG's table; 5 that's declaration iv, issue 2A.</p> <p>6 LADY JUSTICE GLOSTER: Declaration iv, in small Roman 7 numerals?</p> <p>8 MR BAYFIELD: Correct. And that concerns whether the 9 creditors are entitled to compensation for delay in 10 paying statutory interest.</p> <p>11 Now, we mentioned in our skeleton argument that we 12 would be in a position to update the court as to the 13 progress made by the administrators --</p> <p>14 LADY JUSTICE GLOSTER: Could you give me the paragraph 15 number, please?</p> <p>16 MR BAYFIELD: So the skeleton argument is at tab 18 of core 17 volume A, and it's paragraph 19.</p> <p>18 LADY JUSTICE GLOSTER: Thank you.</p> <p>19 MR BAYFIELD: Where we said in the middle of the paragraph: 20 "The administrators will, at the hearing, be in 21 a position to update the court as to the payments of 22 debts proved and as to whether they have been able to 23 make interim distributions of statutory interest." 24 I think it's probably worth giving the court a short 25 update in that regard because it does, to a certain</p> <p style="text-align: center;">Page 18</p>	<p>1 parts of the Waterfall litigation, which make it 2 difficult for the administrators safely to make 3 substantial distributions of the surplus.</p> <p>4 The three principal sources of that uncertainty are, 5 first, the issue raised in Waterfall I as to the ranking 6 of the subordinated debt. Obviously, if the 7 subordinated debt in fact ranks above statutory 8 interest, the first £1 to £2 billion of the surplus is 9 not available to pay statutory interest, and the Supreme 10 Court's judgment will determine that issue once and for 11 all.</p> <p>12 The second uncertainty arises out of the issue 13 before this court as to whether or not <i>Bower v Marris</i> 14 has application at the stage of calculating statutory 15 interest under rule 2.88(7). That issue may, 16 ultimately, be destined for the Supreme Court as well. 17 We will have to wait and see.</p> <p>18 The third uncertainty is one that arises in the 19 context of Waterfall II part C, which if resolved in 20 favour of the SCG, may encourage claims to statutory 21 interest at a rate above the Judgment Act rate.</p> <p>22 In that part of Waterfall II, the SCG contends that 23 default interest is the master agreement and similar 24 agreements may be based on the cost of equity funding. 25 The judge, Mr Justice Hildyard, decided against them</p> <p style="text-align: center;">Page 20</p>

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<p>1 on that issue. That is subject to an appeal which is in 2 the process of being fixed at the moment and is likely 3 to come before the Court of Appeal some time in 2018. 4 Notwithstanding those uncertainties, on 5 29 March 2017, so last week, the administrators 6 announced the outline terms of a proposal to make an 7 initial distribution of statutory interest, to follow 8 the handing down of the Waterfall I judgment by the 9 Supreme Court, and the proposal is premised on the 10 Supreme Court not overturning the Court of Appeal in 11 terms of the ranking of the subordinated debt. 12 The proposal is for an interim distribution of 13 approximately £4.5 billion to be made to creditors 14 through a CVA, based on all creditors receiving 15 statutory interest on their proved debts at the rate of 16 8 per cent, at the Judgments Act rate and no higher. 17 In my submission, that does rather frame the 18 arguments in relation to item 4. The administrators on 19 that issue are aligned with Wentworth and support the 20 decision of the judge, that creditors are not entitled 21 to interest on statutory interest or damages for "late 22 payments of statutory interest". 23 Firstly, there is nothing in rule 2.88 or elsewhere 24 in the Insolvency Act or insolvency rules, which makes 25 provision for any further interest to be paid. That's</p> <p style="text-align: center;">Page 21</p>	<p>1 So that is item 4, and an update in relation to 2 distributions and also some supplementary submissions in 3 relation to why the judge was correct in what he held. 4 The other item I wish briefly to turn to is item 7 5 on the SCG's table, that's declaration (vi), which 6 relates to whether creditors have a non-provable claim 7 to interest on non-provable claims on which interest is 8 payable apart from the administration. 9 Now, in relation to this item, there is one 10 potential source of very minor confusion potentially 11 arising out of the skeleton arguments of Wentworth and 12 the SCG, which it may be helpful for me, briefly, to 13 address. 14 In their skeleton arguments, both Wentworth -- and 15 that's at paragraph 7, subparagraph 3, 10 and 16 and the 16 SCG at paragraph 15 -- refer to the judge as having 17 decided that interest on non-provable claims runs from 18 the date of administration. 19 Now, we suggest that that summary of what the judge 20 held is not entirely precise. The first point is that 21 it's correct that interest on non-provable claims cannot 22 run from a date prior to the date of administration 23 because pre-administration interest is provable as part 24 of the provable debt. One sees that from the insolvency 25 rule 2.88(1).</p> <p style="text-align: center;">Page 23</p>
<p>1 the point made by the judge at paragraph 167 of his 2 judgment. Further, it is clear, on the face of rule 3 2.88(7), that statutory interest is payable, firstly, 4 only on the debts proved; and secondly, only in respect 5 of the period during which they have been outstanding 6 since the company entered administration. So there is 7 no scope, in my submission, for rule 2.88(7) to extend 8 to afford the creditors a right to have interest on 9 their statutory interest. 10 As to damages for late payment of statutory 11 interest, as Mr Zacaroli submitted and as the judge held 12 at paragraph 166, the direction contained in rule 13 2.88(7) to apply the surplus to pay statutory interest 14 imposes no time limit by which the surplus should be so 15 applied and no question of damages arises. 16 Now, that doesn't leave creditors without a remedy. 17 If a dissatisfied creditor considered that the 18 administrator was sitting on his or her hands and should 19 be paying statutory interest, then they would, of 20 course, be entitled to make an application under, for 21 example, paragraph 74 of Schedule B1 to the 22 Insolvency Act, claiming that the creditors are being 23 unfairly harmed by the failure to distribute, and the 24 court would direct the administrators to make 25 a distribution, if that was the appropriate thing to do.</p> <p style="text-align: center;">Page 22</p>	<p>1 But the judge did not hold that interest on 2 a non-provable debt necessarily runs from the date of 3 administration. His declaration -- this is declaration 4 (vi) -- is to the effect that interest on a non-provable 5 claim will run for such period after the date of 6 administration, as is provided for by the contract or 7 other instrument, pursuant to which the creditor is 8 entitled to interest. 9 We are in the realms here of remission to 10 contractual rights and whilst interest may run from the 11 date of administration, it will in fact turn on what the 12 contractual, or other rights, that the creditor has 13 dictate. One sees that not only from the declaration 14 itself, but in my submission, it's clear from 15 paragraph 169 of the judgment and also, for 16 completeness, paragraph 19 of the judge's judgment on 17 the supplemental issues. 18 Now, having discussed this issue with Mr Dicker, 19 I am going to leave it to him to reply to Wentworth's 20 submissions as to how the non-provable claim to interest 21 is to be calculated on a currency conversion claim. 22 That's something that you were addressed on by 23 Mr Zacaroli, but I think it falls to Mr Dicker to deal 24 with it, given it's his client that has the financial 25 interest in the outcome of the issue.</p> <p style="text-align: center;">Page 24</p>

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

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

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

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

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<p>1 When we talk about the rule or principle in 2 Bower v Marris, one needs to be careful; all, 3 essentially, one is doing is saying that approach, that 4 outcome can also be taken in an insolvency, despite the 5 fact that one of the requirements for the insolvency 6 regime is that payments have already been made in 7 respect of proved debts; therefore in respect of 8 principal, perhaps with a small amount of interest up to 9 the date of administration, but not in relation to 10 post-insolvency interest.</p> <p>11 Now, it's common ground between the parties that, at 12 one stage, at least, this was the position in both 13 liquidation and bankruptcy. But my learned friend says 14 that, at some stage, for both, it disappeared. It 15 appears to have disappeared in relation to liquidation 16 in 1986; the bankruptcy, I will come on to in a second.</p> <p>17 Now, I said in opening that it disappeared, despite 18 the fact that no case had rejected its application, or 19 indeed had ever criticised it in any Commonwealth 20 jurisdiction we have found and at any stage, despite the 21 fact that pre-legislative materials didn't criticise it 22 or even refer to it.</p> <p>23 I also said that the judge himself didn't provide 24 a reason as to why the legislature might have sought to 25 dis-apply it, and nor did my learned friend.</p> <p style="text-align: center;">Page 29</p>	<p>1 that's common ground between the parties.</p> <p>2 Now, that's despite the fact that in each regime for 3 those periods, the statutory regime required dividends 4 be paid in respect of proved debts, ie principal. So 5 that when one got to the stage of talking about 6 distribution in respect of interest, the statutory 7 regime had already made payments in respect of 8 principal.</p> <p>9 So that is 100 and so years of liquidation, and 10 a similar period in relation to bankruptcy, although 11 earlier.</p> <p>12 Now, my learned friend says Bower v Marris stopped 13 operating in 1986 in relation to liquidation, as 14 a result of the introduction of rule 2.88. Now, again 15 just taking this in stages, the first point we made 16 was: why did rule 2.88 dis-apply the principle in 17 Bower v Marris when it is common ground that the 18 introduction of section 132 of the Bankruptcy Act did 19 not?</p> <p>20 Now, it's common ground that following the 21 introduction of section 132, Bower v Marris applied, at 22 least in relation to the first limb of 132; in other 23 words, a creditor who had a right to interest at law.</p> <p>24 So, we have two statutory provisions, section 132 25 and rule 2.88, which permit a creditor in the event of</p> <p style="text-align: center;">Page 31</p>
<p>1 I will come back to policy and principle in due 2 course, but it does appear that if Bower v Marris no 3 longer applied post-1986, that appears to have been not 4 as a result of a conscious and deliberate decision by 5 the legislature, but essentially, an accident of the 6 enactment of rule 2.88 or its wording.</p> <p>7 Now, the question therefore is: did it cease to 8 apply; and if so, precisely why. I want to take this in 9 stages because, in our submission, it's important to 10 understand the logic which underpins my learned friend's 11 submissions as to why it ceased to apply.</p> <p>12 The easiest way to do this is to deal with the two 13 strands separately, so dealing first with a creditor who 14 has an underlying right to interest. It doesn't matter 15 whether it is contractual or statutory, and then to come 16 back and deal with a creditor whose only right to 17 interest is under the rules.</p> <p>18 So I start with the first. To make it easy, imagine 19 a creditor with a contractual right to interest and an 20 express right to appropriate any payments, first to 21 interest, and then to principal.</p> <p>22 Now, we know that the principal in Bower v Marris 23 applied in such a situation for the entirety of history 24 of the liquidations between 1869 and 1986. And we also 25 know it applied in bankruptcy between 1743 and 1883;</p> <p style="text-align: center;">Page 30</p>	<p>1 a surplus to receive the interest that he was entitled 2 to at law, section 132, or interest at the rate 3 applicable to the debt apart from the administration, 4 and that's rule 2.88.</p> <p>5 Now, why did rule 2.88 dis-apply Bower v Marris, but 6 it's common ground section 132 did not, in relation to 7 a creditor who has a contractual right to interest? 8 I made that submission in opening; my learned friend 9 didn't accede to answer it.</p> <p>10 Now, what my learned friend did say was: well, 11 Lord Cottenham in Bower v Marris didn't really consider 12 section 132; he didn't really consider section 132 13 because 132 wasn't retrospective. That, in our 14 submission, doesn't help him because it's common ground 15 that Bower v Marris did apply after the introduction of 16 section 132, through to at least 1883, in relation to 17 creditors with contractual right to interest. That is 18 common ground.</p> <p>19 The judge agreed, paragraph 65, he said: 20 "I do not doubt that approach in Bower v Marris was 21 accepted as correct, at least until the Bankruptcy Act 22 1883." 23 LORD JUSTICE BRIGGS: Sorry, which paragraph of the 24 judgment? 25 MR DICKER: 65.</p> <p style="text-align: center;">Page 32</p>

1 LORD JUSTICE BRIGGS: Than you.
 2 MR DICKER: One needs to bear in mind, at this stage I am
 3 only dealing with creditors who have a contractual right
 4 to interest. As I said, section 132 is introduced; it
 5 has two limbs. The first limb deals with creditors who
 6 are entitled to interest at law. As I say, it's common
 7 ground that in relation to that limb of section 132,
 8 Bower v Marris --
 9 LADY JUSTICE GLOSTER: Can you just give me the tab number
 10 in bundle 4 for section 132, where I see it?
 11 MR DICKER: It is 118.
 12 LADY JUSTICE GLOSTER: Thank you.
 13 MR DICKER: Now, as your Lordships know, Lord Cottenham did
 14 in fact refer to section 132 in Bower v Marris.
 15 Bower v Marris post-dated its introduction by some
 16 10 years.
 17 Then there is the paragraph that you saw where he
 18 dealt with it. Can I just take you quickly back to
 19 that, and to one other line? I am not sure that you
 20 were specifically referred to it. So if you go to the
 21 authorities, bundle 1, tab 6, it deals, as you know, in
 22 bundle 1, tab 6, at page 357, in the last half of the
 23 page, with section 132. I won't go back through that;
 24 you've seen it.
 25 He then, over the page, deals with the authorities,

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1 pre-dating its introduction. That's at 358. Halfway
 2 down, or a third of the way down, he says:
 3 "The order [referring to Bromley v Goodere] indeed
 4 appears to have been framed by himself...(Reading to
 5 the words)... this was the opinion of that great judge
 6 of the justice of the case without the aid which the
 7 statute now affords."
 8 In other words, there is an indication in
 9 Bower v Marris that Lord Cottenham thought the same
 10 applied under section 132 as had previously applied as
 11 a matter of judge made law.
 12 My first point is simply a comparison between 132
 13 and rule 2.88. They are doing, essentially, the same.
 14 If it applies in relation to a creditor with a
 15 contractual right to interest in the context of 132, why
 16 doesn't it apply in the context of rule 2.88?
 17 Now, the next point is this: if even leaving aside
 18 that comparison, in our submission, there is nothing in
 19 my learned friend's point that the introduction of rule
 20 2.88 is inconsistent with the continued application of
 21 Bower v Marris.
 22 Again, focusing at the moment just on a creditor
 23 with a contractual right to interest. Now, the first
 24 point he made was: well, for Bower v Marris to apply,
 25 you need to have had interest accruing throughout. So

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

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1 accruing interest throughout.
 2 So when you ask: are there two debts, in the sense
 3 of was interest accruing due at the time? The obvious
 4 answer is "yes". We have an underlying contractual
 5 right on which interest accrues, and at the relevant
 6 date that creditor was entitled to say, "I had interest
 7 accrued and I am now in a position, looking back, to
 8 appropriate to interest notionally rather than to
 9 principal".
 10 So that leads to this: it's a necessary step, in my
 11 learned friend's argument, so far as a creditor with
 12 a contractual right to interest is concerned, that
 13 underlying right has been extinguished. It is only if
 14 it's been extinguished is he able to say: the only right
 15 you have is the right under rule 2.88, and that right
 16 doesn't involve interest accruing; therefore, on his
 17 approach to Bower v Marris, no room for appropriation
 18 and no room for a misapplication.
 19 So the next necessary step in his argument is that
 20 2.88 has somehow extinguished the underlying right to
 21 interest.
 22 Now, the way my learned friend sought to deal with
 23 this in submissions was to say: well, rule 2.72 and
 24 2.88(1) operated together to extinguish any claim to
 25 post-insolvency interest.

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1 The argument, as I understand it, was, as he put it,
 2 "proving" just means "claiming", and that those rules
 3 are therefore saying you can only claim for
 4 pre-insolvency interest, so any other claim has been
 5 extinguished.
 6 With the greatest respect to my learned friend, in
 7 our submission, that's hopeless. Rule 2.72 is concerned
 8 with identifying what you can prove for. It's headed
 9 "Proving a Debt". It's concerned with the priority
 10 level of proving debts, assets of an insolvent company
 11 are to be distributed *pari passu* in respect of its
 12 proved debts and proved debts do not include
 13 post-insolvency interest.
 14 So one has a rule certainly which says this is what
 15 you can prove for, but we know that the rules which say
 16 what you can prove for do not extinguish the balance of
 17 your claim.
 18 The contrary is unarguable. I said we know the
 19 rules as to what you can prove for do not extinguish the
 20 balance of your claim because we know that you couldn't
 21 prove the post-insolvency interest prior to 1986, but
 22 that didn't extinguish a claim for post-insolvency
 23 interest in the event of a surplus.
 24 We know that the rules in relation to proof, so far
 25 as foreign currency debt is concerned, require them to

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1 be converted into sterling, but we know from the
 2 judgment of this court in Waterfall I that that doesn't
 3 extinguish the balance of the underlying claim either.
 4 Now, all rule 2.88 did, so far as the contractual
 5 interest was concerned, was codify previous judge-made
 6 law. In liquidation 1869 to 1986, it was, as a matter
 7 of judge made law, the position that in the event of
 8 surplus creditors with contractual right of interest
 9 could recover the interest they would have been able to
 10 receive under they contract had there been no
 11 insolvency.
 12 We say all rule 2.88 was intending to do, so far as
 13 they were concerned, was to codify that. One can see
 14 this pattern of judge-made law being codified, having
 15 taken place throughout history of insolvency.
 16 If one goes back to Bromley v Goodere, I think
 17 mentioned in opening there were two or three examples of
 18 exactly that having happened. Now, if the legislature
 19 had intended to extinguish any underlying right to
 20 interest, we say it would not have sought to do it in
 21 the way suggested by my learned friend through rule
 22 2.72, dealing generally with proof and 2.88. It would
 23 have used language similar to that you find in relation
 24 to disclaimer, which is one of the very few exceptions
 25 to Lord Hoffmann's general principle.

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1 There is a power to disclaim onerous obligations.
 2 The underlying claim is extinguished and replaced with
 3 a statutory claim for damages, essentially, in the
 4 identical amount, but the language of the statutory
 5 provision in relation to the disclaimer makes it
 6 perfectly plain that that is what is going on.
 7 So just in relation to the creditor with
 8 a contractual right to interest, there is no issue, we
 9 say, in relation to appropriation. His underlying claim
 10 exists. Interest was due on his underlying claim at the
 11 date of the dividend and there is no problem now with
 12 looking back and notionally saying, "We will treat the
 13 payments you received as payments first in respect of
 14 interest."
 15 So appropriation and the requirement for interest
 16 having been due is not an issue in relation to
 17 a creditor with a contractual right to interest. The
 18 argument, as I say, only gets off the ground if somehow
 19 that underlying right has been extinguished, so that one
 20 is looking solely at the statutory right under 2.88,
 21 which point, as I say and my learned friend says: this
 22 is the only right to interest you now have and under
 23 this right, interest doesn't accrue day by day.
 24 LADY JUSTICE GLOSTER: You really are going back to Lord
 25 Hoffmann in Eckhardt, aren't we? I mean, it's a basic

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1 conceptual proposition your problem.
 2 MR DICKER: One of the interesting things is you will see
 3 from a comment -- Mr Justice Dixon, in one of the
 4 Australian cases my learned friend showed you, had
 5 a similar issue, in a sense, to an issue that this court
 6 had in Waterfall I. He was looking at the Australian
 7 statutory provision, which seemed to say: you pay proved
 8 debts in full and then you distribute to members. And
 9 he seemed to leave no room for non-provable liabilities
 10 in the middle.
 11 He said: well, that's fine. But if look at the
 12 history, you look at the way it's developed and you
 13 construe the Act in a sensible fashion, having regard to
 14 fundamental policies and principles of insolvency law,
 15 it's plain there is this thing in the middles, and this
 16 is how we read it. I will show you the passage later.
 17 One of the features of insolvency law is we have an
 18 iterative process. The law has been developed in this
 19 context, in part, through the judges. Parliament has,
 20 on occasions, codified the judge's decision. On
 21 occasions, Parliament has simply rolled forward the
 22 statutory language, no doubt on basis that the way it
 23 was interpreted by the judge, even if not, initially,
 24 the most obvious reading, is one which Parliament is
 25 content with.

