Tuesday, 4 April 2017
(10.30 am)
Submissions by MR DICKER (continued)
LADY JUSTICE GLOSTER: Yes, Mr Dicker.
MR DICKER: Just a few points arising out of yesterday. Your Lordships asked a couple of questions in relation to paragraph 46 of the order of 1841. The order applied of Whittingstall v Grover. So far as the source of the power to make the order is concerned, the order at the top refers to the source of the power being 3 and 4 Victoria C94(4) and (5) Victoria, they provided that orders made by the chancellor had the force of an Act of Parliament. Under the 1840 Act, the orders had force of an Act of Parliament once laid before Parliament and proved, but in the 1841 Act that changed. They had force of Parliament if after a certain number of weeks of the orders being made Parliament did not intervene and disprove them.
So paragraph 46 of the 1841 order can effectively be treated as if it were a statute.
LORD JUSTICE PATTEN: It's all delegated legislation, yes.
MR DICKER: Our short point, as you know, is that analytically the 1841 order operates in the same way as rule 2.889, in the sense that it provides payment of interest to those who otherwise aren't entitled to

interest, but only in the event of a surplus. So it's a statutory right conferring a new entitlement to interest, which arises if, and only if, there is a surplus.
Now, we say, there's nothing inconsistent with that and the principle in Bower v Marris, one can see that from judgment of Mr Justice Chitty because he applied it in the that context. If it works in the context of the 1841 order, we say there's absolutely no reason why, as a matter of analysis, it can't work equally in relation to rule 2.88.
Now, so far as the scope of the 1841 order is concerned, the only examples we have been able to find are in the context of decrees for the administration of a deceased's estate. The reason for that may be that by the time one gets to order 55, which Mr Justice Chitty referred to in Whittingstall v Grover, order 55 expressed it solely in that context. So whatever the scope may originally have been under the 1841 order, by the time one moved on a few years, it appears to have been limited to the administration of the deceased estate.
We know that it can't have applied to orders for payment of sums of money made by the courts of equity, that's because section 18 of the Judgments Act already

provided for orders in equity to carry interest --
LADY JUSTICE GLOSTER: So the point I made yesterday was wrong? Yes.
MR DICKER: Now, just in terms of the rationale for the provision, I mentioned a case yesterday called Garrard v Lord Dinorben. Can I just show you a very short passage from that and, indeed, there is only a short passage. It's authorities 1, tab 7. The Vice-Chancellor -- this is at the bottom of the first page -- says:
"The object of the 46th order was to prevent injustice which often followed from the decree of the court preventing the creditor from enforcing his demand at law and thereby delaying the payment of the debt. The order therefore declares the creditor shall be entitled to interest on his debt out of any assets which may remain after satisfying the costs, the debts established and the interest payable by law. The interest on the other debts not carrying interest ...(Reading to the words)... creditor out of the fund which, but for the order, would have gone to the debtor."
We say the basic rationale is essentially the same as that underlying the reference to the Judgment Act rate, in rule 2.88(9). In other words, he's being

prevented from enforcing your judgment, and it's only right, as Mr Justice Chitty said, that you should be put in the same position as if you had been able to do so.
One can trace the order of 1841 through, as I said, order 55, rule 62 and 63, which are referred to by Mr Justice Chitty in Whittingstall v Grover, to order 44, rule 18(1) and (2) which applied from 1967 onwards when order 44, rule 18(1) and (2) --
LORD JUSTICE PATTEN: That was in the last version of the White Book before the CPR came in, wasn't it?
MR DICKER: Yes.
LADY JUSTICE GLOSTER: Why was that dealing with administration of estates?
MR DICKER: Then, CPR 64.2(b) and CPR 40 Practice Direction 14, which I mentioned yesterday, so these rules were essentially continued being incorporated in subsequent Rules of Court through to the CPR. That's why I said yesterday there's a potential inconsistency in the light of the judge's judgment, because if the administration of estate which is solvent, it's governed by the CPR, and following Whittingstall v Grover through it would seem that Bower v Marris would still apply. But if you have an administration of estate which starts off insolvent and is therefore governed by the Insolvency Act, which nevertheless turns out to be

solvent. According to the judgment, Bower v Marris doesn't apply. It seems a slightly strange outcome.

Your Lordships asked, I think, about the meaning of certain words in section 132, the Bankruptcy Act 1825. The relevant phrase was:

"The remainder of the debts due to him."