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<p>1 Again, it's another point made by Mr Justice Dixon. 2 When you look at the Australian legislation, it's quite 3 hard to see how you find room for non-provable 4 liabilities. 5 This is intellectual freight. It's one thing to 6 say, of course the 1986 Act changed the law. You have 7 to be very careful, in our submission, to work out in 8 what respects and why, and to ensure that when you come 9 to construe its wording, you do so with adequate regard 10 to what preceded it. 11 So that is the position in relation to creditors 12 with a contractual right to interest. Can I turn now 13 and deal with the second strand, which is creditors 14 whose only right to interest is at the judgment at rate; 15 in other words, they have no underlying rate of 16 interest. The only right is the right they are given 17 under 2.88(7) and (9), and the only thing they are 18 entitled to is interest at judgment at rate. 19 Now, at this point, I obviously cannot rely on any 20 underlying right; I can't rely on Lord Hoffmann's 21 analysis in <i>Wight v Eckhardt</i>; I can't find any interest 22 that was due, essentially, behind the scenes. 23 So my learned friend is able to say: look at this 24 statutory provision, to say -- at least to submit 25 that -- interest under that statutory provision only</p> <p style="text-align: center;">Page 41</p>	<p>1 a contractual right to interest. We say it would be 2 slightly odd if it applied to them, but didn't apply all 3 also to those who were given a right of interest, 4 effectively, as we would later say, as if they had 5 a judgment. 6 The second point is: there is no obvious reason why 7 it can't or shouldn't apply in that context. If the 8 effect of giving creditors who don't otherwise have 9 a right to interest, a right to interest at the 10 judgment at rate, if the reason for that is that the 11 moratorium has prevented them from getting a judgment, 12 we ought to treat them as if they had a judgment, the 13 logic then would be: well, if they had a judgment and, 14 again, unless it were County Court judgment, 15 <i>Bower v Marris</i> would apply, so why doesn't 16 <i>Bower v Marris</i> apply in this situation as well? 17 The third point is this. Whether the legislature is 18 intending to provide creditors with interest at 19 4 per cent, as in section 132, or 8 per cent, as in rule 20 2.88(9), that is a rate which the legislature has said 21 creditors should receive. 22 Now, if <i>Bower v Marris</i> doesn't apply, what the 23 creditor will end up getting is not an effective rate of 24 either 4 or 8 per cent; and the reason for that, as 25 I submitted before, is simply interest accrues for</p> <p style="text-align: center;">Page 43</p>
<p>1 falls due in the event of surplus. And that this is 2 inconsistent with the operation of <i>Bower v Marris</i>. 3 Now, the real question is whether such a statutory 4 provision is inconsistent with the operation of 5 <i>Bower v Marris</i>, and we say it's not. 6 Now, my learned friend's position in relation to 7 this is, if one goes back to section 132 and focuses on 8 the second limb of 132, which gave creditors 9 second-ranking priority, 4 per cent interest, even if 10 they weren't otherwise entitled to interest. 11 My learned friend's case is <i>Bower v Marris</i> never 12 applied to the second limb of section 132 because it was 13 giving you a right to interest, which you never had 14 before, and which obviously wouldn't have accrued during 15 the course of payments of dividends. 16 So he says, at this stage, <i>Bower v Marris</i> didn't 17 apply in 1832, didn't apply in 1883, and effectively, 18 never applied in bankruptcy up to 1986. 19 Now, we say that's wrong. Before dealing briefly 20 with the cases my learned friend referred you to, three 21 points. First of all, we say it would be rather odd if 22 <i>Bower v Marris</i> applied to the first limb, but not to the 23 second. 24 So if one goes back to section 132, we know 25 <i>Bower v Marris</i> applied in the case of creditors with</p> <p style="text-align: center;">Page 42</p>	<p>1 a period but then is frozen, and if it's paid one year, 2 two years, three years later, they won't end up getting 3 interest at the effective rate. So in our submission, 4 there is no reason why Parliament would have wanted to 5 achieve such a result. 6 Now, against that background, there are authorities 7 which indicate that <i>Bower v Marris</i> can apply to such 8 a provision. The most important one, so far as this 9 jurisdiction is concerned, is obviously 10 <i>Whittingstall v Grover</i>. 11 Now, my learned friends said: well, that case was 12 different. He said that the decree for the 13 administration of the estate operates as a judgment in 14 favour of creditors, which itself gives rise to a right 15 to interest. So he says that's different because you 16 have a decree. That operates as a judgment in equity. 17 That judgment gives you the right to interest. So it's 18 another Judgment Act case where <i>Bower v Marris</i> normally 19 applies, so of course it applied in 20 <i>Whittingstall v Grover</i>. 21 We say that doesn't explain <i>Whittingstall v Grover</i> 22 for three reasons. First of all, a decree is not 23 a judgment which itself gives rise to a right to 24 interest. That is because, firstly, if one goes to 25 section 18 of the Judgments Act -- it's authorities</p> <p style="text-align: center;">Page 44</p>

<p>1 bundle 4, tab 120, volume 4, 120 -- section 17 deals 2 with judgment debts; section 18 deals with decrees at 3 orders of court in equity. You will note, four lines 4 down: 5 "These are decrees and orders of court of equity 6 whereby any sum of money or any costs, charges or 7 expenses shall be payable to any person. Those decrees, 8 but only those decrees, shall have the effect of 9 judgments in superior courts at common law." 10 Dropping two lines: 11 "... and they shall be deemed judgment creditors 12 within the meaning of the Act." 13 The first point is a decree of court in equity is 14 not an order whereby any sum of money or any costs, 15 charges or expenses shall be payable to any person, so 16 as to entitle the creditor to interest. 17 The second point is we know that, for the simple 18 reason that paragraph 46 of the order of 1841 was 19 enacted. If a decree entitled you to interest, as my 20 learned friend said, it wouldn't have been necessary to 21 enact the 1841 order, which gave you a right to 22 interest. You already would have had one. 23 One can also see that the decree didn't give 24 everyone a right to interest because when one comes to 25 the 1841 order, the right wasn't given to all creditors</p> <p style="text-align: center;">Page 45</p>	<p>1 Mr Justice Chitty's explanation or justification for 2 applying Bower v Marris was not couched in terms of 3 whether interest had become due, or anything of that 4 sort. The explanation which you will recall was simply 5 that the moratorium that prevented them from obtaining 6 a judgment, equity should treat them as if they had 7 a judgment. That is what the order of 1841 was intended 8 to achieve, and given you were treating them as if they 9 had a judgment, like a judgment creditor, generally, 10 Bower v Marris applied. 11 I wonder whether that would be a convenient moment? 12 I had rather lost sight of the time. 13 LADY JUSTICE GLOSTER: Certainly. I am sorry? 14 MR DICKER: I had rather lost sight of the time. 15 LADY JUSTICE GLOSTER: Five minutes, then. 16 (11.55 am) 17 (A short break) 18 (12.00 pm) 19 MR DICKER: Now, my learned friend submits that whatever may 20 be the position in relation to the administration of the 21 deceased estate, insolvent's estates, the position was 22 different in relation to winding up, and he referred you 23 to Herefordshire Banking Company. Can I just show you 24 that? It's authorities 1, tab 13. 25 It's important to bear in mind when considering</p> <p style="text-align: center;">Page 47</p>
<p>1 of the deceased debtor, which is what would have 2 happened if it had arisen because the decree was 3 a judgment. 4 Under the 1841 order, the right to interest was only 5 given to those creditors whose debts did not carry 6 interest. So you cannot explain Whittingstall v Grover 7 on the basis that this was just a Judgment Act case; an 8 unusual one in that it involved a decree in equity, but 9 a decree in equity is a judgment which entitles you to 10 interest. 11 It didn't. What entitled you to interest was the 12 1841 order, subsequently order 52, rules 62 and 63, 13 which my learned friend referred you to. Now, once you 14 get to that stage, we say that you have a provision 15 that's analytically the same as section 132 of the 1825 16 Act, rule 2.88(7); in other words, a provision which 17 says you get interest if, and only if, there is 18 a surplus, regardless of whether you had an underlying 19 right to interest; in other words, the point my learned 20 friend makes that under 2.88 interest doesn't accrue 21 day-by-day can equally be made, if right, in the context 22 of the 1841 order. On that basis, Bower v Marris should 23 not have been capable of applying 24 Whittingstall v Grover. 25 Now, it's interesting to note that</p> <p style="text-align: center;">Page 46</p>	<p>1 Lord Romilly's judgment that this case concerned the 2 winding up of a partnership which carried on a banking 3 business, and the winding up was, essentially, intended 4 to settle the equities been the partners and to wind up 5 the affairs of the partnership. 6 You will see that at 252, over the page to 253. The 7 last four lines of 252, Romilly says: 8 "Although a winding up order is a decree in equity 9 and therefore a judgment, it is a judgment in degree of 10 a different character. It is, in point of fact, 11 a degree amongst a great number of co-partners to settle 12 their equities among themselves to wind up the affairs 13 of the partnership, but that does not give the creditors 14 co-partners, partners a judgment against the company or 15 entitle them to any interest in respect of it." 16 Now, that may be a fair thing to say about 17 a proceeding which is designed to settle the equities 18 between a number of co-partners and wind up the 19 partnership, essentially, where creditors are not 20 affected. But in our submission, it's very difficult to 21 read that description of a winding up as equally 22 applicable to the sort of winding up that we are talking 23 about. 24 The sort of winding up we are talking about is, in 25 our submission, much closer to what was going on in</p> <p style="text-align: center;">Page 48</p>

<p>1 Whittingstall v Grover; namely, that you have a debtor 2 who is insolvent and whose assets need to be distributed 3 amongst its creditors, which involves a moratorium 4 preventing them from getting judgment, and which, as 5 a result, should entitle them to be treated as if they 6 have a judgment. 7 So although Lord Romilly was referring to a winding 8 up order, he was obviously thinking about that in the 9 context of the particular case with which he was 10 dealing. 11 Just for your note, there is a good description of 12 the operation of the Banking Act, governing the 13 formation and structure of the bank in the Herefordshire 14 Banking Company case in the judgments of the House of 15 Lords in Oakes v Tuquand, pages 358 to 359. That's 16 volume 1, tab 14 of the authorities. 17 Now, there are two other authorities in other 18 jurisdictions where Bower v Marris has been applied to 19 similar statutory provisions. The first, my learned 20 friend mentioned, re Hibernian, I don't think need to 21 say any more about that; and the second is 22 Attorney General of Canada v Federation Trust case. 23 Now, in relation to this, my learned friend took you 24 to the judge's judgment. As you know, he dealt with 25 Attorney General of Canada case in two places. First of</p> <p style="text-align: center;">Page 49</p>	<p>1 entitled thereto any surplus that remains after to 2 satisfaction of the debts in liabilities of the company 3 ... 4 "(2): Any surplus referred to in subsection 1 shall 5 first be applied in payment of interest." 6 We do, respectfully, ask in what sense does 7 section 95 not expressly refer to the surplus as 8 remaining after payment of the debts proved? It's true 9 it doesn't use that precise phrase, but section 95.1 10 expressly states the obligation is to distribute to the 11 persons entitled thereto any surplus that remains after 12 satisfaction of the debts and liabilities of the 13 company; in other words, after the debts have been 14 proved. 15 Now -- 16 LORD JUSTICE BRIGGS: There may be slightly more substance 17 in the judge's second point of distinction though 18 because he says -- 19 MR DICKER: He doesn't expressly say for how long. 20 LORD JUSTICE BRIGGS: He doesn't specify the end date. 21 MR DICKER: The end date. 22 LORD JUSTICE BRIGGS: The end of period. 23 MR DICKER: Yes, but again has to ask what's 2.88(7) doing 24 in that respect? We are saying it's just saying you pay 25 interest for the period for which the debts have been</p> <p style="text-align: center;">Page 51</p>
<p>1 all, he cited upon it at some length, 123 to 128, where 2 he says: 3 "The decision and its reasoning clearly provide 4 support for the submissions made on behalf of SCG and 5 York, and that the submissions indeed are powerful 6 submissions, but I have concluded an application of the 7 principal is incompatible with the regime established by 8 rule 2.88." 9 Then he goes on to deal with that. As my learned 10 friend said, he comes back to Attorney General of Canada 11 at 153. Just to note, if I may respectfully say, that 12 the subtlety of some of the distinctions the judge draws 13 between that case and this -- he says: 14 "I note, however, the statutory provision in that 15 case was not identical to rule 2.88. It does not 16 expressly refer to the surplus as remaining after 17 payment of the debts proved, nor does it specify the end 18 date of the period in respect of which interest is to be 19 paid." 20 Now just, for example, taking that first point, 21 "does not expressly refer to the surplus as remaining 22 after payment of the debts proved", if you go back to 23 123, where he sets out section 95 of the Canadian Act, 24 (1) says: 25 "The court shall distribute among the persons</p> <p style="text-align: center;">Page 50</p>	<p>1 outstanding. I will come back to this. It's not saying 2 how you calculate the amount of (inaudible). I will 3 come back this. It's an interesting -- one of the 4 consequences of the judge's, in our respectful 5 submission, overly literal approach to 2.88 is it leads 6 to consequences which make no sense. You can see that 7 in the context of issue 3 relating to compound interest. 8 The point is much better made when I come to issue 3. 9 A more general point in relation to appropriation is 10 this. My learned friend says, "Well, when you read the 11 cases, the vast majority of the cases talk about 12 Bower v Marris and talk about notional application of 13 dividends to interest due." My learned friend 14 repeatedly emphasised the word "due", and that is 15 absolutely right. The simple reason for that is that 16 those cases, most of them, the more recent ones being 17 liquidation cases, or pre-section 132 of the 18 Bankruptcy Act cases, were concerned with creditors who 19 had an underlying right to interest. So there is 20 nothing surprising in the court describing the principle 21 operating in a way which reflects those underlying 22 rights. 23 Now, it's plain that that is sufficient for the 24 principle to operate. It does not follow that it's 25 necessary for it to do so. Whittingstall v Grover,</p> <p style="text-align: center;">Page 52</p>

<p>1 Attorney General of Canada, et cetera, indicate that 2 it's not. 3 It's a little like the fallacy one I think was 4 taught when one was learning law. Donoghue v Stevenson: 5 if someone goes for advice and says, "Could I be 6 liable", the answer is no because your facts don't 7 involve a snail in a ginger beer bottle. I mean, it is 8 a frivolous example, but what is sufficient isn't the 9 same as what is necessary. 10 Why should appropriation be essential? You have 11 seen Lord Hoffmann in Bower v Marris saying it didn't 12 depend on appropriation. There is one other passage 13 I wanted to show you in this respect. It's from an 14 Australian case called Midland Montagu: authorities 15 volume 2, tab 61. The passage on the judgment of Chief 16 Justice McLelland(?) is at 326. You will see the 17 reference about two-thirds of the way down the top half 18 to Joint Stock Discount Company, Warrant Finance 19 Companies case; that's Humber Ironworks. 20 It's the last two sentences where he says: 21 "This depends on the applicable principles of 22 appropriation of payments. However, principles of 23 appropriation applicable to consensual payments founded 24 upon the express or implied intention of the payer or 25 payee do not govern payments made in the course of</p> <p style="text-align: center;">Page 53</p>	<p>1 draftsman wasn't aware of it and didn't expressly intend 2 to dis-apply it, but that is the consequence of the 3 wording that he chose to using 2.88. 4 Now, we say that is a submission which one needs to 5 assess in the light of the history. My learned friend 6 says no reported case applying Bower v Marris in England 7 after 1841 when it was decided. Well, firstly, absence 8 of reported cases between 1841, certainly 1869, 1883, in 9 our submission, is of little significance. Lord 10 Cottenham in Bower v Marris, you will recall, described 11 it as a well recognised rule that was "so well 12 understood as not to be the subject of question". So if 13 there isn't another reported case it may simply be that 14 no one thought there was an issue here worth litigating 15 about. It is certainly, in our respectful submission, 16 ridiculous to suggest that it is lost to view. That's 17 apparent from Humber Ironworks. Whatever extent to 18 which parties may have thought about Bower v Marris, 19 Humber Ironworks is a classic insolvency case. 20 LADY JUSTICE GLOSTER: Which has been in the textbooks. 21 MR DICKER: It's been in every textbook in every edition 22 ever since it was decided. 23 Now, it may be that Bower v Marris was effectively 24 only preserved through the decision in Re Humber 25 Ironworks, and it may be that occasionally those who</p> <p style="text-align: center;">Page 55</p>
<p>1 administration provided for by law." 2 Then there is a long discussion of Bower v Marris 3 which continues to 328. Just noting at 328, about ten 4 lines down, he refers to Bromley v Goodere. He says: 5 "He has always proceeded upon the same rules as he 6 would ...(Reading to the words)... that an equitable 7 rule ought to be followed in giving interest in these 8 bankruptcy cases." 9 Then there is a discussion of Humber Ironworks which 10 I won't take you through. 11 Whether one calls it a rule in Bower v Marris or 12 a principle in Bower v Marris or what simply 13 Bower v Marris does, the cases have consistently 14 described it as a means of achieving a fair or just 15 result. It's not something that depends on technical 16 rules of appropriation, interest having become due or 17 anything of that sort. It's to ensure creditors are 18 compensated to the extent intended for a period of 19 delay. 20 Given all that, why and how did Bower v Marris cease 21 to apply, having applied, certainly in liquidation, for 22 the previous hundred years, in 1986? My learned 23 friend's submission, as I understood it, was that, in 24 effect, Bower v Marris, having been decided in 1841, 25 promptly disappeared from view. It may be that the</p> <p style="text-align: center;">Page 54</p>	<p>1 read Humber Ironworks read it for the purposes of 2 working out what happens when a company is insolvent and 3 skip over the bit where Lord Selwyn says, "This is what 4 happens if it's solvent", but that no doubt was where 5 Mr Potts, Mr Stubbs, whoever sourced it from for the 6 purposes of Re Lines Bros -- and Humber Ironworks, it's 7 not merely referred to in the textbooks, but it's cited 8 in pretty much all the leading authorities. It comes up 9 in Re Dynamics, Re Lines Bros, there is a discussion of 10 it by Lord Hoffmann in Wight v Eckhardt. 11 Now, my learned friend said, "Well, there are other 12 authorities but they are in Commonwealth jurisdictions." 13 There are 11 authorities in the bundles, I am not going 14 to take you through them, in respect of other 15 Commonwealth jurisdictions. What I will say is this. 16 Reading them, it is interesting to note that they do not 17 simply contain a short reference to and application of 18 Bower v Marris. Pretty much all of them have a long, 19 well-reasoned discussion of Bromley v Goodere, 20 Bower v Marris, Humber Ironworks, and the relevant 21 statutes in England before considering the position in 22 the relevant foreign jurisdiction. Three, in 23 particular, which I think it is important the court 24 should at some stage read, just to identify them. 25 Re Langstaff, an early decision, 1851. It's authorities</p> <p style="text-align: center;">Page 56</p>

<p>1 1, tab 9. It contains a length --</p> <p>2 LADY JUSTICE GLOSTER: Where is that one?</p> <p>3 MR DICKER: It's Canada, my Lady. As I say, it contains</p> <p>4 a lengthy discussion both of the English statutes and</p> <p>5 Bower v Marris. The second is Mackenzie v Rees, which</p> <p>6 is authorities 1, tab 38. There was one passage I did</p> <p>7 want to show you in that. If I can ask you to turn up</p> <p>8 authorities 1, tab 38. It's from Mr Justice Dixon's</p> <p>9 judgment and it's at pages 10 and 11.</p> <p>10 Just picking it up in the last five lines of the</p> <p>11 first paragraph, so about halfway down the page, he</p> <p>12 says:</p> <p>13 "The principle which stops interest upon debts for</p> <p>14 the purposes of proof of assets so that the rights of</p> <p>15 creditors may be equitably adjusted ...(Reading to the</p> <p>16 words)... has been applied on the winding up of</p> <p>17 companies."</p> <p>18 He says:</p> <p>19 "The principle has long received statutory</p> <p>20 recognition and, to some extent, expression."</p> <p>21 Then he refers to section 132 of the 1825 Act. Then</p> <p>22 the discussion that follows in relation to the</p> <p>23 Australian legislation we say is worthy of note. If you</p> <p>24 could perhaps continue reading down to over the page, on</p> <p>25 11: for those who have hole punches, down to the first</p> <p style="text-align: center;">Page 57</p>	<p>1 starts with a judgment of Mr Justice Slade in</p> <p>2 Lines Bros No 1, which was decided on 15 April 1981.</p> <p>3 Humber Ironworks was considered. Bower v Marris was</p> <p>4 cited. This was the first instance decision that went</p> <p>5 on to the Court of Appeal.</p> <p>6 One then has as the next stage, so after that, the</p> <p>7 Cork Report. Now it's recorded as having reported on</p> <p>8 30 April 1981, so very shortly after Mr Justice Slade's</p> <p>9 judgment had been given. Although it is fair to say the</p> <p>10 report was not published or laid before Parliament in</p> <p>11 June 1982. You can see that from the front sheet. We</p> <p>12 know from certain other passages in the report that</p> <p>13 additions were made after April 1981 because there are</p> <p>14 three references to events prior to the end of</p> <p>15 December 1981. Just to give you the references,</p> <p>16 paragraph 1586 refers to a case called</p> <p>17 Re MR Shoes Limited, a judgment delivered</p> <p>18 4 December 1981. Paragraph 1791 refers to a provision</p> <p>19 of the Companies Act which only came into operation on</p> <p>20 22 December 1981. Paragraph 1918 refers to a report of</p> <p>21 the House of Lords Select Committee, dated 22 October --</p> <p>22 LORD JUSTICE BRIGGS: Sorry, what was that paragraph?</p> <p>23 MR DICKER: Sorry, paragraph 1918.</p> <p>24 LORD JUSTICE BRIGGS: 1918, thank you.</p> <p>25 MR DICKER: A report of the House of Lords Select Committee,</p> <p style="text-align: center;">Page 59</p>
<p>1 hole punch; for those who don't, to the end of the</p> <p>2 sentence before the sentence that refers to</p> <p>3 section 60(2), et cetera.</p> <p>4 LADY JUSTICE GLOSTER: Sorry, where did you want us to go</p> <p>5 down to?</p> <p>6 MR DICKER: Down to the first hole punch or before the</p> <p>7 sentence that starts 15 lines down. It starts,</p> <p>8 "Section 60(2)", et cetera. So the first 15 or so lines</p> <p>9 on page 11. I said I would show you that. In our</p> <p>10 submission, it's interesting to note that is</p> <p>11 Mr Justice Dixon saying:</p> <p>12 "Some difficulty may be felt in reconciling the</p> <p>13 operation of the principle as part of our law of</p> <p>14 bankruptcy with the express language of some</p> <p>15 provisions."</p> <p>16 This is dealing with how non-provable claims fit in.</p> <p>17 He finds a way of doing so.</p> <p>18 The third case again which I would suggest is one</p> <p>19 which needs to be read is Midland Montagu v Harkness.</p> <p>20 It's rather more recent. It's 1994. It's authorities</p> <p>21 2, tab 61.</p> <p>22 Now, my learned friend referred you to the</p> <p>23 Cork Report and the White Paper. In our submission,</p> <p>24 it's useful to have in mind the precise chronology. If</p> <p>25 I can indicate what, in our submission, that was. One</p> <p style="text-align: center;">Page 58</p>	<p>1 22 October 1981. We can't find anything in the</p> <p>2 Cork Report that postdates the end of 1981. Although,</p> <p>3 as I say, the report was not in fact published or laid</p> <p>4 before Parliament until June 1982.</p> <p>5 Now, one then gets Lines Bros No 1 in the Court of</p> <p>6 Appeal, and that's 11 February 1982. There was an issue</p> <p>7 which we debated in the context of Waterfall I before</p> <p>8 this court as to whether or not the Cork Committee had</p> <p>9 seen that before the Cork Report was actually finally</p> <p>10 published in June 1982. There isn't a clear answer to</p> <p>11 that. I think Lord Justice Lewison considered it was</p> <p>12 more likely that it had not been.</p> <p>13 So one has the Cork Report. One then has Lines Bros</p> <p>14 in the Court of Appeal. Humber Ironworks considered.</p> <p>15 Bower v Marris cited. By this stage, obviously</p> <p>16 Bower v Marris was clearly in play, if I may put it that</p> <p>17 way. Two years later, we have Lines Bros No 2, which</p> <p>18 was a decision of Mr Justice Mervyn Davies, argued in</p> <p>19 December 1983 and decided in January 1984. Finally, we</p> <p>20 have the White Paper published in February 1984.</p> <p>21 Now, something, we say, prompted the authors of the</p> <p>22 White Paper to add the reference to the rate applicable</p> <p>23 to the debt apart from the administration, because that</p> <p>24 wasn't part of the recommendations of the</p> <p>25 Cork Committee. We say the obvious explanation for the</p> <p style="text-align: center;">Page 60</p>

<p>1 inclusion of those words is that by the time the White 2 Paper was published, some two years after the Court of 3 Appeal had given judgment in Lines Bros No 1, they were 4 aware of how post-insolvency interest was dealt with in 5 a liquidation, including the application of the 6 principle in Bower v Marris. What they essentially said 7 was, "That's how it has worked in liquidation. We 8 think, unlike the Cork Committee, the rules need to 9 blend the two strands, and to provide those creditors 10 who have an underlying right to interest with the 11 interest they would have received absent the 12 insolvency." 13 Now, just one small point on the Cork Report. My 14 learned friend showed you paragraphs 1383 to 1386. 15 LORD JUSTICE BRIGGS: Just remind me of the reference. 16 MR DICKER: If you would not mind taking that up, it's 17 authorities bundle 5, tab 2/11. It's paragraphs 383 to 18 386. 19 LADY JUSTICE GLOSTER: 383? 20 MR DICKER: I am sorry, 1383. 21 LADY JUSTICE GLOSTER: Yes. 22 MR DICKER: To 1386, I am sorry. Our submission here in 23 fact it's probably more of a plea. It is simply that 24 one doesn't construe the report as if it was a statute. 25 One is sensitive to what, in substance, the authors were</p> <p style="text-align: center;">Page 61</p>	<p>1 Now, so far as the three aspects of the rules that 2 my learned friend referred to, we say 2.88(7) 3 established the priority of post-insolvency interest, it 4 comes after proved debts and before non-provable 5 liabilities. It establishes interest is to be paid in 6 respect of the periods during which they have been 7 outstanding and it tells you that they can have interest 8 at the greater of Judgment Act rate and the rate 9 applicable to the debt apart from administration. 10 Nothing there tells you how you calculate the amount of 11 interest which should be paid. Do you calculate it on 12 the basis the principal has been paid or by notionally 13 treating those payments as having been paid first in 14 respect of interest? 15 Now, we say the learned judge's approach to 16 construction and my learned friend's just takes too 17 narrow and too literal an approach. He focused on three 18 main points; first of all, the reference to "those 19 debts". He says that's a reference to the proved debts, 20 not the underlying debts. But actually, if one thinks 21 about it, the phrase is potentially ambiguous. It could 22 equally be referring more broadly to the debt in respect 23 of which the creditor has proved. Indeed, my learned 24 friend made precisely that submission later in his 25 submissions in the context of contingent claims.</p> <p style="text-align: center;">Page 63</p>
<p>1 dealing with. What, in substance, the authors were 2 dealing with here was the regime in bankruptcy was 3 different from that in liquidation. The conclusion in 4 1386 was simply: 5 "Our attention has been drawn to this anomaly 6 between the two insolvency orders by a number of bodies, 7 who suggest there should be a common code of rules for 8 situations which occur both in personal insolvency and 9 in winding up proceedings and, in particular, interest 10 should be payable on debts in the same way in both 11 administrations. We agree." 12 That's what they were focusing on. They weren't 13 focusing on the precise way in which post-insolvency 14 interest was being dealt with in bankruptcy and they 15 certainly weren't in 1383 seeking to resolve the 16 construction of sections 40(5) and section 65 of the 17 1883 Act. 18 Now, finally on this, so far as construction of rule 19 2.88 is concerned, I have made my submissions and 20 I don't intend to repeat them. The critical point is 21 obviously to remember that Bower v Marris is 22 a calculation methodology. There is nothing in it that 23 subverts the statutory scheme. Dividends have been paid 24 pari passu in respect of proved debts. We are now just 25 concerned with calculating how much interest is payable.</p> <p style="text-align: center;">Page 62</p>	<p>1 Secondly, so far as outstanding is concerned, my 2 learned friend says, "Well, proved debts were only 3 outstanding until the dividends are paid", but, in our 4 submission, this leads you to oddities like those the 5 judge reached in issue 3 in relation to compound 6 interest where compound interest stops running when 7 principal has been repaid, even though the interest is 8 still outstanding, contrary to the basic nature of 9 compound interest. It reduces the right as neither one 10 thing, nor another. 11 One other small point. My learned friend repeatedly 12 said the rule required you to pay interest "for" the 13 period the debt was outstanding. The words the rule in 14 fact uses are "in respect of", which are slightly more 15 general in relation. 16 Finally, my learned friend says the rule is 17 concerned with applying surplus and payment of interest. 18 Bower v Marris would result in the surplus being used to 19 pay principal, which then, if one bears in mind 20 Bower v Marris, is simply a notional calculation as to 21 the amount to be paid and doesn't in fact subvert the 22 priority regime. There is no issue there. 23 Now, he also referred to the reference to rate. 24 This is obviously a point of construction that's only 25 relevant to creditors with an underlying right to</p> <p style="text-align: center;">Page 64</p>

1 interest. He says the concept of the word "rate" can't
 2 encompass Bower v Marris.
 3 Now, again I referred to section 132 of the
 4 Bankruptcy Act in opening which uses the phrase "the
 5 rate of interest". It's common ground that in that
 6 statute that word did -- that was wide enough to cover
 7 Bower v Marris. If it was wide enough to cover
 8 Bower v Marris there, there is no reason why it isn't in
 9 the context of rule 2.88.
 10 As we say, this phrase in 2.88(9) is simply intended
 11 to ensure creditors with an underlying right to interest
 12 receive the interest they would have received absent
 13 administration. Now, perhaps slightly unfairly, but
 14 that was a phrase I picked up from the judge's own
 15 supplemental judgment at paragraph 34, but we do say he
 16 was right in that context. That is precisely what that
 17 phrase is intended to achieve.
 18 Now, my learned friend referred you to
 19 Fine Industrial Commodities, Mr Justice Vaisey, and
 20 I think the court picked up Mr Justice Vaisey's comment
 21 that if a company turns out to be solvent you treat it
 22 as if it always was solvent.
 23 LADY JUSTICE GLOSTER: Yes.
 24 MR DICKER: It's another way of describing the way in which
 25 liquidation worked prior to 1986, which was essentially,

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1 whether one calls it remission to rights, whether one
 2 calls it treating the company as if it always had been
 3 solvent, or whether one simply says you ensure that
 4 creditors receive their full entitlement before any
 5 distributions are made to shareholders doesn't matter,
 6 but the thrust of it is the same. We've now essentially
 7 reached a different stage and before the shareholders
 8 could get anything the creditors have to be paid in
 9 full, and that's certainly one rather graphic image of
 10 how one achieves that.
 11 That's all I was going to say on item one. I can be
 12 rather shorter I think in relation to the remaining
 13 issues. Item two is compound interest. Now, there are
 14 a number of points here. The first is what did the
 15 judge actually decide? Can I take you back to
 16 paragraph 26 of his judgment. This is part A, core
 17 bundle 1, tab 2, paragraph 26. The last six lines
 18 contain his decision.
 19 He says:
 20 "For the reasons given there, I consider interest is
 21 not compound following the payment in full of the
 22 principal amount because, under the terms of rule
 23 2.88(7), interest, whether simple or compound, is
 24 payable only for the period that the proved debt or part
 25 of it is outstanding."

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1 Now, we read that as meaning compound interest only
 2 stops running when the proved debt has been paid in
 3 full, as the judge says, thus giving rise to our leaving
 4 £1 outstanding example. Now, Wentworth say that's not
 5 what the judge decided; what the judge decided is
 6 effectively that compound interest stops running on
 7 a particular bit of principal as and when that principal
 8 has been repaid.
 9 Now, just assuming for present purposes, that is
 10 what the judge decided, Wentworth illustrated that in
 11 the table. I am not sure where you have it but it's --
 12 LADY JUSTICE GLOSTER: We have it loose.
 13 MR DICKER: Now, the difference between this and the judge's
 14 approach is of course that on the judge's approach sums
 15 continue to -- interest continues to compound until the
 16 principal has been -- our interpretation of the judge's
 17 approach is that interest continues to compound on
 18 interest for so long as any part of the principal debt
 19 is outstanding. Wentworth take a different approach.
 20 They say essentially you look at each pound of principal
 21 separately. Now, obviously this produces an even lower
 22 rate of return than the judge's approach, but it also
 23 has other consequences because it is even further away
 24 from the way in which compound interest would normally
 25 operate.

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1 Now, I say that because if you imagine you have
 2 a sum of principal, say £100, it's outstanding for
 3 a year, and during that year £10 of interest was earned,
 4 compound interest means you are entitled to interest on
 5 principal and interest until the entirety has been
 6 repaid. Wentworth says, "Well, imagine at the end of
 7 the year the £100 is repaid." There is still £10 of
 8 interest left outstanding, but they say the consequence
 9 of repaying the £100 principal is that essentially the
 10 right to compound interest, ie interest on interest, is
 11 turned off. So what they say the legislature
 12 effectively intended was to give the debtor a right to
 13 turn off the creditor's right to compound interest by
 14 repaying the principal.
 15 Now, if one is looking for illogical halfway houses
 16 which are neither one thing nor another, of the type the
 17 judge described in paragraph 24, we, in our submission,
 18 say that this is a prime example. This is not a right
 19 to compound interest. It's certainly not in any normal
 20 sense. The one thing that's clear from Wentworth's
 21 diagram is that, whereas a right to compound interest
 22 entitles you to interest on interest, in other words it
 23 doesn't matter that the principal has been repaid, your
 24 interest outstanding continues to accrue interest, on
 25 Wentworth's chart that's simply not what happens.

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<p>1 Now, why would the legislature want to achieve this 2 result? It is one thing to say creditors with a right 3 to compound interest should get the amount of compound 4 interest they otherwise would have got, but why require 5 a calculation of this court? No explanation is given. 6 There can't be, in our submission, a sensible reason. 7 The reason why Wentworth end up with this conclusion, 8 and why the judge ends up with this conclusion, is 9 because it's a logical consequence of his construction 10 of rule 2.88. That's the only reason why one gets 11 there. Once you say rule 2.88 says you only get 12 interest on proved debts for the period the proved debts 13 are outstanding, my learned friend is able to argue, 14 "Well, the proved debts, that's the principal, that's no 15 longer outstanding. So under the rules compound 16 interest can no longer apply." 17 So it's a logical consequence of the judge's 18 construction that you end up with results like this. 19 Again, we say it throws real doubt as to whether or not 20 this is what the legislature was trying to achieve. 21 LADY JUSTICE GLOSTER: It's also predicated, isn't it, the 22 declaration here, on the assumption or presumption that 23 there has been payment in full of the principal amount 24 through dividends? Whereas in fact, on your argument, 25 all that has been paid is what has been proved, an</p> <p style="text-align: center;">Page 69</p>	<p>1 of rule 2.88. 2 LADY JUSTICE GLOSTER: Yes. 3 MR DICKER: You only get it for so long as the proved debt 4 is outstanding. He then says, "Okay, there is no 5 possible hypothetical world. I am in the world of 6 looking at what in fact has happened. The proved debt 7 has been paid. Ergo, compound interest must have 8 stopped running." 9 LADY JUSTICE GLOSTER: Yes. 10 LORD JUSTICE BRIGGS: I mean, in a way you read 11 declaration 8 I think it is in the light of 12 declaration 3 because it's lower down the list of 13 declarations. It's probably speculation what the 14 judge's answer would have been if he'd come to the 15 opposite view on declaration 3. 16 MR DICKER: Yes. 17 LORD JUSTICE BRIGGS: That said, I think his reasoning is 18 2.88(7) sets out what the periods are, and even if you 19 are using Bower v Marris as a notional way of 20 recalculating interest it doesn't alter the periods laid 21 down by 2.88(7). But it is speculation because he 22 didn't have to ask himself that question. 23 MR DICKER: Yes. As you know, our essential point in 24 relation to this is if you follow the judge's 25 construction through, although the judge says Parliament</p> <p style="text-align: center;">Page 71</p>
<p>1 amount equivalent to what has been proved? It isn't 2 necessarily the same thing, is it? 3 MR DICKER: No. We say, certainly when you come to -- 4 forgive me, I am not sure, are we now in the world of 5 Bower v Marris? 6 LADY JUSTICE GLOSTER: If we go back to Bower v Marris, 7 obviously this declaration is on the basis, isn't it, 8 that Bower v Marris doesn't apply? Is that right? 9 MR DICKER: Correct. 10 LADY JUSTICE GLOSTER: Well, if that's right, if I am on the 11 right hypothesis here, I still don't quite understand 12 the wording of the declaration, if we are in that 13 scenario, because it seems to me that the words of the 14 declaration assume that there has been payment in full 15 of the debt. I mean, you may say that's the same as 16 applying Bower v Marris. 17 MR DICKER: I think the declaration obviously seeks to 18 encapsulate the judge's judgment. 19 LADY JUSTICE GLOSTER: Yes. 20 MR DICKER: And did so in a form that the judge was happy 21 reflected his judgment. I think it's simply that the 22 logic is that you -- he says rule 2.88 provides for 23 interest on proved debts so long as the proved debt is 24 outstanding. Now, he says you are entitled to that 25 interest on a compound rate but within the constraints</p> <p style="text-align: center;">Page 70</p>	<p>1 obviously intended everyone should have compound 2 interest, that's within the word "rate". For some 3 reason, they don't actually get -- 4 LORD JUSTICE BRIGGS: They get it, but only for a period 5 shorter than you would have got it if you really had 6 compound interest as your -- 7 MR DICKER: Imagine the creditors reaction to having been 8 told, "It's fine. Rule 2.88 entitles you to your right 9 to compound interest", subsequently to receive a sum 10 which bears no resemblance to what that right would 11 actually have provided them with. 12 One other point. On my learned friend's approach, 13 it's also right that for a period the creditor with 14 a right to compound interest is entitled to interest on 15 interest under rule 2.88. That necessarily follows from 16 the fact that compound interest is permitted, albeit 17 only for a period. That's despite the fact that, on my 18 learned friend's rigorous approach to construing 2.88, 19 the rule only entitles you to interest on the proved 20 debt which is principal. It's unclear to us how, in the 21 light of that construction, you actually got to this 22 point. If you construe rule 2.88 and you say, "Look, 23 what is going on here", what is going on here is you are 24 getting interest on your proved debt. On the judge's 25 approach, there has been a breach in that construction</p> <p style="text-align: center;">Page 72</p>

<p>1 because for a period, whether the period identified by 2 Wentworth or the period which we assumed the judge 3 meant, the longer period, you are not simply getting 4 interest on your proved debt, you are also getting 5 interest on interest, for which you never had a right to 6 proof. 7 It's another illustration, in our submission, of the 8 difficulties in taking what, in our respectful 9 submission, is an unduly literal narrow approach to the 10 construction of 2.88. You end up with consequences 11 which can't have been intended, at which point it is 12 much easier to stand back: what is 2.88 trying to do? 13 In substance, the same as in section 132: set out 14 a priority regime, entitle you to post-insolvency 15 interest on two different bases, and leaves open the 16 calculation methodology to the ordinary approach which 17 is adopted outside of insolvency and which, prior to 18 1986, was also adopted inside the insolvency, namely 19 <i>Bower v Marris</i>. 20 Now, the next issue is non-provable claims which is 21 item three. I can deal with this I think very shortly. 22 The same or similar points can be made here as I made in 23 the context of the creditor with a contractual right to 24 interest under rule 2.88. Again one starts with 25 <i>Lord Hoffmann and Wight v Eckhardt</i>: underlying claims</p> <p style="text-align: center;">Page 73</p>	<p>1 LADY JUSTICE GLOSTER: What do you say about the 2 corresponding provision of the Act in section 189? 3 MR DICKER: The same point. 4 LADY JUSTICE GLOSTER: Yes. 5 MR DICKER: The same point is simply this. The purpose -- 6 LADY JUSTICE GLOSTER: You say it doesn't make any 7 difference whether the word "other" is there or not. 8 MR DICKER: Again the purpose is that it must be first used 9 for the payment of interest in accordance with 10 rule 2.88(7) and (9). 11 Now, if you have used it for that purpose, in other 12 words providing creditors with whatever they are 13 entitled to receive under 2.88(7) and (9), you are 14 applying it for a different purpose. If you then say 15 you are going to apply it in respect of non-provable 16 claims, that's anyone who hasn't been paid in full and 17 that happens to pick up creditors with an unpaid claim 18 for interest. 19 You can imagine starker examples where -- and you 20 have seen the Cork Report's recommendation which is 21 construed by my learned friend had been accepted which 22 simply said interest is 4 per cent, and that is the 23 first purpose for which the surplus has to be applied. 24 There is nothing inconsistent with that and coming back 25 later and saying, "Well, I am now applying it in respect</p> <p style="text-align: center;">Page 75</p>
<p>1 are not affected. Rule 2.88 doesn't affect that, any 2 more than the ordinary rules of proof affect that, 3 although both can equally be said in one sense to cut 4 across creditor's rights. So the cutting across doesn't 5 take one anywhere. You have to find something which 6 extinguishes the underlying right. That takes one back 7 to rule 2.72 and 2.88(1) and my learned friend's 8 submissions that if you are proving you are claiming, 9 and if the rules say you are not entitled to prove it 10 follows you are not entitled to claim and the 11 consequence is you can never claim. 12 In our respectful submission, that's nonsense. Take 13 currency conversion claims: the rules say you can only 14 prove in a sterling amount, but that doesn't stop you 15 coming back similarly. 16 LADY JUSTICE GLOSTER: It's the same old point really, isn't 17 it? 18 MR DICKER: He made one further point on construction in 19 this context. He said the reference to the surplus 20 being applied in payment of statutory interest is that 21 it's to be applied before being applied "for any other 22 purpose". He said, "Well, it's presently being applied 23 in respect of interest, so it must necessarily follow 24 that, whatever you then do with it, it can't involve 25 being applied to another bit of interest."</p> <p style="text-align: center;">Page 74</p>	<p>1 of non-provable liabilities, which is everything over 2 and above that." 3 Policy and principal I think I need say very little 4 in relation to. In our submission, none of the points 5 made by my learned friend provided any sensible reason 6 why the legislature might have wanted to leave creditors 7 with a shortfall and reward shareholders with 8 a windfall. It simply doesn't help to describe those 9 with a credit exposure to the company as "investors". 10 It is probably not how a trade creditor would regard 11 himself, but in any event the subordinated creditors and 12 shareholders agreed to rank after unsecured creditors 13 and cannot complain if everyone else is paid out in full 14 first. That's the short answer to that. 15 But it is worth noting there is a real potential 16 moral hazard here. If we are talking about between 6.8 17 and 8 billion, I don't know in what form that currently 18 takes, but just assuming it's on account and earning 19 interest, the consequence of Wentworth's submission is 20 the longer this process goes on the longer that they 21 would continue to receive interest earned on that sum, 22 even if that sum is eventually distributed entirely to 23 the unsecured creditors. 24 Mr Bayfield explained the difficulties the 25 administrators have had and may continue to have in</p> <p style="text-align: center;">Page 76</p>