I think the short explanation of this is, as was suggested yesterday, as follows: section 63 of the Act contained a general vesting provision. It vested all the bankrupt's estate in the assignees, and included all debts due or to become due to the bankrupt and provided that after assignment the bankrupt has no right to recover those debts.

Now, what section 132 essentially did was first to require the assignee to hand over any surplus assets to the bankrupt.

Second, to give back to the bankrupt the power to recover any outstanding debts in the event that everyone had been paid in full. In other words, reversing the assignment which had originally occurred on the bankruptcy under section 63.

LORD JUSTICE BRIGGS: That's what it looked like, but thank you for confirming.

MR DICKER: Then, the phrase in section 132:

"To creditors whose debts are now by law entitled to

carry interest."

This can't have referred to Judgment Act interest for the simple reason that the Judgment Act hadn't yet been introduced.

As Lord Justice Briggs suggested yesterday, it might concern the effect of the Usury Act, because at the time of 1825, the Usury Act of 1660, as amended by the Usury Act of 1713 was still in force. It wasn't repealed until 1854. The Usury Act of 1713 fixed a maximum rate of interest to 5 per cent. So one explanation of these words might be: where the Usury Act applied, you were only entitled to 5 per cent under the Act. That was intended to be covered by the phrase:

"Debts which are now by law entitled to carry interest."

The alternative possibility is, it appears, and we haven't been able to find any sufficiently clear authority to this effect, that there were rights to interest under the law merchant, in certain circumstances.

The final point from yesterday concerned the examples, which we said we agreed we would provide you as to the operation of Bower v Marris and the operation of the compound interest. We have prepared some. They're in the course of being checked. I hope I'll be

able to provide them to you at the short adjournment --

LADY JUSTICE GLOSTER: It would be helpful if they were agreed so we're not having arguments about arithmetic. So if you can just pass --

MR DICKER: We will see if we can achieve that, but they shouldn't be controversial.

LADY JUSTICE GLOSTER: No.

MR DICKER: So those were the only points I had arising from yesterday.

I had, at the end of yesterday, moved on to start dealing with declarations 4 and 5, essentially non-provable claims and the possibility of a claim to interest on statutory interest, which was the second declaration.

Just starting with non-provable claims for interest --

LORD JUSTICE PATTEN: This is 5 at the moment, is it? We're on declaration 5, are we?

MR DICKER: We are. In a sense, it's easier to take that first.

As your Lordships know, this issue arises in the following way: if we're wrong about the construction of 2.88 and it doesn't capture a creditor's full underlying entitlement -- in other words, after payment of interest under 2.88, there is still an unpaid balance of interest

owing -- is the creditor entitled to recover that as a non-provable liability?

We say the answer to this is yes.

The only point, I think, just so you're aware, this declaration effectively raises the same issues as issues 29 and 30. The submissions I will make on this issue effectively cover pretty much everything I need to say in relation to those issues.

LORD JUSTICE BRIGGS: Sorry, which --

MR DICKER: They are point 9 and point 10 on the list of issues. I will mention them briefly when I deal with currency conversion claims and the relationship of those claims to interest because 29 and 30 arise in that connection, but they are essentially just another example of a non-provable claim.

Again, just to emphasise --

LADY JUSTICE GLOSTER: This is on the hypothesis that you've lost?

MR DICKER: Correct.

LADY JUSTICE GLOSTER: On the Bower v Marris point.

MR DICKER: Either on Bower v Marris or on compound interest, or both, or on any other points that might result in creditors receiving less than their full entitlement to interest.

LORD JUSTICE PATTEN: So this is, essentially, all about

whether rule 2.88(7) is an exhaustive code.
MR DICKER: Right, the judge had two points. First of all, he said it's an exclusive code and, secondly, he said it cuts across creditors' existing rights. By that, we understand him to have meant, effectively, what you're given is sufficiently different, that you can tell that what you previously had is effectively extinguished and you no longer have a right to pick it up. Again, I will deal with that a second.
What I was going to do is start by emphasising a point which I made yesterday, which is that this is a secondary argument. We say that there is at least some force in the judge's point that you wouldn't naturally expect Parliament to say you should be entitled to recover one slug of interest under 2.88 but leave another slug to be recovered as a non-provable liability. Not impossible. Certainly not impossible, but we do say the first reaction -- if that's where you get to -- should be to go back and reconsider the construction of 2.88 to see whether or not what has been omitted can in fact be covered on the true construction of 2.88. Because the alternative -- which is the alternative the judge effectively adopted -- is that the unpaid balance effectively falls into a black hole. We say that is a much less likely outcome. Parliament