<p>1 making substantial interim payments by way of interest 2 out of the surplus. 3 There are a variety of moral hazards. I mean, one 4 other is that there is a potential incentive to 5 creditors, either in a members' voluntary liquidation 6 which is plainly solvent or anticipating a solvent 7 liquidation, essentially to delay submission of their 8 proof to avoid receiving a dividend and thereby freezing 9 their right to interest. Logically, they would do a lot 10 better overall if they delayed their submission of proof 11 and continued to accrue interest in the meantime so that 12 when they were eventually paid the sum they were owed 13 they wouldn't lose part of it potentially through the 14 time value of money. 15 Now, one example that was raised I think by the 16 court concerned foreign currency creditors who did not 17 prove and just wanted to be paid prior to any 18 distribution to shareholders. I think this was 19 a question my Ladyship raised. The short answer is the 20 creditor will be entitled to be paid in full the amount 21 he is owed, principal and interest, but it is wrong to 22 say he has to prove. 23 LADY JUSTICE GLOSTER: Yes. 24 MR DICKER: Indeed, there is something illogical in saying 25 that, because if he tries to prove he will be told he's</p> <p style="text-align: center;">Page 77</p>	<p>1 behind. 2 MR DICKER: I think my learned junior is hungry. 3 LADY JUSTICE GLOSTER: Right. Well, maybe we all are. 4 2 o'clock. 5 (1.00 pm) 6 (The luncheon adjournment) 7 (2.00 pm) 8 9 LADY JUSTICE GLOSTER: We have the video back in the next 10 court. 11 MR DICKER: I hope to be relatively brief. I was going turn 12 to issues that relate to currency conversion rights, but 13 before turning to the specific issues, can I make the 14 following general point? We say it's enormously 15 important to bear in mind precisely what we call 16 a currency conversion claim is. 17 One of the submissions my learned friend makes is 18 that you can't calculate the amount of a currency 19 conversion claim, or interest from a currency conversion 20 claim, unless and until the final dividend's been paid, 21 and he uses that to support a submission that therefore 22 interest can only be paid from the date of the final 23 dividend. 24 Now, what we say, and certainly I learnt through 25 bitter experience in this case, is that confusion arises</p> <p style="text-align: center;">Page 79</p>
<p>1 not entitled to the extent that what he's claiming is 2 a non-provable claim. 3 But ignoring that, if you look at the passage from 4 Re T&N which I showed you in opening, what the court is 5 likely to do is to permit the creditor, if necessary, to 6 execute against the assets to ensure that it is paid 7 ahead of any distribution being made to shareholders. 8 There is an example of that. It is not in the bundles 9 at the moment. It was cited to the Supreme Court in the 10 Waterfall 1 appeal, but a case called Gerard v Worth of 11 Paris Limited. We can let you have a copy. 1936, 2 All 12 England, 905. 13 The short point is the Court of Appeal in that case 14 refused to grant a stay of garnishee proceedings against 15 a company in a members; voluntary liquidation which 16 appeared to be solvent. 17 Lord Justice Slosser saying: 18 "So far as we know, there are no other creditors and 19 that fact alone seems to me to be a sufficient reason." 20 That is one approach. The other approach, and the 21 reason why I said if necessary creditors can do that, is 22 that indicated by the majority of the Court of Appeal in 23 Waterfall I, which is it's part of the liquidator's duty 24 to discharge extant claims before making a distribution. 25 LADY JUSTICE GLOSTER: You are being passed a note from</p> <p style="text-align: center;">Page 78</p>	<p>1 if you think of a currency conversion claim in terms of 2 loss. 3 LADY JUSTICE GLOSTER: Right. 4 MR DICKER: It is only the unpaid balance of the foreign 5 conversion claim. 6 LADY JUSTICE GLOSTER: That's what the Court of Appeal 7 decided and when I was talking about claims for damages, 8 I was ill-advised or not advised at all. 9 MR DICKER: Since Miliangos a claim in debt, which the 10 English court will recognise and, for the purposes of 11 a non-provable claim, it's simply the balance of the 12 debt which has not been paid. So if one imagines one 13 has the underlying foreign currency debt -- per Lord 14 Hoffmann in Wight v Eckhardt not affected -- imagine a 15 foreign currency debt is a claim which attracts interest 16 and, going on in background, you have principal earning 17 interest; you then have this process of collective 18 execution, which can be regarded as, essentially, 19 a black box which, from time to time, spits out 20 a sterling sign which a creditor receives, either 21 converts or is to be treated as having been converted 22 into a foreign currency, at which point whatever sum he 23 was owed is now reduced pro tanto, interest continues to 24 run on that balance, going forward. So at the end of 25 the day, you see how much he has left, which is the</p> <p style="text-align: center;">Page 80</p>

<p>1 total of his contractual rights in respect of principal 2 and interest, and that's his non-provable -- 3 LADY JUSTICE GLOSTER: What about the interim position, when 4 you get an interim dividend? I can quite see the way in 5 which you calculate the foreign currency claim or the 6 debt is -- you get interest or -- you notionally drew 7 interest on the debt at its foreign rate in foreign 8 currency throughout the life; as and when interim 9 dividend is paid, what happens then? 10 MR DICKER: The interim dividend is, of course, in respect 11 of his sterling proved debt, equal with every other 12 creditor. 13 LADY JUSTICE GLOSTER: But out of the black box comes 14 a £100. 15 MR DICKER: Comes a sterling sum, so at that point, a 16 creditor says to himself: for the purposes of any 17 possible non-provable liability in due course, what has 18 now happened is what I'm presently owed today, in terms 19 of foreign currency, is 120 US dollars -- 20 LADY JUSTICE GLOSTER: Which is a hundred principal and 21 20 -- 22 MR DICKER: What I've received in sterling is the equivalent 23 of 100 US dollars. It doesn't matter what the sum is. 24 What is left is his unpaid balance, as at that date. If 25 he goes on and receives further dividends, which</p> <p style="text-align: center;">Page 81</p>	<p>1 anything that comes out of what you call the "black box" 2 -- that's the UK insolvency process -- whether it comes 3 out as a dividend or a statutory interest payment, 4 there's a payment on account against your foreign 5 currency claim by converting into dollars at the date of 6 payment. And you probably do it on a Bower v Marris 7 basis if your foreign contract enables you to do so, 8 which probably it usually will. 9 And at the end of the day, when there's nothing more 10 to come out of the black box, you know where your 11 shortfall is and you claim it. So where is all the room 12 for -- I mean, I agree if you cut this all down into 13 tiny chunks, you can get into terrible rows about how 14 each little chunk works. 15 MR DICKER: Correct. Your Lordship is right. We say it 16 follows that -- my learned friend says interest on the 17 foreign currency claim, for the purposes of a 18 non-provable claim, can only effectively run from the 19 date of the final dividend because it's only then you 20 know you have a foreign currency claim, and therefore 21 it's only then you have anything on which interest could 22 be accruing, we say is wrong. 23 LORD JUSTICE BRIGGS: I said he might have my credit 24 number 2 problem -- 25 LORD JUSTICE PATTEN: How do you accommodate changes in the</p> <p style="text-align: center;">Page 83</p>
<p>1 essentially satisfies his contractual claim in full, he 2 will not have an unprovable claim, obviously; if there 3 is a shortfall, he will. 4 LORD JUSTICE BRIGGS: Are you just talking about principal 5 at the moment, or interest? 6 MR DICKER: I'm talking interest as well. 7 LORD JUSTICE BRIGGS: Right. 8 MR DICKER: So it's no more than the balance, the unpaid 9 balance from time to time, and if it's 10 an interest-bearing claim, and obviously it's an unpaid 11 balance which is continuing to accrue interest. 12 LADY JUSTICE GLOSTER: But if you get a £100 sterling out of 13 your interim dividend in your hands, you have to 14 notionally convert it at that date. 15 MR DICKER: Correct. 16 LADY JUSTICE GLOSTER: You accept that? 17 MR DICKER: Yes. 18 LORD JUSTICE BRIGGS: I'm finding it (inaudible) there can 19 be any real room for dispute about how you do this. And 20 yet there appears to be, because there are all sort of 21 argument about set-off and whether you have to give 22 credit for interest received on your -- for statutory 23 interest against your interest claim under the foreign 24 currency claim. But as I see it, you just carry out 25 an account in the foreign currency and you treat</p> <p style="text-align: center;">Page 82</p>	<p>1 exchange rates that are favourable to the creditor? 2 MR DICKER: That was an issue that the Court of Appeal dealt 3 with in Waterfall I. There are two points. As a matter 4 of accounting, it doesn't change the position; it 5 simply, as it were, changes the figures in the books. 6 So creditor receives a sum of sterling, it may be worth 7 more or less when he receives it; receives a subsequent 8 dividend, again it may be worth more or less, depending 9 on what's happened to exchange rates in the meantime, 10 notionally converted and it reduces(?) pro tanto. 11 If the consequence of exchange rate movements is 12 such that sterling has appreciated rather than 13 depreciated, then it will necessarily follow that the 14 foreign currency creditor has received in his hands as 15 part of stage 1 of the Waterfalls -- we've been 16 referring to it -- more than he is entitled to as 17 a matter of contract. 18 LORD JUSTICE PATTEN: Not necessarily. 19 MR DICKER: That is a consequence, which the Court of Appeal 20 held in Waterfall I, of the requirement to distribute 21 the assets pari passu. So the first stage you have to 22 go through before you can get to any other stage is 23 ascertain the claims -- the foreign currency claims have 24 to be converted into sterling -- and distribute the 25 assets pari passu in respect of those claims, including</p> <p style="text-align: center;">Page 84</p>

1 claims converted into sterling. It's equality of
 2 treatment at that stage.
 3 And if the consequence of equality of treatment is
 4 that the foreign currency creditor ends up getting more
 5 than his underlying sum in the foreign currency doing
 6 the accounting exercise, then that's simply
 7 a consequence of the requirement for pari passu
 8 distribution.
 9 LADY JUSTICE GLOSTER: The liquidators can't keep it all
 10 till the end and then work it out at the rate then.
 11 MR DICKER: The result may be different if they do.
 12 LADY JUSTICE GLOSTER: Yes. On the assumption they make
 13 a pari passu interim dividend, this is the inevitable
 14 consequence.
 15 MR DICKER: No, it all depends on what happens --
 16 LADY JUSTICE GLOSTER: Sorry, on where the currency goes.
 17 MR DICKER: You end up, essentially, aggregating the
 18 payments in respect of principal that they have received
 19 and if there's a shortfall, they have a currency
 20 conversion claim; if they end up receiving a sum, which
 21 when converted into a currency conversion claim is more
 22 than their contractual entitlement --
 23 LORD JUSTICE PATTEN: They don't have to cough up.
 24 MR DICKER: They don't have to cough up. That's simply
 25 a necessary consequence of pari passu distribution.

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1 LORD JUSTICE BRIGGS: Yes, that was held in Waterfall 1,
 2 wasn't it?
 3 MR DICKER: Yes.
 4 The one additional element which is relevant here
 5 when one's dealing with offset concerns the additional
 6 statutory right to interest at the judgment at rate,
 7 whether or not you entitled to interest. We say, to
 8 avoid trying to answer questions which weren't really
 9 argued below, and certainly weren't addressed by the
 10 judge and weren't raised by the issue in the
 11 declaration, it is enormously important for this
 12 question to focus on what the declaration is actually
 13 concerned with.
 14 LADY JUSTICE GLOSTER: Yes, and which one are we looking at?
 15 MR DICKER: It's item 6, declaration 17.
 16 LORD JUSTICE BRIGGS: Issue? 10.
 17 MR DICKER: This declaration deals with a particular
 18 situation. It says:
 19 "The calculation of a non-provable claim ..."
 20 Then importantly:
 21 "... excluding any non-provable claims to interest
 22 as to which no declaration is made, including though not
 23 limited to, a currency conversion claim should not take
 24 into account nor therefore be reduced by the statutory
 25 interest paid to a relevant creditor."

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1 So the declaration is concerned with a non-provable
 2 claim, which does not include a non-provable claim to
 3 interest. That's why I can started by saying: imagine
 4 a situation in which you have a claim for principal, the
 5 creditor is not entitled to post-insolvency interest
 6 because this declaration isn't concerned with
 7 post-insolvency claims to interest. Just --
 8 LADY JUSTICE GLOSTER: Again, I'm not following this. Just
 9 explain why, in the examples, you've just been
 10 discussing, you don't bring into account interest.
 11 MR DICKER: Can I take it in stages? We deal with this in
 12 our skeleton argument and reply, and that sets out our
 13 position. Just so you have the reference, it's
 14 bundle 1, tab 15, paragraphs 42 to 61.
 15 What we do, essentially, is take it in stages and
 16 deal, first -- rather it needs to be taken in stages.
 17 The issue which we say is raised by this declaration,
 18 essentially, concerns -- and it's easiest considered by
 19 reference to a claim for principal. Forget about
 20 interest afterwards, just think of a creditor whose only
 21 claim is to principal.
 22 LORD JUSTICE BRIGGS: I'm trying to get my mind round the
 23 concept, but okay. In a foreign currency situation?
 24 MR DICKER: Yes. So we have a creditor with a foreign
 25 currency claim, which doesn't accrue interest. So he

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1 converts it into sterling for the purposes of proof.
 2 And the issue is whether, after you've gone through
 3 payment of dividends, payment of statutory interest,
 4 when he comes to calculate his non-provable claim in
 5 respect of principal, because that's the only underlying
 6 claim he has, he has to give credit for statutory
 7 interest.
 8 And the answer I gave you in opening to remind you
 9 was a comparison between two creditors. The first was
 10 a sterling creditor who had a claim to principal, no
 11 entitlement to interest. He gets paid the full amount
 12 of his principal, as part of priority level 1, and he
 13 gets paid 8 per cent of the Judgment at rate as part of
 14 priority level 2 because he has no other right to
 15 interest.
 16 So he receives payment in full, his underlying
 17 claim, plus interest at 8 per cent, regardless of the
 18 fact that he has no other right to interest because it's
 19 an additional statutory right, which is given under the
 20 scheme's compensation for delay. No question of having
 21 to give credit for it, obviously. If he had to give
 22 credit for it, he wouldn't end up receiving the
 23 compensation for delay which the rule intends to provide
 24 him with.
 25 The next stage is to say: okay, how does it work in

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1 relation to a foreign currency creditor? Priority level
2 1: his claim is converted into sterling because that's
3 what the rules require; he's paid the full amount of his
4 proved debt, ie the sterling equivalent at the date of
5 administration, as part of level 1.
6 Assume sterling is depreciated, there's a balance
7 still unpaid of principal. There's nothing he can do
8 with that at this stage because that's a non-provable
9 claim. You have to exhaust the first stage before
10 getting down to the second, and therefore getting down
11 to the third.
12 So at the second stage, the statute says he is
13 entitled to 8 per cent on his sterling proved debt,
14 along with everyone else, whether or not he has a right
15 to interest as compensation for delay. That's
16 a separate right which the statute gives him. Again, no
17 question of offset at this stage, any more than there
18 would be in relation to the sterling creditor.
19 We then come to the third stage. At the third
20 stage, he says: okay I've received my proved debt in
21 full and that didn't repay all my principal; I have
22 received the interest which statute says I should also
23 receive, regardless of the fact I don't have any right
24 to interest under rule 2.88, but I now have some
25 principal still unpaid.

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1 Now, we say he's entitled to claim that unpaid part
2 of principal as a non-provable claim without giving
3 credit for statutory interest he's received.
4 LADY JUSTICE GLOSTER: Even in circumstances where sterling
5 has appreciated against the dollar? So in fact, in
6 interest terms, maybe he's collected more than he would
7 have done.
8 MR DICKER: Well --
9 LADY JUSTICE GLOSTER: I mean, are you saying it doesn't all
10 come out of in the wash at the end of the day
11 calculation?
12 MR DICKER: It's really difficult if one starts
13 introducing -- one obviously needs to deal with more
14 complicated --
15 LADY JUSTICE GLOSTER: It could go in and dip in and out,
16 couldn't it, depending on the volatility of sterling
17 against the dollar, or whatever the foreign currency?
18 MR DICKER: Coming back to the question in a moment, if
19 I may. Our point at this stage, which is essentially
20 the issue raised by the --
21 LADY JUSTICE GLOSTER: Question.
22 MR DICKER: -- the question and the answer which we say
23 should be given to it and which, in substance, the judge
24 gave to it -- it's essentially at this point we say that
25 the creditor turns up and says, "Look, I haven't been

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1 paid the full amount of my principal". You can't, at
2 that point, say to him, "Ah yes, but you have to give
3 credit for the statutory interest that you have
4 received".
5 LADY JUSTICE GLOSTER: I can see that.
6 MR DICKER: So it makes no sense to have an offset, just in
7 relation to that question.
8 LORD JUSTICE BRIGGS: It depends what you are trying to do,
9 doesn't it? If you stand back and say: well, actually
10 what you are trying to do is to make sure that your
11 foreign creditor, who here hasn't got a right to
12 interest, is no worse off than if he reverted to his
13 contractual rights; then if the shortfall in principal
14 is made good by the statutory interest, he is no worse
15 off than if he reverted to his contractual rights.
16 MR DICKER: You then have the --
17 LORD JUSTICE BRIGGS: If that's what you're trying to do,
18 I don't see how your submission addresses that.
19 MR DICKER: The way it addresses that is, essentially, by
20 saying you can't use the same sum of money for two
21 purposes. So I take your Lordship's point that one way
22 of approaching the money he has received by way of
23 statutory interest is to say: okay, we'll treat that as
24 if it's payment of your underlying principal for these
25 purposes.

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1 But where then does that leave the creditor? That
2 leaves the creditor, essentially, he's been paid
3 principal in full, but he has not effectively been paid
4 any compensation for delay, which the statute says he is
5 to receive equally with everyone else.
6 LORD JUSTICE BRIGGS: Even though he didn't have a right to
7 interest, but he has got everything he would have got
8 under his foreign contract right.
9 MR DICKER: Well, our point is the statute gives you two
10 things. First of all, you're entitled to interest on
11 your sterling proved debt, whether or not you have
12 a right to interest. That's something the statute gives
13 you and cannot, in substance, be taken away from you
14 because otherwise, at this stage of the Waterfall, you
15 are not being treated equally with everyone else.
16 LADY JUSTICE GLOSTER: That I can see, but it's at the end
17 of the day whether you are having your cake and eating
18 it.
19 MR DICKER: We say not because the statute is, essentially,
20 doing two things, we say. This may be the difference
21 between us. We say it is intended to ensure everyone is
22 paid in full before any distribution is made to
23 shareholders. There shouldn't be any dispute about
24 that. That's creditors first; members last.
25 We also say that the statute says: forget about

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<p>1 whether you've been paid in full, in the sense of have 2 you received all of your principal for which you were 3 entitled, because the statute says you ought to get 4 something as well as your principal. 5 LORD JUSTICE BRIGGS: Isn't that just having your cake and 6 eating it? You have to take the whole statute. The 7 statute requires you to convert your Forex into, and 8 only enable you to prove on a sterling version, as at 9 the cut-off date, and it gives you statutory interest, 10 you might say, partly as a quid pro quo for that 11 thoroughly tough arrangement if you happen to be 12 a foreign currency creditor. 13 But if the comparator is what you would have got 14 apart from the administration, and if the statutory 15 interest fully repays your shortfall of principal 16 converted back into dollars at the appropriate date, 17 I don't see how the underlying principle that this is 18 designed to enable you to revert to your contractual 19 rights helps you. 20 MR DICKER: No, but only at the price of subverting, we say, 21 the other bit of the scheme -- 22 LORD JUSTICE BRIGGS: Well, if you ignore the fact that that 23 bit is only applied to your sterling provable debt. 24 MR DICKER: It doesn't, in our submission, matter. It 25 doesn't matter what it's applied to. The point is it's</p> <p style="text-align: center;">Page 93</p>	<p>1 LADY JUSTICE GLOSTER: It seems to me it goes to reduce your 2 currency conversion claim. And you're saying that 3 doesn't happen, so even if, depending on the volatility 4 of sterling against the dollar, or vice versa, in fact 5 because you've been receiving statutory interest, you 6 don't have a currency conversion claim; you say, if you 7 set off the two against the other, you can bring 8 a currency conversion; is that right? 9 MR DICKER: When you imagine, at the first stage, the black 10 box, (inaudible) payments, those are payments in respect 11 of principal. They, undoubtedly, reduce principal 12 that's outstanding. 13 Now, imagine somewhere else in the system the 14 liquidator is dealing with something different, which 15 is -- 16 LADY JUSTICE GLOSTER: Interest. 17 MR DICKER: -- a separate right to interest. It happens to 18 be interest, in a sense it could be any separate 19 statutory right the statute just says you should get, 20 and he make as payment. That's not a payment in respect 21 of principal. The payments which are made in respect of 22 principal are made by way of dividend, at stage 1; 23 payment that is made at stage 2 is not a payment in 24 respect of principal at all. 25 LADY JUSTICE GLOSTER: I could see that.</p> <p style="text-align: center;">Page 95</p>
<p>1 a statutory right given to all creditors, something 2 they're entitled to keep and put in their pocket over 3 and above payment in full of their underlying debt. 4 Once you say: I'm going to use that sum and, 5 effectively, apply it to discharge of principle, you are 6 necessarily saying you are no longer, in substance, 7 being treated equally with everyone else in the sense 8 that you are not getting compensation for -- 9 LORD JUSTICE BRIGGS: I understand the submission. 10 MR DICKER: Yes. And one sees how it ends up, so far as the 11 creditor is concerned. The foreign currency creditor, 12 he gets paid in full, but he gets paid in full perhaps 13 ten years after the debt should have been paid. 14 LORD JUSTICE BRIGGS: His debt didn't carry interest. 15 MR DICKER: No, but unlike everyone else whose debts didn't 16 carry interest, he doesn't get compensation for delay 17 which everyone else got, in substance, because he's been 18 obliged to give credited for that against his principal. 19 And the judge said those are, essentially, two 20 separate things. One is a statutory right to interest, 21 which is given to everyone, sterling or foreign, which 22 you're entitled to keep, and you can't require an offset 23 against principal without, in substance, depriving 24 people of that separate statutory right which they have 25 been given.</p> <p style="text-align: center;">Page 94</p>	<p>1 MR DICKER: It's a payment pursuant to a second statutory 2 right. 3 LORD JUSTICE PATTEN: As I understand it, the right to 4 statutory interest in relation to creditors who don't 5 have contractual right to interest is simply given to 6 them as quid pro quo being kept out of the their money 7 by moratorium on enforcement of the debt. 8 MR DICKER: Correct. 9 LORD JUSTICE PATTEN: Now, on the hypothesis you are 10 operating on, let's assume on a straight-line basis 11 throughout the relevant period, there is a diminution in 12 the value of what they can prove for by reason of 13 an adverse change in the rate of exchange, you are going 14 to be getting statutory interest on a lesser sum than 15 you are entitled to contractually. 16 MR DICKER: Yes. 17 LORD JUSTICE PATTEN: That will compensate you for being 18 kept out of at least the sum in respect of which you can 19 prove. The balance of your currency claim is simply the 20 other part of your contractual claim which you would 21 have been able to prove for, had you been able to prove 22 in a foreign currency rather than in sterling. 23 MR DICKER: The question -- 24 LORD JUSTICE PATTEN: And on that basis, would have then 25 become entitled to receive statutory interest in</p> <p style="text-align: center;">Page 96</p>

1 a larger sum than you've actually been able to recover
 2 statutory interest for on the sterling amount.
 3 So your argument is simply that you shouldn't have
 4 to give credit for what you've been paid, by way of
 5 statutory interest, for being kept out of the amount you
 6 proved for, in order to finance the loss that you've
 7 suffered in respect of the amount you can't prove for.
 8 MR DICKER: Correct. These are not payments -- another way
 9 of putting it is payments of statutory interest are not
 10 payments in respect of principal. They're not.
 11 LADY JUSTICE GLOSTER: Why shouldn't you have to offset
 12 against the interest that you are claiming under your
 13 currency conversion claim? Because that seems to me to
 14 be logical.
 15 MR DICKER: I said this can lead to considerably more
 16 complicated issues. What this declaration, however, is
 17 concerned with is at least trying to sort out the right
 18 answer to the simple question --
 19 LADY JUSTICE GLOSTER: But it's not. It's not, Mr Dicker.
 20 The declaration is not limited to reduction of statutory
 21 interest against conversion claim for principal.
 22 MR DICKER: It ignores --
 23 LADY JUSTICE GLOSTER: Excluding any non-provable claims to
 24 interest.
 25 MR DICKER: In other words, this is not an offset between

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1 a non-provable claim to interest and statutory interest.
 2 LADY JUSTICE GLOSTER: Right.
 3 MR DICKER: That's not what the declaration is --
 4 LORD JUSTICE BRIGGS: It's an offset between statutory
 5 interest and an unprovable claim to principal because
 6 that, on your hypothesis, is all your foreign creditor
 7 can prove for. I can quite understand that if the
 8 reason for a currency conversion claim was to somehow
 9 put right an equitable injustice caused by not being
 10 able to prove in dollars, you would have a very strong
 11 argument. But as I understand it, the underlying reason
 12 for a currency conversion claim is simply, and has
 13 always been, a reversion to contractual rights. And
 14 what troubles me about your submission is that you get
 15 more than your contractual rights if you're right on
 16 this argument.
 17 MR DICKER: To which the short answer is: only in the sense
 18 that the sterling creditor gets more than his
 19 contractual rights.
 20 LORD JUSTICE BRIGGS: I agree, but if the sole basis for
 21 your claim is that if there had been no insolvency, you
 22 have suffered a shortfall in what you would otherwise
 23 recover -- and you had no right to interest --
 24 MR DICKER: Because that's not the creditor's only claim.
 25 The creditor has two claims. He has his underlying

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1 claim. He's entitled to say: I am entitled to payment
 2 of that claim in full. He is also entitled to say,
 3 equally, with every other creditor: and I'm entitled to
 4 compensation for delay. It's the "and" that's vital.
 5 LORD JUSTICE BRIGGS: Yes.
 6 LADY JUSTICE GLOSTER: Why was it dealt with without dealing
 7 with the question of interest? A currency conversion
 8 claim for interest? It seems to me that you are leaving
 9 out --
 10 LORD JUSTICE BRIGGS: It's a rather unlikely kind of
 11 claim --
 12 MR DICKER: Because matters at that point start becoming
 13 increasingly complicated. The submission we made --
 14 LADY JUSTICE GLOSTER: So we shouldn't be bothered with
 15 them, you mean?
 16 MR DICKER: No, I don't think that's right. I mean the
 17 submission we made to the judge below was focus on this,
 18 decide, you know -- this at least is an issue which one
 19 is capable of getting one's head round, otherwise it
 20 becomes enormously difficult to work through all of the
 21 possible implications. And our submission to the judge
 22 below was: decide this and then hopefully we can work
 23 out what consequences flow.
 24 And plainly, where you are talking about a claim to
 25 interest, contractual interest on the one hand, and

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1 offsetting against statutory interest on the other hand,
 2 different issues potentially arise. Because in that
 3 context, you can say --
 4 LADY JUSTICE GLOSTER: You are comparing like-with-like.
 5 MR DICKER: -you are comparing like-with-like. The
 6 statutory interest for compensation for delay, and that
 7 is like you are serving the same function as your
 8 contractual claim to interest, so that can potentially
 9 raise different issues.
 10 LADY JUSTICE GLOSTER: Yes --
 11 MR DICKER: One of those more complicated situations was
 12 addressed by the judge in supplemental issue 3, and
 13 you've seen that. If you remember the diagram, that was
 14 the underlying claim split into a provable and a
 15 non-provable bit. 2.88, he says, gives you interest on
 16 a provable bit, not a non-provable bit.
 17 He also went on in supplemental issue 3 to hold
 18 a non-provable claim to interest on a currency claim is
 19 not to be reduced by statutory interest. Again, the
 20 reasoning is entirely different because here is simply
 21 compensation for your provable claim, not for your
 22 non-provable claim. That was a second issue the judge
 23 dealt with in this context.
 24 LADY JUSTICE GLOSTER: Yes.
 25 MR DICKER: And the short point, your Lordships have it,

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<p>1 I think, is that you can't make the same sum of money 2 satisfy both rights. He has an underlying right to 3 payment in full, the principal -- the statute also says 4 he has a right to compensation for delay; they are two 5 separate things. And aside from one of those individual 6 (inaudible) one sees on Oxford street with the three 7 carts, moving the beam around -- you can't make the same 8 sum of money, effectively, satisfying both. 9 My learned friend dealt with this particular 10 situation very, very shortly in his submissions, if you 11 recall. He really only had two points. First of all, 12 he said liquidation is a matter of benefit and burden, 13 to which we say this is nothing to do with benefit and 14 burden. The creditor is given both his rights and you 15 have to work through the statutory scheme and see how 16 they operate. 17 He also said a foreign currency creditor is given 18 statutory interest, as he said, a quid pro quo for 19 having his claim converted into sterling. We say that's 20 not right; statutory interest is given to all creditors, 21 it can't conceivably be seen as a quid pro quo 22 (inaudible) conversion. It's a separate right, 23 compensation for delay. 24 LORD JUSTICE PATTEN: Even if it was a quid pro quo, I don't 25 understand why you would set it off. All it would mean</p> <p style="text-align: center;">Page 101</p>	<p>1 interest, but it's a right he has to a payment. We say 2 he has a non-provable claim in that respect. 3 And in our submission, it really shouldn't matter 4 whether this right to interest arises under a contract 5 which predates the administration order or is acquired 6 pursuant to a judgment, which is actually obtained 7 afterwards. 8 I think my learned friend suggested that somehow all 9 of this is enormously unfair and an attempt to gain 10 excessive interest rates. It's worth observing that the 11 New York Judgment Act rate during this period happens to 12 be 9 per cent, so that's what one's talking about. 13 The final topic I need to deal with are contingent 14 claims, which are item 5. 15 LADY JUSTICE GLOSTER: Do you want to say anything more 16 about 11B, that's to say, punitive claims -- 17 MR DICKER: No. 18 LADY JUSTICE GLOSTER: -- to foreign judgment? 19 MR DICKER: No. 20 So item 5, contingent claims. This, obviously, 21 concerns the date from which they attract interest. My 22 learned friend's approach obviously is to use the 23 illustration of contingent debt basis during the course 24 of the administration to drive his analysis, which we 25 say, in a sense, is the tail wagging the dog.</p> <p style="text-align: center;">Page 103</p>
<p>1 is -- you follow the logic of that, you simply won't 2 have a currency conversion claim. 3 MR DICKER: Yes, I suppose it depends on -- he would say, 4 presumably, the extent of the quid pro quo. 5 That's all I was going to say in relation to 6 currency conversion claims and offset. 7 The next thing I can deal with very shortly is 8 item 11, issue 4, in relation to foreign judgments. 9 Just one short point in relation to this. It concerns 10 a foreign judgment, which has actually been returned(?). 11 The question is whether the interest entitlement under 12 that judgment can give rise to a non-provable claim. 13 And my learned friend said that was impossible 14 because it would involve you proving twice, which we say 15 is simply wrong. And the relevant right is, by 16 definition, one in respect of which you could not have 17 proved because it's dealing with post-insolvency 18 interest. 19 It's also inconsistent with the point my learned 20 friend relied on earlier, which is the underlying debt 21 is different from the technical point; the underlying 22 debt is different from the judgment debt. 23 The substantive point is someone has acquired 24 a right, a post-administration order, for interest. He 25 can't prove for that because it's post-administration</p> <p style="text-align: center;">Page 102</p>	<p>1 Any contingent claims will be admitted for an amount 2 reflecting their estimated value, as at the date of 3 administration, including a discount for maturity, which 4 the judge indicated. And they will be paid without the 5 contingency having occurred; in other words, they'll be 6 discounted to present value and compensation should be 7 given for the delay in paying that present value equally 8 with everyone else. 9 Where the contingency does vest during the course of 10 the administration, there are, essentially, two 11 approaches which can be taken. The first is the judge's 12 approach, whereby the vested contingent right is 13 admitted at the full undiscounted amount. 14 LADY JUSTICE GLOSTER: From the date of the administration? 15 MR DICKER: On the date of the administration. And we say 16 that's justified for the reasons the judge gave. It's, 17 essentially, a rough-and-ready approach. It fits with 18 how the legislature has, for whatever reason, treated 19 future debts which mature prior to the date of 20 administration. 21 My learned friend said with the future debts are 22 different because many future debts will bear interest. 23 One can equally say, certainly in this case, that many 24 contingent debts will also bear interest. If one thinks 25 of an ISDA closeout claim, my learned friend's clients'</p> <p style="text-align: center;">Page 104</p>

1 position is that's a contingent claim for their
 2 purposes. Although once it is closed out in value,
 3 interest runs from the early termination date. So
 4 that's an interest bearing claim, obviously after the
 5 closeout amount and runs as payment is made at the
 6 default rate.
 7 So we have an example of a contingent claim which
 8 bears interest. And can you well imagine that in a case
 9 involving a financial company like LBIE, many of the
 10 claims will involve closeout provisions, and therefore
 11 contingent, given the nature of those claims they are
 12 also claims which will bear interest.
 13 LADY JUSTICE GLOSTER: Yes.
 14 MR DICKER: The second approach is for vested contingent
 15 claims to be admitted to proof, discounted back to the
 16 date of administration. And as I understand it,
 17 Wentworth wouldn't be, it's not unfair to say, unhappy
 18 if that were the solution.
 19 And my learned friend is absolutely right, as
 20 I indicated in opening, that that was in fact the
 21 solution --
 22 LADY JUSTICE GLOSTER: That was the fall-back solution you
 23 proposed.
 24 MR DICKER: It was in fact the solution we proposed. Below
 25 we submitted --

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1 LADY JUSTICE GLOSTER: That's logical, isn't it? Why did
 2 the judge not agree to that?
 3 MR DICKER: Well, the judge said -- I think I dealt with
 4 this briefly in opening just to --
 5 LADY JUSTICE GLOSTER: Just remind me.
 6 MR DICKER: Sorry. He said, first of all, rule 2.81 simply
 7 doesn't permit discounting of a contingent claim where
 8 the contingency has crystallised, because 2.81 talks
 9 about estimating the value of a claim, the value of
 10 which is a matter of opinion. And his starting point
 11 was: well, it's no longer a matter of opinion;
 12 contingency has crystallised, I know what it's value is.
 13 The second point he made was this: well, if you try
 14 and argue that it is still of uncertain value because
 15 although the contingency is crystallised, what you now
 16 conceive you have is a future claim, and what you are
 17 required to do is give it a present value.
 18 He said: well, it would be -- Parliament could not
 19 have sensibly intended that where you have a future
 20 claim that was never contingent you don't discount back
 21 in this situation because that is what rule 2.105 says.
 22 He said Parliament cannot sensibly have intended the
 23 position is different for what you can now see is
 24 a future claim, which was previously contingent.
 25 What you now have is, essentially, the same thing,

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1 is a loan repayable in ten years unless something
 2 happened. Something is now clear isn't going to happen;
 3 it's repayable in ten years. The judge's point
 4 was: well, if you treat that as a future claim,
 5 logically you really should be doing exactly the same as
 6 you would be doing with any other future claim.
 7 LADY JUSTICE GLOSTER: To which you respond?
 8 MR DICKER: To which we responded below by saying we can see
 9 the force of that, but there are the authority we
 10 referred to in our skeleton argument that suggests that
 11 there are cases in which, nevertheless, contingent
 12 claims appear to have been given a present value in that
 13 sort of situation. The judge deals with those in his
 14 judgment, and says either they're not clear or they're
 15 based on earlier legislation.
 16 LORD JUSTICE BRIGGS: As I see it, it's not a case where
 17 there isn't what I think Mr Moss once memorably called
 18 "a gut-feel fair solution", on which you and Mr Zacaroli
 19 would agree; the trouble is trying to fit it within the
 20 rules.
 21 MR DICKER: When you talk about a "gut-feel --"
 22 LORD JUSTICE BRIGGS: He said it in Nortel.
 23 MR DICKER: Yes.
 24 LORD JUSTICE BRIGGS: I'm afraid I put it in the judgment,
 25 but it did strike me as a wonderful expression.

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1 MR DICKER: Your Lordship was constrained from reaching the
 2 gut.
 3 LORD JUSTICE BRIGGS: I was, but the Supreme Court wasn't.
 4 MR DICKER: I was given the luxury of being able to argue in
 5 the Supreme Court, contrary to the submission I was
 6 arguing for below, to achieve that.
 7 The only hesitation I would have about the gut-feel
 8 approach here --
 9 LORD JUSTICE BRIGGS: I'm talking about when the contingency
 10 occurs, discounting in fact at the cut-off date.
 11 MR DICKER: I understand that, and the judge's response to
 12 that was: well, your gut-feel needs to be guided by
 13 statutory framework.
 14 LORD JUSTICE BRIGGS: Exactly.
 15 MR DICKER: He says, in a sense, it's Parliament's gut that
 16 matters. You can you tell what Parliament intends from
 17 2.105.
 18 He also made the point, again, I think, acknowledged
 19 by my learned friend, that if you are dealing with
 20 either a future or a contingent claim which carries
 21 interest, then if you discount back principal, there is
 22 a risk, certainly if you don't provide any interest, for
 23 a creditor losing out twice, even if you provide
 24 interest under the statutory regime still losing out
 25 once.