can't have intended creditors should lose part of their entitlement and the amount of the shortfall should be paid to shareholders.
Just starting, briefly, with a few submissions in relation to non-provable claims. I'm conscious that this will be familiar to at least some of your Lordships. We say it's a fundamental principle, company insolvency law, the claims of creditors have to be satisfied before any distributions could be made to shareholders. That has always been part of the architecture of the statutory scheme, although not, as I said yesterday, something you can find expressly dealt with.
Just showing you the two main relevant statutory provisions. They are sections 107 in a voluntary liquidation, 143 in a compulsory --
LADY JUSTICE GLOSTER: I don't think you need to take us there, do you? We are all pretty familiar with those.
LORD JUSTICE PATTEN: Those of us who have short memories, you might at least remind us what they say.
MR DICKER: It's volume 4, tab 184 and 184A. 184 is in relation to that voluntary winding up. Section 107:
"Subject to the provisions of this Act as to preferential payments the company's property and voluntary winding up shall, on the winding up, be

applied in satisfaction of the company's liabilities pari passu, and subject to that application shall, unless the Articles otherwise provide, be distributed among the members according to their rights and interest in the company."
Statutory provision talks about pari passu distribution and talks about, subject to that, the assets being distributed amongst the members. There's no reference to non-provable claims.
Similarly, for compulsory liquidations, in the next tab, section 143, although slightly more ambiguously, 143(1):
"The functions of the liquidator of a company that is being wound up by the court are to secure the assets of the company are got in, realised and distributed to company's creditors and if there is a surplus to the persons entitled to it."
Again, no express reference to unprovable claims, where they rank, or when or how they're paid.
The way in which the legislation works, as interpreted by the courts, was recently summarised by Lord Neuberger in Re Nortel. Can I show you the relevant passages in that. It's bundle 3, tab 96. The relevant paragraph is paragraph 39.
LADY JUSTICE GLOSTER: I think we're all there.

MR DICKER: Paragraph 39, Lord Neuberger starts by summarising, setting out the relevant provisions. Then, at the top of page 231, says:
"The effect of these as interpreted and extended by the courts is the order of priority for payment out of the company's assets is in summary terms as follows ..."
Obviously, we are primarily concerned with categories 5, 6 and 7:
"Unsecured proof of debt, statutory interest and non-provable liabilities."
Just before we move away from Nortel, paragraph 54, just identified the issue in that case. The detail doesn't matter. Essentially, it concerned how a financial support directive under the Pensions Act ranked. Lord Neuberger says, line 4:
"The courts below both held a potential liability constitutes an expense of the administration falling within category 2. So it took priority over the normal run of unsecured creditors, even over the threshold of creditors. Four possibilities have been canvassed before us. The first is: the courts below were right. The second is: the potential liabilities and ordinary provable unsecured debt ranking pari passu with other unsecured debts falling within category 5. The third possibility is that it is not a provable debt within

13.12 and, therefore, it falls within category 7."
We emphasise the word "therefore" simply because that reflects the fact that if a debt is not either in whole or in part provable, it is therefore a non-provable liability.
Now, it's easiest to see this if one recalls how the concept -- the categories of provable claims, and non-provable liabilities changed over the years. Because, when bankruptcy started, the category of provable claims was very narrow indeed. Essentially, only liquidated debts were provable. Everything else was a non-provable claim. So when Lord Hardwicke in Bromley v Goodere said that you pay off the proved debts, he was, at that stage, talking about only liquidated debts. When he says that every other liability had to be paid before the surplus was returned to the bankrupt, in that case ten years later, however long it was, he was talking about further liabilities which a creditor had a right to against the bankrupt, as at the date the surplus was retained. Those liabilities could have been considerably more expensive than any of the claims which could have been proved.
Proof in respect certain types of contingent claims was increasingly permitted by various Acts between 1745 and 1869. I don't think I need to give you the details.

There's a short summary of the process by Mr Justice David Richards in T&N. Just for your reference it is authorities 2, tab 74, paragraphs 76 to 85.
Non-provable claims remained relevant by 1986 and, indeed, afterwards. One tends perhaps now to forget that, at the time of the 1986 Act, unliquidated claims for damages in tort were still not provable. That only changed with the introduction of the 1986 Act and, indeed, had to be amended further in the light of the judgment of Mr Justice David Richards in T&N, I think in about 2001. So categories of non-provable claims continues to exist. It continues to exist, indeed, past 1986. You can see from Lord Neuberger's judgment, in Nortel, certain types of statutory liabilities, for example, which only arise on the basis of Lord Neuberger's test after the date of administration, will be non-provable liabilities. As he said in his judgment, the category may have narrowed, and the category may have become less visible over the years. It's nevertheless one that exists. It is essentially the residue, any sum to which a creditor was entitled and which he hasn't received through the process of proof and dividends on his proof.
That's connected to this: the process of liquidation

has been described as a process, essentially, of execution, collective process of execution. In a case called White v Eckhardt, Lord Hoffmann explained that given that it is only a process of collective execution, claims are discharged only to the extent that they are paid out of dividends. So, in a sense, there's no surprise in the idea of a non-provable claim. If the process of liquidation is just a process of collective execution, which results in dividends being paid to creditors, their underlying claims have only been repaid if and to extent they received dividends. Anything less remains a claim which they have against the debtor.
LORD JUSTICE PATTEN: I mean, it's not just a question of what is provable and unprovable by reference to the categories of debts you can admit to proof at the time of -- or at least by reference to the time of liquidation, is it? Because the sort of liabilities we're talking about here -- whether it be interest or, for example, currency conversion claims -- can never be anticipated at the time of liquidation because in large part they depend on what dividends are going to be available and when they're paid. So there are always going to be -- it maybe right that they are essentially contractual liabilities insofar as you are referring them back to the underlying indebtedness in the

contract, but they are necessarily going to be liabilities, and are rolling forward and coming into existence post-liquidation, post administration, depending on how the administration is actually carried out.
MR DICKER: That's absolutely right. Put in a slightly different way: there are essentially two reasons why a claim may be a non-provable liability. The first is that it simply arises for the first time, in any sense, after the date of the administration order. One could take a post-administration tort claim, for example, RR Realisations, or the example given in T&N of an aircraft engine being manufactured. The plane crashes sometime after the administration order has been made and personal injuries result. In no sense was that a claim that existed, contingently or otherwise, as at the date of the administration order. That is a non-provable liability.
Your Lordship is absolutely right. There is another category of non-provable liabilities which arise for a slightly different reason. Currency conversion claims and post-insolvency interest are the two classic examples of that. They arise because to distribute the assets pari passu among the creditors, you have to have a cut-off date. The necessary consequence of having

a cut-off date, the courts held, is that currency conversion claimants are provable but are recoverable in the event of a surplus. Post-insolvency interest isn't provable but, again, is recoverable in the event of a surplus.

One can see how this operated prior to 1986 in a liquidation, because post-insolvency interest in a liquidation before 1986 was simply recoverable as a non-provable liability. There was no specific statutory provision dealing with it, but the courts starting in Humber Ironworks said.

"Potentially, the cut-off date means you can't prove a post-insolvency interest but, nevertheless, in event of a surplus, you are entitled to be paid it before any distributions are made to shareholders.

LADY JUSTICE GLOSTER: But the definition of what is a provable debt doesn't, you might argue, necessarily predicate that there is a variation of the underlying liability.

MR DICKER: That is precisely what Lord Hoffmann says in White v Eckhardt and that was the basis of this court's judgment in Waterfall 1. Essentially, that if one of the grounds for the conclusion in that judgment was that if liquidation is simply a collective process of enforcement, and creditors' claims are only discharged

to the extent that they have been paid, it necessarily follows that if when the creditor receives his sterling dividends and converts them into his foreign currency and finds there is a shortfall, he has a non-provable claim for the difference.

The point, at this stage, is simply that non-provable liabilities are simply what is left after provable liabilities have been admitted and paid.

Against that background, the judge gave --

LORD JUSTICE BRIGGS: Is it right to say that now virtually nothing that is accrued before the cut-off date is non-provable. I know it's dangerous to say, "Never".

MR DICKER: There are certain exceptions, I think in 12.3 of the rules. Certain things, I think, are specific to that date.

LORD JUSTICE BRIGGS: Yes, but that's because there's --

MR DICKER: As a general rule, your Lordship is absolutely right. If it is approved prior the administration order, it will be provable. It will also be provable if it's a claim or liability arising out of an obligation incurred before the administration order. The problem is when neither of those are satisfied, one can help with the Nortel issue.