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<p>1 Pre-1986 there was a case -- I think I mentioned 2 Brown and Wingrove(?) -- where again, as a matter of 3 judge-made law, you are effectively entitled to set out 4 of the discounting rate against your contractual right 5 to interest, which rather neatly resolved that. That 6 doesn't seem to be something that's open on the rules as 7 drafted and no one suggested that it is. 8 The final point in relation to this is this is 9 another of these questions I think, inevitably, on 10 application like this, where there is at least 11 a potential risk of trying to answer every question, 12 which requires one to envisage every possible scenario. 13 We made the point below that we weren't quite sure 14 what was a contingent claim or what wasn't for these 15 purposes, and there are very many different types of 16 contingent claims, and one's gut-feel may differ, 17 depending on the nature of the claim. 18 LORD JUSTICE BRIGGS: Unfortunately, we have to find 19 a one-cap-fits-all solution, don't we? 20 MR DICKER: Can I just say, if in trying to work out what 21 the one-cap-fits-all solution feels it should be, there 22 is a witness statement, relatively short, of 23 Mr Zambelli. It's in part B, supplemental bundle, 24 tab 14. Just if your Lordships want some, as it were, 25 practical illustrations of the different kinds of</p> <p style="text-align: center;">Page 109</p>	<p>1 Submissions in reply by MR SMITH 2 MR SMITH: We have just three points to make, very briefly, 3 by way of reply, if we may. Firstly, in relation to 4 Bower v Marris, item 1, issue 2, and to respond to what 5 Mr Zacaroli said in relation to our submissions on order 6 55, rules 62 and 63. As you will recall, those were the 7 rules under which entitlement to interest arose in 8 Whittingstall v Grover. 9 If I could just take you back to that, if I may, 10 it's in the authorities bundle 4, tab 151, just over the 11 page in the tab. Mr Zacaroli's suggestion in relation 12 to this, in relation to these two rules was that in the 13 case of the creditor whose debt does not carry interest 14 at law, the right to interest arose under rule 62, not 15 rule 63, and he said that for the purposes of then 16 submitting that the right to interest under the rule 17 arose from the date of the decree and therefore he could 18 say it was an accruing continuing right, as from the 19 date of the decree. 20 Now, in our submission, Mr Zacaroli has incorrectly 21 construed rule 62 and rule 63. You need to take 22 a little care in looking at what the two rules are doing 23 and what the purpose of each rule is. 24 Now, so far as rule 62 is concerned, in our 25 submission, that's concerned with the question of the</p> <p style="text-align: center;">Page 111</p>
<p>1 contingent claims and possible scenarios that might 2 affect them, there are a very clear, if I may say, 3 relatively short series of examples, just setting out 4 applications -- as I say, I think best thought of as 5 a sort of tool to enable one to test particular 6 gut-feels. 7 LADY JUSTICE GLOSTER: So this is the examples he gives -- 8 worked examples of contingent claims? And was this 9 filed on your behalf? 10 MR DICKER: Yes. I mean there may be other examples. I 11 think Mr Lomas, in one of his witness statements, gives 12 an example that Mr Zambelli deals with. It's just to 13 try and give a slightly more -- 14 LADY JUSTICE GLOSTER: Yes, that would be helpful, but 15 there's no point going through them now. 16 MR DICKER: I wasn't intending to -- 17 LADY JUSTICE GLOSTER: -- sort of "work round your head 18 stuff", isn't it, rather than doing it in court. 19 MR DICKER: They will need to be worked through; it will not 20 help if I just talk them out. 21 LADY JUSTICE GLOSTER: No. 22 MR DICKER: That's all I was going to say in relation to 23 contingent claims and, subject to the court, that's all 24 I was going to say by way of reply. 25 LADY JUSTICE GLOSTER: Thank you very much. Indeed.</p> <p style="text-align: center;">Page 110</p>	<p>1 applicable rate; in effect, it's the analogue of 2 rule 2.88(9). And you can see that in particular from 3 the wording at the beginning of the third line: 4 "Interest shall be computed ..." 5 That's the operative word. What it is effectively 6 doing is providing that the applicable rate, in the case 7 of a debt which carries interest at law, to whatever 8 that rate debt carries is; and secondly, in case of a 9 debt which does not carry interest at law is 4 per cent. 10 So it's rather similar to rule 2.88(9). It's telling 11 what you the applicable rate is in the two cases. 12 Now, it's rule 63, in our submission, which then 13 confers the entitlement of a creditor whose debt does 14 not otherwise bear interest at law to interest in the 15 administration of the deceased's estate, and it also 16 deals with priority. 17 You see that again from the wording, in particular 18 at the beginning of the fourth line: 19 "Shall be entitled to interest ..." 20 So the drafting isn't particularly elegant, but you 21 can see, in my submission, from reading those carefully, 22 that rule 62 is dealing with working out what the rate 23 is and rule 63 is dealing with the question of 24 entitlement and the question of priority. 25 And indeed, if you construe the rules in the way</p> <p style="text-align: center;">Page 112</p>

1 that Mr Zacaroli does, there's a tautology between
 2 rule 62 and rule 63 because both rules, on his
 3 construction, provide for an entitlement -- my learned
 4 friend said -- to interest where the debt does not
 5 otherwise bear interest.
 6 So in my submission, Mr Zacaroli's submission on
 7 that is wrong and our construction is correct. On that
 8 basis our submission, which we made to you on Tuesday,
 9 remains good, and the effect of rule 63 was that in the
 10 case of a creditor whose debt does not bear interest at
 11 law, the entitlement to the interest only arose once the
 12 principal debts has been paid in full.
 13 And as you know, the relevance of that is that we
 14 submit that's very close to the position under
 15 rule 2.88. But nevertheless there was no reason why
 16 Bower v Marris couldn't be applied, which is the
 17 calculation of that interest, as Mr Justice Chitty held.
 18 That was the first point.
 19 LORD JUSTICE PATTEN: I'm a bit puzzled by this. I mean, 62
 20 is concerned with an order for an account, an account of
 21 debts, which is a specific type of order, and provides
 22 that unless otherwise ordered, interest then follows at
 23 the rate prescribed in relation to an order for
 24 an account. But 63 is not concerned with that, it's
 25 concerned with somebody who comes in in relation to

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1 a specific claim and establishes that under a judgment
 2 or order of the court.
 3 MR SMITH: Yes.
 4 LORD JUSTICE PATTEN: Then he gets interest at 4 per cent on
 5 that judgment. I mean, it seems to me to be dealing
 6 with two completely different things.
 7 MR SMITH: What we know from the judgment in
 8 Whittingstall v Grover is Mr Justice Chitty, I think,
 9 refers to both rules together --
 10 LORD JUSTICE PATTEN: Yes.
 11 MR SMITH: -- as conferring the right to interest in that
 12 case, and the reference he makes in the judgment is to
 13 order --
 14 LORD JUSTICE PATTEN: -- because you could have a situation
 15 where the administration of the estate of a deceased
 16 person, ultimately, gave rise to an order for an account
 17 to which 62 would apply, but some of the debts could be
 18 debts that have already been established by a judgment
 19 which will bear interest at the prescribed rate under 63
 20 in their own right.
 21 But I'm not persuaded, I think, that the two are --
 22 that you know -- I mean, I think your argument that 62
 23 is a sort of parasitic on -- the scope of 62 is simply
 24 to prescribe the rate for purposes of 63, but I think
 25 that's quite difficult to square with the type of orders

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1 that they're relating to.
 2 MR SMITH: What we do know, in my submission, is rule 63 is
 3 certainly dealing with the question of the priority.
 4 LORD JUSTICE PATTEN: Yes.
 5 MR SMITH: Because it's dealing with priority of rights to
 6 interest and, in particular, the priority of the debts
 7 established. So one knows that rule 63 is at least
 8 dealing with the question of priority and provides for
 9 the priority that Mr Justice Chitty discussed. You pay
 10 the principal first, then there's creditors who are
 11 entitled to interest at law and then the creditors who
 12 are entitled to interest under the rule.
 13 So rule 63 applies at least to that term first. And
 14 in our submission, taking it to its logical conclusion,
 15 it also applies for the purpose of conferring the
 16 entitlement, and it may be sufficient, in my submission,
 17 to establish the application of rule 63 for the purposes
 18 of priority. Because what follows from that is the
 19 entitlement to interest in the case of creditors whose
 20 debt does not bear interest at law, only arises once the
 21 principal debts, in a sense, have been paid in full.
 22 LORD JUSTICE PATTEN: I've put it away now, but which is the
 23 second one? 63.
 24 MR SMITH: 63.
 25 LORD JUSTICE PATTEN: 63 is concerned with judgment

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1 creditors. You are right, it does since set out your
 2 priority, but it's concerned with judgment approaches,
 3 whereas an order for an account of the debts of
 4 a deceased person would comprehend people who were
 5 creditors, who didn't necessarily have a judgment at
 6 all. And they, I think, then get interest under those
 7 provisions, assuming their debts don't carry contractual
 8 interest already.
 9 MR SMITH: I can see that, although you are still then left
 10 with the position that it's the second half of 63, which
 11 deals with priority --
 12 LORD JUSTICE PATTEN: I agree it's not crystal clear but ...
 13 MR SMITH: So my Lord -- and that, I suggest, is probably
 14 sufficient for our purposes, as I say, because that part
 15 of the rule establishes that the right to interest for
 16 someone who's debt does not bear interest at all, only
 17 comes into effect once the principal debt has been paid
 18 in full. So that was the first point.
 19 The second point, again in relation to item 1, issue
 20 2, concerns the suggestion which was made that the
 21 argument that it would be unfair not to apply
 22 Bower v Marris does not apply in the case of creditors
 23 who would not have a contractual or other right to
 24 interest as at the commencement of the administration.
 25 That's, obviously, a point particularly close to our

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<p>1 hearts and, in our submission, it's wrong. 2 The reason it's wrong, we suggest, is that the 3 effect of the moratorium imposed by an administration or 4 liquidation is to prevent such creditors from obtaining 5 a judgment on their debts. That's clearly the effect of 6 the administration moratorium in relation to obtaining 7 judgments in England. And in relation to obtaining 8 judgments elsewhere, creditors may, in practice, be 9 prevented from doing that by injunction or similar 10 measure. 11 If the creditor had been able to obtain a judgment, 12 then he would also have obtained a right to interest on 13 that judgment. There's no reason why the Bower v Marris 14 principle would not have applied to calculation of that 15 interest. So even in relation to creditors whose debts 16 do not bear interest at the commencement of the 17 administration, the effect of the administration, we 18 suggest, is to deprive them of the rights which they 19 would otherwise have been able to obtain to a judgment 20 which carried with it a right to interest, calculated in 21 in accordance with Bower v Marris. 22 It's worth bearing in mind in this context, in our 23 submission, that the rationale for conferring the right 24 to statutory interest on creditors whose debts do not 25 bear interest is because the creditor is deprived of the</p> <p style="text-align: center;">Page 117</p>	<p>1 A related point to this concerns Mr Zacaroli's 2 fall-back suggestion, that if Bower v Marris is to be 3 applied at all, it should only be given effect to as 4 a non-provable claim available to those creditors who 5 have an existing right to interest on their debt. 6 That's I think his final level of fall-back. 7 As we already submitted that would be an odd result 8 and would give rise to the difference in the treatment 9 of creditors whose debts bear interest and those who 10 don't. And in our submission, the whole purpose of the 11 changes made to corporate insolvency in 1986 was 12 essentially to put those two categories of creditors on 13 a broadly equal footing. 14 So far as entitlements to interest in administration 15 and liquidation were concerned, you have already seen 16 the references in the Cork Report at paragraphs 13.85 17 and 13.86, removing the anomaly between bankruptcy, 18 corporate insolvency and between creditors whose debts 19 bear interest and those who don't. 20 The other point that's worth bearing in mind is that 21 if that was right, it would actually provide a very 22 significant incentive for creditors whose debts do not 23 bear interest to rush off once the administration or 24 liquidation had commenced, and seek to obtain 25 a judgment.</p> <p style="text-align: center;">Page 119</p>
<p>1 ability to obtain a judgment. 2 It might be worth reminding you that that is a point 3 that Mr Justice David Richards make in Waterfall I, 4 authorities 3, tab 100, paragraph 163, page 55. Just 5 below D, he made the very point that the justification 6 for statutory interest, even in those cases where the 7 debts do not already carry a right to interest, is that 8 creditors are prevented by the liquidation regime from 9 obtaining judgment against the company which would then 10 carry interest at the judgment rate. 11 So that's the justification for statutory interest. 12 There is, we submit, an unfairness in not allowing 13 a creditor whose debt does not bear interest to have 14 interest calculated under rule 2.88 on a Bower v Marris 15 basis. That is particularly so if you see rule 2.88 as 16 compensation for the rights which the creditor would 17 otherwise have had, if he had been able to obtain 18 a judgment. Because if he had otherwise been able to 19 obtain a judgment, he would have the right to interest 20 on that judgment; he would have right to apply 21 Bower v Marris in relation to that judgment. 22 Just for your note -- I don't think we need to turn 23 it up -- the judge made a similar comment in his 24 Waterfall II judgment at paragraph 207, referring back 25 to what he'd said in Waterfall I.</p> <p style="text-align: center;">Page 118</p>	<p>1 Because the natural reaction would be that if you 2 are faced with an insolvency where there's any prospect 3 whatsoever of a surplus, you would want to have 4 a judgment in your back pocket. So that if it came to 5 the question of a non-provable claim, you had a judgment 6 in which you could rely on. 7 Now, it's difficult to see how incentivising and 8 encouraging creditors to take that course could be 9 intended as a matter of policy. Obviously, it would 10 give rise to practical difficulties. The court might be 11 faced with various applications to lift moratorium, and 12 so on. 13 So that suggests itself that this can't be the right 14 solution and does, we submit, support the submission 15 that Bower v Marris should be given effect in relation 16 to the calculation of statutory interest under 17 rule 2.88. 18 Finally, just very briefly in relation to issue 7, 19 item 5, which is the day from which interest on 20 contingent debts runs, on which you've just been hearing 21 submissions from Mr Dicker. You may already have these 22 points on board -- I suspect you do -- if I could just 23 add them by way of emphasis. It is very important, we 24 suggest, to test Mr Zacaroli's submissions in relation 25 to contingent debts against the established position in</p> <p style="text-align: center;">Page 120</p>

<p>1 relation to future debts, which one can (inaudible). 2 There are two ways in which that's particularly 3 important. The first is the meaning of outstanding in 4 rule 2.88(7), because clearly once you accept that 5 a future debt is outstanding from the date of the 6 administration, notwithstanding it's only payable in the 7 future, you ask yourself: well, how sensibly can it be 8 said the position is any different in relation to 9 contingent debts? And really, we suggest Mr Zacaroli's 10 submission for that reason doesn't really get off the 11 ground. 12 LORD JUSTICE BRIGGS: That's a point I put to him. 13 MR SMITH: Exactly. In our submission, that really is 14 a critical point on that. 15 The second point is the discounting of future debts, 16 and the point in relation to that is the one Mr Dicker 17 made a moment ago, is that if you look at rule 2.15 18 a clear decision has been made not to discount matured 19 future debts. That is obviously a policy decision, for 20 whatever reason. 21 It seems very difficult for a court then in effect 22 to insert a new rule into the 1986 rules, which provides 23 for discounting of matured contingent debts. So not 24 only is the court, in effect, being invited to insert 25 a new rule dealing with discounting contingent debts, it</p> <p style="text-align: center;">Page 121</p>	<p>1 subsisting rights to interest thereafter, whether you 2 are an English creditor or a foreign currency creditor. 3 That is paragraph 228 of the judgment. 4 It flows from that -- 5 LADY JUSTICE GLOSTER: The parentheses there, "excluding 6 any non-provable claims ..."? 7 MR ZACAROLI: Exactly because if there isn't one, there is 8 no possible claim for such a thing. That is why this 9 point is directly linked to two other declarations, 10 which you see in items 9 and 10, as I mentioned when 11 opening this whole debate, where he declines to find 12 that there is any currency conversion claim, in relation 13 to post-administration interest on either bases, either 14 based on your contractual rights or what you would have 15 get under a judgment rate. 16 LORD JUSTICE BRIGGS: Because it's a complete code? 17 MR ZACAROLI: Because of the complete code. 18 LADY JUSTICE GLOSTER: I see. 19 MR ZACAROLI: We have dealt with -- 20 LORD JUSTICE BRIGGS: Which were those two, 19 and 20? 21 MR ZACAROLI: Declarations 18 and 19, yes. 22 When I opened this, I mentioned the argument may be 23 slightly different if there is a complete code or if 24 there is not. The point about how offset is to be 25 calculated, or how a currency conversion claim is to be</p> <p style="text-align: center;">Page 123</p>
<p>1 is also being invited to insert a rule which takes 2 diametrically the opposite approach from matured 3 contingent debts as the rules at present take in 4 relation to matured future debts. 5 So really, for both those reasons, we submit when 6 you test the position against the position in relation 7 to future debts, the submissions made by Wentworth don't 8 get off the ground. Those are the only points we would 9 like to make by way of apply. 10 LADY JUSTICE GLOSTER: Thank you very much. 11 Mr Zacaroli, I was going to take the break now. On 12 your timetable we have come to the end of day 4, 13 I think, anyway. You are now asking for a right to 14 reply? 15 MR ZACAROLI: Just five minutes. 16 LADY JUSTICE GLOSTER: We will do that after the break. 17 (3.12 pm) 18 (A short break) 19 (3.17 pm) 20 Submissions in reply by MR ZACAROLI 21 MR ZACAROLI: On the question of offset, turning to item 6 22 on the list, dealing with the point that the declaration 23 there set out, declaration 17, refers only to principal. 24 The reason for that is the judge's conclusion that 25 rule 2.88 is a complete code, therefore there is no</p> <p style="text-align: center;">Page 122</p>	<p>1 calculated in a world where there isn't a complete 2 code -- we dealt with in paragraphs 62 to 66 of our 3 skeleton at tab 3 of core bundle A -- so we certainly 4 foreshadowed this in the skeleton. 5 And our point is it's an aggregated approach you 6 would take. You look at what you are contractual rights 7 were, absent the administration, and see if those had 8 been satisfied by what comes out of the insolvency 9 process. 10 The second short point is that the essence of the 11 SCG's case -- and we say the flaw in it -- is the 12 conclusion that our contention was to offset results in 13 foreign currency creditors not getting statutory 14 interest to which they are entitled. We say that's not 15 so because there are two separate questions here. 16 The first is your debt is converted into sterling 17 and you get the statutory interest on that sterling debt 18 at the full amount. We have never said any of that 19 should be clawed back. That remains an entitlement 20 which is paid in full. 21 The second and completely different question is once 22 you have gone through this whole process, the dividends 23 and interest have been paid in full, the question which 24 then arises is the creditor is remitted to their 25 contractual rights, the foreign creditor has a right to</p> <p style="text-align: center;">Page 124</p>

<p>1 be paid, say, in dollars, and the question is: do they 2 have in their back pocket the dollars to which they are 3 entitled to, having run through the whole statutory 4 scheme? And if they do, they don't have a currency 5 conversion claim. It's as simple as that. 6 Now, if I may make two points of clarification which 7 aren't on the offset point, rather than jumping up 8 during reply submissions. 9 The first point is this: my learned friend repeated 10 the submission that it is common ground that 11 Bower v Marris applied to bankruptcy prior to the 12 1883 Act. I won't repeat my submission, but just to 13 make the point that I dealt with what I meant by common 14 ground, day 3 of the transcript, page 10, line 25 to 15 page 11, line 24, and then page 13, lines 8 to 18. 16 Finally, a very short point on -- it's the 17 declaration in relation -- it's item 2 on the list of 18 issues, declaration 8. A point that was raised by 19 my Lady, Lady Justice Gloster, that in the declaration 20 there's a reference at the end to interest not 21 continuing to compound following payment in full of the 22 principal amount. 23 LADY JUSTICE GLOSTER: Yes. 24 MR ZACAROLI: When you look at the declarations in order, 25 you will see the previous one for declaration 3 -- it's</p> <p style="text-align: center;">Page 125</p>	<p>1 statutory interest which is applicable to a provable 2 debt, which is a closeout sum under a contract, where 3 the closeout sum only arose due to action taken after 4 the commencement of the administration. 5 I'll explain in a moment a little more what those 6 closeout sums are in practice. It's, essentially, early 7 termination amounts which arise under ISDA master 8 agreements. 9 This supplemental issue was actually dealt with by 10 Mr Justice Hildyard, not Mr Justice David Richards, as 11 it was considered that it related more closely to the 12 issues concerning interest on claims under ISDA master 13 agreements, which he was dealing with as part of 14 Waterfall IIC. So there's a different judgment and it 15 was dealt with by a different judge. Everyone is agreed 16 that, for the purposes of this appeal, it belongs more 17 conveniently together with the other issues, which are 18 before this court. 19 Now, as you'll see from the issue, it concerns 20 rule 2.88(9) of the rules. Specifically the question is 21 whether the concept of a rate applicable to the debt, 22 apart from the administration in rule 2.88(9), includes 23 a contractual rating applicable to a closeout sum, which 24 only arose after the administration had commenced. 25 Now, as I said, the closeout sums which we're</p> <p style="text-align: center;">Page 127</p>
<p>1 the previous item on the list -- the judge defines it in 2 these terms in relation to Bower v Marris: 3 "You allocate dividends, first, the reduction(?) of 4 principal, ie the proved debt ..." 5 So when he uses the word "principal", what he means 6 is the proved debt, and it's clear from that, as it 7 were, defining that term in the earlier declaration. 8 LADY JUSTICE GLOSTER: Yes, I see, so I don't need to worry 9 about what he's actually saying there? 10 MR ZACAROLI: No. 11 My Lords, that's what I want to say by way of reply 12 or rejoinder. 13 LADY JUSTICE GLOSTER: Thank you. 14 Well, we are about half a day ahead, aren't we? 15 MR SMITH: We are, my Lady. 16 LADY JUSTICE GLOSTER: Mr Smith, you have three-quarters of 17 an hour. 18 Further submissions by Mr SMITH 19 MR SMITH: Thank you, my Lady. 20 It falls to me, therefore, to deal with two of the 21 supplemental issues. First of all, supplemental issue 22 1A, then supplemental issue 2. I'm going to start with 23 supplemental issue 1A, which is item 12 on the issues 24 list. 25 Broadly, what this issue concerns is the rate of</p> <p style="text-align: center;">Page 126</p>	<p>1 concerned with are, essentially, the early termination 2 amounts, which arise under ISDA master agreements and 3 similar agreements. 4 I'm sure your Lordships will be aware and familiar 5 with these. They, essentially, arise where there's open 6 derivative transactions, whether they're swaps or so on. 7 They're terminated following the occurrence of an event 8 of default, and there's then a net early termination 9 amount -- 10 LADY JUSTICE GLOSTER: Does it matter which method of 11 calculating the amount -- 12 MR SMITH: No. 13 LADY JUSTICE GLOSTER: We're not into any of that? 14 MR SMITH: No, thankfully, we are not getting into any of 15 these questions for these purposes. It's just 16 a construction of rule 2.88(9) against the background of 17 these early termination amounts. 18 In the case of LBIE, the early termination amounts 19 which we're concerned with for the purposes of this 20 issue will only have fallen due as a result of action 21 taken by creditors after commencement of LBIE's 22 administration. So that will, typically, be where 23 there's been an event of default, as a result of LBIE 24 going into administration. At some point afterwards, 25 the creditor has then served an early termination</p> <p style="text-align: center;">Page 128</p>

<p>1 notice.</p> <p>2 Under the terms of the ISDA master agreement, only</p> <p>3 at that point do you get early termination and an early</p> <p>4 termination amount falls due, and that sum then attracts</p> <p>5 a rate of contractual interest under the terms of the</p> <p>6 master agreement.</p> <p>7 Now, Mr Justice Hildyard held that the contractual</p> <p>8 interest rate applicable to the early termination</p> <p>9 amount, even though it only kicks into effect after the</p> <p>10 commencement of the administration, was nevertheless</p> <p>11 a rate applicable for purposes of rule 2.88(9).</p> <p>12 Just to mention, finally by way of introduction,</p> <p>13 this is not -- it sounds like a somewhat more esoteric</p> <p>14 point. It's not merely of academic interest. You will</p> <p>15 appreciate it's of quite practical significance and</p> <p>16 importance because the number of claims in LBIE's</p> <p>17 estate, which are early termination amounts, is</p> <p>18 considerable, when you think about £4.4 billion.</p> <p>19 And depending on the contractual rate of interest</p> <p>20 which applies to those claims, this issue is</p> <p>21 potentially -- it's certainly at least worth hundreds of</p> <p>22 millions, quite possibly billions, of pounds, so</p> <p>23 although it is a somewhat esoteric issue on one view, it</p> <p>24 is a point of practical significance.</p> <p>25 Now, you will appreciate this issue is, obviously,</p> <p style="text-align: center;">Page 129</p>	<p>1 issue 1A is in some sense a contingent appeal.</p> <p>2 LADY JUSTICE GLOSTER: Supplemental 1A.</p> <p>3 MR SMITH: Yes. Indeed. So our appeal in relation to</p> <p>4 supplemental issue 1A, is in a sense a contingent</p> <p>5 appeal, because it only arises if the appeal in relation</p> <p>6 to foreign judgment part of issue 4 is unsuccessful and</p> <p>7 that this court holds that issue 4 was rightly decided</p> <p>8 by Mr Justice David Richards.</p> <p>9 Now if the court concludes that</p> <p>10 Mr Justice David Richards was right, then in our</p> <p>11 submission it follows, as I will seek to explain, that</p> <p>12 supplemental issue 1A was wrongly decided by</p> <p>13 Mr Justice Hildyard. Because essentially, in very broad</p> <p>14 terms what our submission is is that Mr Justice Hildyard</p> <p>15 wrongly applied the logic of Mr Justice David Richards'</p> <p>16 judgment on issue 4. And if you apply that logic</p> <p>17 correctly to supplemental issue 1A it leads to</p> <p>18 a different result from that which Mr Justice Hildyard</p> <p>19 found.</p> <p>20 And in particular, we would say if it's right that</p> <p>21 a rate of interest applicable to a foreign judgment</p> <p>22 obtained after the commencement of the administration</p> <p>23 was not a rate applicable, then we say it's equally the</p> <p>24 case that a rate of interest applicable to an early</p> <p>25 termination amount which arises after the commencement</p> <p style="text-align: center;">Page 131</p>
<p>1 very closely related to issue 4 on which my learned</p> <p>2 friend, Mr Dicker, has already addressed your Lordships.</p> <p>3 LADY JUSTICE GLOSTER: Issue 4, not item 4.</p> <p>4 MR SMITH: Yes, sorry. I have written down the item number.</p> <p>5 LORD JUSTICE BRIGGS: It's item 11.</p> <p>6 MR SMITH: That's right.</p> <p>7 LORD JUSTICE BRIGGS: That's where you get a foreign</p> <p>8 judgment after the cut-off date.</p> <p>9 MR SMITH: Absolutely. So issue 4 includes the question of</p> <p>10 whether an interest rate applicable to foreign judgment</p> <p>11 obtained after the commencement of the administration is</p> <p>12 capable of being a rate applicable for the purposes of</p> <p>13 rule 2.88(9).</p> <p>14 As you know, and as you heard from Mr Dicker,</p> <p>15 Mr Justice David Richards held that it did not,</p> <p>16 essentially because such an interest rate was not in</p> <p>17 fact applicable to the debt, as at the commencement of</p> <p>18 the administration.</p> <p>19 Now, it's right to make clear at the outset, if the</p> <p>20 appeal, in relation to that part of issue 4 is</p> <p>21 successful, so if Mr Dicker succeeds in persuading you</p> <p>22 that the judge was wrong on that point, then we would</p> <p>23 accept that it would necessarily follow that</p> <p>24 supplemental issue 1A was also correctly decided by</p> <p>25 Mr Justice Hildyard. So if you like, our appeal on</p> <p style="text-align: center;">Page 130</p>	<p>1 of the administration is also not a rate applicable. We</p> <p>2 say the two situations are analogous, and one applies</p> <p>3 the same logic in relation to each --</p> <p>4 LADY JUSTICE GLOSTER: You and the SCG are not in the same</p> <p>5 camp on this.</p> <p>6 MR SMITH: No. This is an issue where actually we are the</p> <p>7 opposing parties. Supplemental issue 1A is essentially</p> <p>8 between --</p> <p>9 LADY JUSTICE GLOSTER: Even though you were both appellants</p> <p>10 on the earlier one.</p> <p>11 MR SMITH: That's right. So in a sense, as I say, this</p> <p>12 issue only arises contingently if the appeal on that</p> <p>13 part of issue 4 is wrong. And what we say --</p> <p>14 LADY JUSTICE GLOSTER: It fails, you mean.</p> <p>15 MR SMITH: Yes. That part of the appeal fails. And then</p> <p>16 there's an argument essentially between myself and</p> <p>17 Mr Dicker as to what the consequences are of that in</p> <p>18 relation to interest which arises under the closeout</p> <p>19 amounts. Because what we broadly say is that issue 4,</p> <p>20 and supplemental --</p> <p>21 LORD JUSTICE PATTEN: Mr Dicker on this issue is arguing to</p> <p>22 the opposite effect of his submissions on issue 4; is</p> <p>23 that right?</p> <p>24 MR SMITH: I think in fairness we are both approaching this</p> <p>25 issue on the footing that the judge's conclusions on</p> <p style="text-align: center;">Page 132</p>

<p>1 issue 4 are upheld. So one's always looking at it 2 against that framework. And what the real question is 3 if the judge is right on issue 4, what are the 4 consequences of that for issue 1A. 5 LORD JUSTICE BRIGGS: Yes. You say they follow as night 6 follows day. 7 MR SMITH: Yes. 8 LORD JUSTICE BRIGGS: But I think those who are going to 9 oppose you say well no they don't, and they are 10 distinguishable. 11 MR SMITH: Indeed. And indeed Mr Justice Hildyard said they 12 were distinguishable and we say he was wrong. 13 LORD JUSTICE BRIGGS: Yes. 14 MR SMITH: Essentially the broad question is whether it's 15 right there's an analogy and whether it's right, as the 16 judge held, that one can draw a distinction. 17 Now, it may be helpful to begin just by reminding 18 ourselves of the relevant features of early termination 19 amounts just so the legal structure is understood. This 20 is common ground, and was summarised by the judge at 21 paragraph 478 of his judgment at A2, tab 2, page 119. 22 There's a very helpful summary by the judge at 478. As 23 I say, this was common ground below and I think it 24 remains common ground. Just to take you through it very 25 quickly, in subparagraph (1) you'll see that under the</p> <p style="text-align: center;">Page 133</p>	<p>1 an early termination date. 2 Then subparagraph (5) upon the occurrence of the 3 early termination date all transactions entered into are 4 terminated. No more payments or deliveries are required 5 to be made, and the amount due in respect of the early 6 termination date is then to be calculated. 7 Then subparagraph (6), there was then a payment date 8 which is specified. 9 And then importantly subparagraph (7): 10 The contractual right to interest only accrues or 11 begins to accrue on the early termination amount from 12 the early termination date. 13 So that's the first time your contractual right to 14 interest kicks in. And really that is the central point 15 for present purposes, that where you get an early 16 termination amount which accrues post-administration the 17 interest rate only kicks in for the first time 18 post-administration. 19 Now to be clear about one point, in paragraph 479 20 the judge points out, rightly, there's a distinction 21 between cases where automatic early termination has been 22 specified and where automatic early termination has not 23 been specified. 24 We are concerned, for the purposes of this issue, 25 only with cases where automatic early termination is not</p> <p style="text-align: center;">Page 135</p>
<p>1 master agreement: 2 "Early termination may occur where there has been 3 an event of default." 4 LADY JUSTICE GLOSTER: Sorry, what's the paragraph number? 5 MR SMITH: It's paragraph 478 and starting with 6 subparagraph (1), I can deal with it quickly. 478(1): 7 "Early termination may occur where there has been 8 an event of default." 9 There are basically two forms: where automatic early 10 termination has not been specified, and where automatic 11 early termination has been specified. I will come back 12 to that difference in a moment. 13 Subparagraph (2) the events of default are defined. 14 They include the appointment of an administrator. 15 Subparagraph (3) is important because it makes the 16 point that until you have an early termination date the 17 obligations on the party are the relevant payment or 18 delivery obligations under the outstanding swaps. 19 Then subparagraph (4) also important: 20 "Until there has been a default in performance there 21 is no contractual right to interest on such payments or 22 right to compensation." 23 So until you have a default there isn't any 24 contractual right to interest. But where an event of 25 default has occurred, then the other party may specify</p> <p style="text-align: center;">Page 134</p>	<p>1 specified. We know where it was, the entry of LBIE into 2 administration would automatically have terminated at 3 that point giving rise to an early termination amount as 4 at the date of administration. 5 LORD JUSTICE BRIGGS: So the interest would run from the 6 cut-off date. 7 MR SMITH: Exactly. So we are not concerned with those 8 cases for the purposes of this issue. And indeed we 9 accept, that in relation to those cases clearly the 10 contractual rate applicable as at the date of 11 administration was the rate due under the ISDA Master 12 Agreement. 13 Before considering the reasoning of 14 Mr Justice Hildyard in relation to supplemental 15 issue 1A -- 16 LORD JUSTICE BRIGGS: Can I just check one thing? 17 MR SMITH: Yes. 18 LORD JUSTICE BRIGGS: If the party in default is in the 19 money, interest still runs on the termination payment to 20 be made by the non-defaulting party presumably. 21 MR SMITH: Yes. 22 LORD JUSTICE BRIGGS: So where it says "Unless there has 23 been a default in performance there is no contractual 24 right to interest", it doesn't mean that only the 25 non-defaulting party gets interest; it's just that --</p> <p style="text-align: center;">Page 136</p>

<p>1 what the judge is there summarising is a time point. 2 MR SMITH: Yes. 3 LORD JUSTICE BRIGGS: Yes. 4 MR SMITH: The contractual right to interest under the 5 ISDA Master Agreement only arises on the early 6 termination amount. 7 LORD JUSTICE BRIGGS: Yes. 8 MR SMITH: So that's going to be due one way or the other. 9 LORD JUSTICE BRIGGS: Yes. But it has nothing to do with 10 who is in default. 11 MR SMITH: No. 12 LORD JUSTICE BRIGGS: It's just who is in the money. 13 MR SMITH: Exactly. The balance is going to be due one way 14 or the other. To whomever the balance is due is 15 entitled to interest on that, absolutely. 16 Before looking at what Mr Justice Hildyard said 17 I think I need to start by looking at what 18 Mr Justice David Richards said in relation to issue 4, 19 because as I submitted a moment ago the central point 20 here concerns whether we are right that the logic of 21 Mr Justice David Richards on issue 4 applies equally to 22 supplemental issue 1A. 23 He dealt with the relevant part of issue 4 at 24 paragraph 171 of his judgment, A1, tab 2, page 41. We 25 just pick it up at paragraph 173. He noted there were</p> <p style="text-align: center;">Page 137</p>	<p>1 commencement of the administration because at the date 2 of the administration he had no right to interest at the 3 relevant judgment rate. So what he's concerned with is 4 looking at what are the rights of the creditor as at the 5 commencement of the administration. 6 Paragraph 180, just over the page on page 44, just 7 to pick up on one point there he made in the penultimate 8 and final sentences, which is: 9 "If the creditor does not have a judgment at the 10 date of the administration the debt proved by the 11 creditor is not ...(Reading to the words)... is not the 12 judgment debt which is the subject of the proof." 13 Now in our submission that logic applies equally to 14 an early termination amount which arises 15 post-administration. 16 Then paragraph 182 is important for present 17 purposes, because he explicitly rejected the submission 18 that a contingent right to interest was sufficient for 19 the purposes of rate applicable. Because the argument 20 was put to him that it may be said that a creditor has 21 a contingent right to judgment interest as at the date 22 of the administration, and he rejected that as being 23 sufficient for the purposes of the rate applicable. And 24 as we understand it he's saying a contingent right is 25 not sufficient for the purposes of rule 2.88(9).</p> <p style="text-align: center;">Page 139</p>
<p>1 in fact two sub-issues, or questions if you like, in 2 relation to issue 4, the first of which concerns the 3 case where the creditor had in fact obtained a foreign 4 judgment after the commencement of the administration. 5 And it's that part of issue 4 which we are concerned 6 with in this case, not the second question -- sorry, my 7 apologies, it's the second question we are concerned 8 with concerning the situation where the creditor in fact 9 obtained a foreign judgment in the course of the 10 administration. And that's obviously part of the 11 question on which Mr Dicker's submissions have focused. 12 Mr Justice David Richards obviously answered that 13 question in the negative, and he dealt with that point 14 at paragraph 178 and onwards of his judgment. 15 LADY JUSTICE GLOSTER: We've seen all that. 16 MR SMITH: Yes. If I can just very briefly emphasise the 17 points which we say are relevant for the determination 18 of supplemental issue 1A. Firstly, he accepted 19 Wentworth's submission recorded in the first sentence of 20 paragraph 179 that, for the purposes of determining the 21 rate applicable you look at the rights of the creditor 22 as at the commencement of the administration. 23 And if you look at the final sentence of 24 paragraph 179 he made the point that the logic did not 25 apply to a creditor who obtained a judgment after the</p> <p style="text-align: center;">Page 138</p>	<p>1 Now, in our submission if the reasoning of 2 Mr Justice David Richards is correct then it applies 3 equally to the rate of interest applicable to an early 4 termination amount which only arises after the 5 commencement of the administration. The two situations 6 are directly analogous. The foreign judgment and the 7 early termination amount both arise after the 8 commencement of the administration. At the commencement 9 of the administration neither of those debts in fact 10 existed; and more importantly, in both cases, so far as 11 interest is concerned, as at the commencement of the 12 administration the only right which the creditor had was 13 a contingent right to interest on the relevant debt as 14 and when it arose. 15 So if you think about the case of the foreign 16 judgment creditor, someone who subsequently obtains 17 the foreign judgment, as at the date of his 18 administration he merely has a contingent right to 19 interest. He may have had a contractual debt but -- 20 LORD JUSTICE PATTEN: The interest the judge is talking 21 about is the interest that stems from the judgment, 22 isn't it, in this example? I mean, his right to 23 interest depends on his getting judgment; it has nothing 24 to do with his contractual position at the time of the 25 administration.</p> <p style="text-align: center;">Page 140</p>

<p>1 MR SMITH: Absolutely. So far as a foreign judgment 2 creditor, that's right, but if you look at what rights 3 or interests he has, as at the date of administration, 4 all he has is a contingent right to interest which 5 arises if and when he obtains a foreign judgment. 6 Now, in our submission -- 7 LORD JUSTICE PATTEN: I mean, I'm not sure it's necessary -- 8 I'm not sure -- why is it a contingent right to 9 interest? I mean, it's a contingency, undoubtedly, in 10 the sense it could occur, but in what sense is it 11 a contingent right? 12 MR SMITH: Well, because if he's in a position whereby 13 something occurs, ie the obtaining of a judgment, at 14 that point he has a right to interest, so he has a right 15 which is subject -- 16 LORD JUSTICE PATTEN: That's like saying if you have are run 17 down in six months' time, you have a right to damages -- 18 it doesn't mean you have a contingent right to damages. 19 MR SMITH: We will come to it in a moment. If you look at 20 the definition of contingent rights, they are rather 21 broadly defined by the Supreme Court in Nortel. 22 But however one defines it, the question for our 23 purposes is where there is a proper comparison between 24 the situation of the creditor in respect of the foreign 25 judgment and the creditor in respect of the early</p> <p style="text-align: center;">Page 141</p>	<p>1 interest applicable to a foreign judgment, and he 2 founded that distinction on the source of the right. 3 He said that in the former case, the early 4 termination amount, the source of the right was 5 contractual; whereas in the latter case, the foreign 6 judgment creditor, the source of the rate and the right 7 to interest is the judgment itself and the relevant 8 Rules of Court. 9 So what he basically decided was that because in the 10 case of early termination amounts to the source of the 11 right was contractual, the right to interest could be 12 said to be in existence at the commencement of the 13 administration, even though it only applied once when 14 the early termination amount had arisen after the 15 commencement of the administration. 16 He distinguished that in paragraph 520 from the 17 position in relation to a foreign judgment, where he 18 said the right to interest, basically, did not exist as 19 at the date the administration, even as a contingent 20 future right. So he's, basically, making a distinction 21 on the basis of the source of the right. 22 Now, in our submission, the distinction drawn by 23 Mr Justice Hildyard is not a proper basis for construing 24 rule 2.88(9). Firstly, in our submission, his analysis 25 at paragraph 520 of his judgment was wrong. He</p> <p style="text-align: center;">Page 143</p>
<p>1 termination. 2 In the case of the foreign judgment creditor, 3 certainly he has no right to interest until foreign 4 judgment accrues post-administration. 5 In the case of the early termination amount 6 creditor, the position is the same, we say, because he 7 has no right to interest unless and until an early 8 termination amount arises post-administration. In our 9 submission, the logic of the two positions is the same. 10 And if the judge, Mr Justice David Richards, was 11 right to say that a right to interest, which at the date 12 of commencement of the administration was merely 13 contingent, does not amount to an applicable rate for 14 the purposes of rule 2.88(9). And that logic applies 15 equally to early termination amounts, as it does to 16 foreign judgments. 17 Now, if we turn to the reasoning of 18 Mr Justice Hildyard, he dealt with this really at 19 paragraphs 516 to 520 of his judgment in bundle A2 at 20 tab 2. It begins on page 130, and really, the essence 21 of his conclusion and his reasoning is at paragraphs 518 22 to 520. 23 His reasoning, essentially, was that he considered 24 there was a distinction between a rate of interest 25 applicable to an early termination amount and a rate of</p> <p style="text-align: center;">Page 142</p>	<p>1 implies -- and certainly this is inherent in his 2 reasoning -- that in the case of a foreign judgment 3 obtained after the commencement of the administration, 4 the creditor has no contingent right to interest, as at 5 the date of commencement of the administration. 6 Now, in our submission, that's wrong. The creditor 7 does have a contingent right to such interest, as at the 8 commencement of the administration. 9 If you take the position of a creditor who has 10 a debt claim against the company in administration, as 11 at the commencement of the administration, he would be 12 entitled to obtain a judgment in respect of that claim, 13 which would attract a rate of interest. And as at the 14 date of the administration, the only contingency to 15 which that right to interest is subject is the obtaining 16 of the relevant judgment. In our submission, such 17 a creditor does have a contingent right to interest. 18 Indeed Mr Justice David Richards didn't disagree 19 with that. The relevant paragraph of his judgment in 20 Waterfall II part A is paragraph 182, where he didn't 21 say such creditor does not have a contingent right to 22 interest; rather he said a contingent right to interest 23 is not sufficient for the purposes of being -- 24 LADY JUSTICE GLOSTER: He calls it the rather ethereal 25 contingent --</p> <p style="text-align: center;">Page 144</p>

<p>1 MR SMITH: He does. He qualifies, if you like, the nature 2 of the contingency. He regards this type of contingent 3 right to be rather ethereal. In our submission, that is 4 not necessarily correct. If you take the example which 5 I was just positing of someone who has an accrued debt 6 claim at the commencement of the administration, they 7 only have to go through one further step of getting 8 a judgment on that and in order to acquire a right to 9 interest.</p> <p>10 But the relevant point here is he's not saying that 11 creditor does not have a contingent right; he's just 12 saying a contingent right isn't sufficient to qualify 13 for the purposes of rule 2.88(9).</p> <p>14 You'll be aware of cases like Nortel and 15 Re Sutherland, which considered the nature of a 16 contingent liability. Contingent liability is very 17 widely described; it's not dependent on there being 18 an existing legal liability. All that's required, 19 taking the definition in Re Sutherland, is that the 20 relevant person is in a position whereby a liability 21 will arise or come into being, one or more certain 22 events occur or do not occur.</p> <p>23 LADY JUSTICE GLOSTER: What's the tab number for Sutherland? 24 MR SMITH: Re Sutherland is authorities bundle 1, tab 41A. 25 LORD JUSTICE PATTEN: Just tell me -- probably my fault for</p> <p style="text-align: center;">Page 145</p>	<p>1 LORD JUSTICE PATTEN: They weren't proving for a contingent 2 or future debt, were they, or what; or were they?</p> <p>3 MR SMITH: I suspect, in practice, they probably proved some 4 way down the line after the early termination amount had 5 taken place. One knows in the case of LBIE, the 6 administration occurred in September 2008 and turned 7 into a --</p> <p>8 LORD JUSTICE PATTEN: What they were proving for is the 9 amount that became payable on the closeout; that was the 10 debt on which statutory interest became payable?</p> <p>11 MR SMITH: In our submission, not, because if you go back to 12 paragraph 180 of Mr Justice David Richards in Waterfall 13 2A, and he describes the position of a creditor who had 14 a debt as at the date of commencement of the 15 administration and then subsequently obtains a foreign 16 judgment, that creditor does not prove for the foreign 17 judgment.</p> <p>18 LORD JUSTICE PATTEN: Exactly. Exactly. But that's the 19 distinction, because if you get a subsequent foreign 20 judgment, you are not proving for the foreign judgment; 21 you've already proved in the example that he was dealing 22 with for the contractual debt.</p> <p>23 MR SMITH: Yes.</p> <p>24 LORD JUSTICE PATTEN: And that's what you're doing here, 25 isn't it?</p> <p style="text-align: center;">Page 147</p>
<p>1 not having read the skeletons -- the creditors that 2 Mr Justice Hildyard was concerned with, what have they 3 proved for on the basis of the closeout, the amount that 4 became payable on the closeout?</p> <p>5 MR SMITH: Well, I don't think the particular proofs were in 6 evidence, and there's some suggestion, I think, in the 7 skeleton argument of the SCG that different creditors 8 may have proved --</p> <p>9 LORD JUSTICE PATTEN: They must have proved something 10 because I don't see how this point arose, considering we 11 are concerned here with statutory interest on the debts 12 that they proved for. So, the debt was what?</p> <p>13 MR SMITH: I don't think the actual proofs themselves were 14 in evidence. But in our submission, as a matter of law, 15 what they were proving for was the debt as it stood as 16 at the date of the administration, as quantified by the 17 subsequently obtained early termination amount. In our 18 submission, the position is the same as 19 Mr Justice David Richards describes in relation to the 20 creditor --</p> <p>21 LORD JUSTICE PATTEN: Was what they were entitled to, under 22 the contract?</p> <p>23 MR SMITH: As at the date of the administration.</p> <p>24 LORD JUSTICE PATTEN: Yes.</p> <p>25 MR SMITH: No, in our submission, the position is the same.</p> <p style="text-align: center;">Page 146</p>	<p>1 MR SMITH: Well, in our submission, there's no real 2 distinction between the two situations because, in both 3 cases, you're in a position whereby as at the date of 4 administration the creditor has certain contractual 5 rights, and subsequently those rights are then 6 transformed into a different set of rights because he 7 obtains either an early termination amount or a foreign 8 judgment.</p> <p>9 Applying the logic of the judge, which we say is 10 right, in both cases, what the creditor is proving for 11 are his rights, as they exist as at the date of 12 administration, as quantified by the subsequent judgment 13 or early termination.</p> <p>14 LORD JUSTICE BRIGGS: There's a difference between having 15 a certain contractual right on the cutoff date, which is 16 merely recognised and confirmed as such a right by the 17 later judgment --</p> <p>18 MR SMITH: Yes.</p> <p>19 LORD JUSTICE BRIGGS: -- and the judgment they quantified, 20 but it quantifies the right as it always was. In this 21 situation, at the cutoff date, as I understand it, all 22 the ISDA counterparty with LBIE had was the usual 23 non-interest-bearing right to payments, if he was in the 24 money, on each payment date -- to the difference between 25 the two payments, depending on the nature of the swap we</p> <p style="text-align: center;">Page 148</p>

<p>1 are talking about.</p> <p>2 MR SMITH: Yes.</p> <p>3 LORD JUSTICE BRIGGS: But what happened in the case of</p> <p>4 an early termination was that something else has</p> <p>5 happened after the cutoff date, which has given rise to</p> <p>6 a debt, and I'm assuming that they were proving for</p> <p>7 their termination elements as debts which had been</p> <p>8 contingent at the cutoff date, but which had matured.</p> <p>9 MR SMITH: Yes.</p> <p>10 LORD JUSTICE BRIGGS: I don't know.</p> <p>11 MR SMITH: We haven't got the proofs in evidence and, as</p> <p>12 I say, I think there's some suggestion in the SCG</p> <p>13 skeleton argument on this point, that different</p> <p>14 creditors may have proved in different ways and it would</p> <p>15 be a question of fact in each case. But in our</p> <p>16 submission, there isn't really a distinction between the</p> <p>17 two situations.</p> <p>18 In the case of the early termination amount, then</p> <p>19 what, in substance, it is doing is valuing the rights as</p> <p>20 they stood as at the date of the early termination and</p> <p>21 netting them off to produce a net liquidated balance.</p> <p>22 It is, in effect, valuing the net position, as it stood</p> <p>23 as at the date of the administration.</p> <p>24 So we do submit there isn't really a difference, but</p> <p>25 in any sense --</p> <p style="text-align: center;">Page 149</p>	<p>1 LORD JUSTICE BRIGGS: Yes, quite.</p> <p>2 MR SMITH: That's a slightly separate question because you</p> <p>3 are then distinguishing between -- you have to draw the</p> <p>4 distinction then between rule 2.88(7) and rule 2.88(9).</p> <p>5 If you have a contingent debt, no doubt can you prove</p> <p>6 for it. It is outstanding as at the date</p> <p>7 administration. It attracts statutory interest, but as</p> <p>8 per issue 1C, which is agreed, you only get the</p> <p>9 judgments rate on that until the contingency actually</p> <p>10 kicks in.</p> <p>11 That was supplemental issue 1C, which was touched on</p> <p>12 this morning. So you can prove for a contingent debt,</p> <p>13 and if you do, you get the 8 per cent judgment rate, is</p> <p>14 the position.</p> <p>15 The question we are concerned with is whether when</p> <p>16 you prove for a contingent debt or a contingent right to</p> <p>17 interest, you get the higher contractual rate. And that</p> <p>18 takes you --</p> <p>19 LORD JUSTICE BRIGGS: Sorry to interrupt. You say it's</p> <p>20 agreed that if you prove for a contingent debt where the</p> <p>21 contingency hasn't matured, you get Judgment Act rate</p> <p>22 interest --</p> <p>23 MR SMITH: That was issue 1C.</p> <p>24 LORD JUSTICE BRIGGS: But what you if you prove for</p> <p>25 a contingent debt where the contingency has occurred?</p> <p style="text-align: center;">Page 151</p>
<p>1 LORD JUSTICE PATTEN: But it looked to me as if what you</p> <p>2 were arguing in front of Mr Justice Hildyard was that</p> <p>3 the only alternative contractual rate that you could</p> <p>4 apply under sub-rule 9 was the one that was actually, so</p> <p>5 to speak, running at the time of the cutoff date.</p> <p>6 MR SMITH: Yes, absolutely.</p> <p>7 LORD JUSTICE PATTEN: And is that what you are saying?</p> <p>8 MR SMITH: It is. That's the essential point.</p> <p>9 LORD JUSTICE PATTEN: So you have a contractual right to</p> <p>10 have 12 per cent, or something like that, but you say</p> <p>11 it's not enough to have the contractual right to have</p> <p>12 that. You have to have reached the point in time in</p> <p>13 which interest has begun to run at that rate, is that</p> <p>14 what you're saying?</p> <p>15 MR SMITH: Yes, what we're saying is that a right to</p> <p>16 interest, which is merely contingent as at the date of</p> <p>17 administration, isn't enough. If you have a right to</p> <p>18 interest, but as at the date of administration, it's</p> <p>19 merely a contingent right, that's not enough. We say</p> <p>20 that is what Mr Justice David Richards, basically, held</p> <p>21 in paragraph 182 in relation to a foreign judgment</p> <p>22 creditor.</p> <p>23 LORD JUSTICE PATTEN: If you can prove for a contingent</p> <p>24 debt, why can't you prove for the rate of interest</p> <p>25 that's applicable?</p> <p style="text-align: center;">Page 150</p>	<p>1 MR SMITH: As at the date of the administration?</p> <p>2 LORD JUSTICE BRIGGS: No, no, where it has occurred before a</p> <p>3 dividend is paid.</p> <p>4 MR SMITH: Well, subject to this issue, you certainly get</p> <p>5 Judgment Act interest.</p> <p>6 LORD JUSTICE BRIGGS: My question --</p> <p>7 MR SMITH: That example ties into exactly the issue we are</p> <p>8 debating.</p> <p>9 LORD JUSTICE BRIGGS: If the contingent carries its own</p> <p>10 built-in rate of interest, you don't get that; you still</p> <p>11 only get the judgment rate, you say?</p> <p>12 MR SMITH: Yes.</p> <p>13 LORD JUSTICE BRIGGS: Even if a contingency has matured?</p> <p>14 MR SMITH: Yes, because that's the question, and that is</p> <p>15 exactly the question, which is: what is the rate</p> <p>16 applicable? In our submission, you look at that as at</p> <p>17 the date of administration; you look at what is the rate</p> <p>18 applicable to the debt as at the date of administration;</p> <p>19 that is what Mr Justice David Richards held. And what</p> <p>20 you need in order to be entitled to the higher rate</p> <p>21 under rule 2.88(9) is an accrued right to interest as at</p> <p>22 that date, not merely a contingent right.</p> <p>23 LORD JUSTICE BRIGGS: Which is the agreed issue; what is the</p> <p>24 number of it?</p> <p>25 MR SMITH: Supplemental issue 1C. I say it's agreed; it was</p> <p style="text-align: center;">Page 152</p>

<p>1 argued below and there's no appeal from it, is there, 2 which is the position? 3 LADY JUSTICE GLOSTER: It's not on our schedule 1C. 4 MR SMITH: No, it's not one that's being appealed from. It 5 was argued below. 6 LADY JUSTICE GLOSTER: You have to go back to the older -- 7 MR SMITH: Yes, it's in Mr Justice David Richards' judgment, 8 dealing with the supplemental issues. 9 Now -- 10 LADY JUSTICE GLOSTER: I'm not sure I am understanding 11 commercially why it's in your interest to argue this. 12 MR SMITH: Well, because we are -- 13 LADY JUSTICE GLOSTER: Just explain to me why. 14 MR SMITH: Yes, so we are a prime brokerage creditor, so we 15 are creditor under a prime brokerage agreement. Prime 16 brokerage agreements do not carry contractual rights to 17 interest. 18 LADY JUSTICE GLOSTER: Right. 19 MR SMITH: But we are potentially competing with people who 20 do carry contractual rights to interest -- 21 LADY JUSTICE GLOSTER: Right, that's why you want to do the 22 ISDA people with no automatic early termination date 23 down? 24 MR SMITH: Yes. Some of the rates of interest are, 25 potentially, enormous, if you're talking about</p> <p style="text-align: center;">Page 153</p>	<p>1 MR SMITH: I think it may depend -- 2 MR BAYFIELD: My Lord, I think it depends on a number of 3 things. The outcome of Waterfall, for one, in relation 4 to whether the subject comes out for statutory interest; 5 whether Bower v Marris is applicable, which might give 6 people -- 7 LORD JUSTICE PATTEN: So you might run out of money. 8 MR BAYFIELD: -- more interest, and also part 2C, which is 9 where the cost of equity can come into the default rate 10 of interest. So it is possible there won't be enough in 11 the surplus to discharge statutory interest in full. 12 Possibly. 13 LORD JUSTICE PATTEN: Thank you. 14 MR SMITH: It may also, of course, affect the amount of 15 money available for currency conversion. 16 LORD JUSTICE PATTEN: It may be important. 17 MR SMITH: Yes. As I say, the sums involved are quite 18 large. 19 Now, as I say, our essential point on this is to say 20 that in the case of both a foreign judgment and an early 21 termination amount, the creditor has a contingent right 22 to interest as at the date of the commencement of the 23 administration. And Mr Justice Hildyard was wrong in 24 paragraph 520 of his judgment to suggest that the 25 foreign judgment creditor does not have that contingent</p> <p style="text-align: center;">Page 155</p>
<p>1 15 per cent compounded on these massive claims. 2 LADY JUSTICE GLOSTER: I see. 3 MR SMITH: It's very much in our interest. 4 LADY JUSTICE GLOSTER: To knock them down. 5 MR SMITH: Yes -- 6 LADY JUSTICE GLOSTER: Knock them back to judgment rate, 7 basically. 8 MR SMITH: Yes, exactly. 9 LADY JUSTICE GLOSTER: I see. 10 MR SMITH: Which is the position we're, basically, in. 11 LADY JUSTICE GLOSTER: Yes, I see. 12 MR SMITH: Now, as we say, in the case of both the foreign 13 judgment -- 14 LORD JUSTICE PATTEN: Sorry, I mean, you'll be creditors of 15 -- both unsecured creditors taking it at the same stage, 16 won't you? 17 MR SMITH: Yes, that's right. 18 LORD JUSTICE PATTEN: There's no suggestion, is there, that 19 there won't be enough to satisfy both of the claims, 20 even if they've got the interest claim that you're 21 opposing? 22 MR SMITH: I don't know the answer to that, I have to say. 23 We don't have access to enough -- 24 LORD JUSTICE PATTEN: I didn't think anything said to us 25 this morning suggested that.</p> <p style="text-align: center;">Page 154</p>	<p>1 right. 2 Now, in fact -- 3 LADY JUSTICE GLOSTER: I think it's 519. 4 MR SMITH: You are right, then he draws on the (inaudible) 5 in 520. 6 LORD JUSTICE BRIGGS: I'm sorry to keep niggling away at 7 issue supplementary 1C; can you just tell me -- you 8 needn't take me to it -- the paragraph of, I assume it's 9 Mr Justice David Richards' judgment -- 10 MR SMITH: It is. 11 LORD JUSTICE BRIGGS: -- where he deals with that? 12 MR SMITH: He does. He deals with it at paragraph 26 of his 13 supplemental judgment, which is in bundle -- 14 LORD JUSTICE BRIGGS: Don't take me there, but if you just 15 tell me it's in supplement 1C, paragraph 26, I can go 16 and read it. 17 MR SMITH: Bundle A2, divider 1, paragraphs 26 through to 18 36. 19 As I say, the position is that in the case of both 20 the foreign judgment and an early termination, the 21 creditor has a contingent right to interest at the date 22 of commencement of administration. 23 And it follows, in our submission, that the 24 distinction Mr Justice Hildyard was in fact drawing was 25 contingent rights, which arises by virtue of an existing</p> <p style="text-align: center;">Page 156</p>

1 contract, and a contingent right which arises otherwise
 2 than by virtue of an existing contract.
 3 He was, basically, drawing a distinction, we would
 4 submit, between different types of contingent rights.
 5 He was, in effect, saying that if you have a contingent
 6 right which arises out of a contract in place, as at the
 7 date of administration, that is sufficient. But if it
 8 arises otherwise, because of the right to go and obtain
 9 a foreign judgment, that isn't sufficient.
 10 Now, we respectfully suggest there isn't any basis
 11 for that distinction between different types of
 12 contingent rights to interest. There's clearly no basis
 13 for it in the wording of rule 2.88(9). There's no other
 14 indication that the drafters of the rules intended there
 15 to be any such distinction.
 16 You ask yourself why, as a matter of policy, should
 17 there be any distinction between different types of
 18 contingent rights --
 19 LORD JUSTICE PATTEN: I think it comes back to the point
 20 that I put to you a little while -- this is paragraph
 21 519 of his judgment and what he is drawing a distinction
 22 between is your right to interest of whatever it is on
 23 closeout, which is a term of the contract that exists at
 24 the date of administration in this case, and your right
 25 to interest under a judgment, which is after all, what

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1 Mr Justice David Richards was interested in, which
 2 arises under the judgment by virtue of the Judgment Act.
 3 That is nothing to do with any contractual rights --
 4 he is not contrasting it with your right or entitlement
 5 to seek a judgment for the debt. That's not the
 6 right -- it's not the right comparator.
 7 The comparison is between a contractual right to
 8 interest, which exists at the date of administration,
 9 albeit contingent on one or two things happening, and
 10 the right to interest in relation to some future
 11 obtained judgment. It doesn't matter whether you have
 12 a claim which would entitle you to seek a judgment; you
 13 don't, in any sense, have a right to interest until you
 14 get the judgment.
 15 MR SMITH: Well, I mean, I think I agree with most of what
 16 you put to me, but in my submission, the true analysis
 17 is that, in both cases, there is a contingent right to
 18 interest, as at the date of the administration. In the
 19 case of the early termination amount, the contingent
 20 rights arises out of the terms of the contract. In the
 21 case of the foreign judgment creditor, the contingent
 22 right doesn't arise out of the terms of any contract, it
 23 arises out of the fact he was in a position whereby he
 24 can go off and obtain foreign judgment in due course.
 25 Now, those are both contingent rights, as at the

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1 date of administration. The source of the right,
 2 contingent right, is obviously different. In one case,
 3 it's the contractual contingent right; in the other
 4 case, it isn't.
 5 Now, in my submission, there's no warrant for
 6 distinguishing between different types of contingent
 7 right to interest. The correct approach, in our
 8 submission, is simply to ask whether the words "the rate
 9 applicable to the debt", apart from the administration
 10 in rule 2.88(9), are capable of including rights to
 11 interest which are contingent, as at the date of the
 12 administration.
 13 LORD JUSTICE BRIGGS: What I don't understand is why you are
 14 not relying on paragraph 34 of Mr Justice David Richards
 15 supplemental judgment, which is, on the face of it, far
 16 more analogous than trying to line it up with his view
 17 about judgments.
 18 MR SMITH: I was going to come to that in a minute, but
 19 I agree.
 20 LORD JUSTICE BRIGGS: Because there may be all the
 21 difference in the world between an existing contractual
 22 right to interest at a certain rate on a future or
 23 contingent date and a judgment, which might depend on
 24 whatever the Judgments Act at a related date says about
 25 the interest rate that comes out of the judgment. But

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1 paragraph 34, he really is comparing like-with-like,
 2 isn't he?
 3 MR SMITH: Yes, absolutely. I was going to come to his
 4 supplemental issue 1C because I agree and it does
 5 support our argument.
 6 LADY JUSTICE GLOSTER: I think we might leave that until
 7 tomorrow morning.
 8 MR SMITH: Is it Monday morning?
 9 LADY JUSTICE GLOSTER: You are quite right, it's Monday
 10 morning. We will sit 10.30 on Monday morning.
 11 (4.00 pm)
 12 (The hearing was adjourned until
 13 Monday, 10 April 2017 at 10.30 am)
 14
 15 Submissions by MR ZACAROLI1
 16 (continued)
 17 Submissions by MR BAYFIELD16
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 20 Submissions in reply by MR SMITH111
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