LORD JUSTICE BRIGGS: Yes.

MR DICKER: Certainly, if one looks Lord Neuberger's test

for which statutory obligations are provable -- I think it's paragraph 77 of his judgment -- one can well imagine statutory liabilities which don't satisfy that test and are therefore non-provable liabilities within the scope of his judgment.

The judge, against this background, made two points as to why rule 2.88 did not permit non-provable claims. The first, as I said, is: it's an exclusive code.

The second is: the rights that you are given cut across your underlying rights.

Dealing with each of those, so far as the exclusive code point is concerned, rule 2.88(7) simply says:

"The surplus is to be used in paying statutory interest before it is applied 'for any other purpose'".

LORD JUSTICE PATTEN: I'm sorry, Mr Dicker, I was just thinking about what you've just been saying. Are you in his judgment now?

MR DICKER: No.

LORD JUSTICE PATTEN: Sorry, I thought you'd referred us to --

MR DICKER: The relevant paragraphs of the judgment, where he deals with this, are 155 to 167.

LADY JUSTICE GLOSTER: Where does he make the two points?

MR DICKER: You can see, 160, there is a reference to Wentworth's submission:

"Rights of creditors are exhaustively stated in rule 2.88(7) to (9)."

And, in 162, reference to Wentworth's submissions:

"The regime introduced by rule 2.88 cuts across such contractual or other rights as creditors would otherwise have had."

And reasons given as to how they cut across.

LADY JUSTICE GLOSTER: Mr Zacaroli will explain all this, but "cut across" means actually vary or discharge, doesn't it?

MR DICKER: Yes, that must be the logical consequence of his judgment. If you don't have a non-provable claim for the balance, that can only be because 2.88 has extinguished your underlying rights and given you rights to interest under 2.88.

The two points are obviously connected. Just dealing with each, first, the bold proposition that 2.88 is an exclusive code. We say, if one looks at the wording of rule 2.88(7), it simply says the surplus must be used to pay interest before it's used for any other purpose. There's no reason why any other purpose can't include non-provable liabilities. Indeed, it plainly does include non-provable liabilities because otherwise paragraph 3 would cease to exist. So the only question is: is it only remaining interest within that reserved

category of non-provable liabilities?
There's nothing, we say, in 2.88, which expressly extinguishes a claim for balance of any interest which the creditor still owes. It doesn't say the existing underlying rights to interest are extinguished. There's no wording, in 2.88, which we say could have that effect. There's nothing else in the statutory scheme which has that effect.
The consequence is that if that's right, then we say the normal position obtains any unpaid balances are non-provable liability.
The judge's response to that, in paragraph 164, was to say:
"If the SCG and York were right, the effect of the legislation is to prescribe one regime for the payment of interest as a first charge out of the surplus remaining after the payment of proved debts in full, leaving without any explicit recognition the possibility of the payment of further post-insolvency interest as a non-provable debt out of the surplus remaining after the satisfaction creditors' rights to statutory interest. I do not think that rule 2.88 can be read in this way."
So one of the points the judge was making was if there is this category of non-provable interest, there's

no express recognition of that in rule 2.88. We say that point doesn't take one very far because there's no express recognition of non-provable liabilities anywhere in the Act at all. So it's not such a surprising point if there's no express recognition of them as well, in rule 2.88.

LORD JUSTICE PATTEN: How does the judge's reasoning, on this point, tie in with his view about currency conversion claims?

MR DICKER: Part of the basis on which he held currency conversion claims existed as non-provable liabilities is, if one looks at the rules for converting currency conversions claims into sterling, those rules say:
"For the purposes of proof a creditor's claim is converted into sterling."
He said that means for the purposes of proof and only for the purposes of proof.

LORD JUSTICE PATTEN: So they leave the Humber Ironworks doctrine -- if that's the right way of describing it -- intact.

MR DICKER: Yes. The distinction that results from his two judgments is a consequence of his construction of the two rules.

LORD JUSTICE PATTEN: Yes.

MR DICKER: Essentially, foreign currency creditors continue

to have an unprovable liability because the rule doesn't exclude it.
Whereas those with a claim to interest, don't have a claim for any unpaid balance of interest because, on his construction, rule 2.88 does extinguish that claim.

LORD JUSTICE BRIGGS: The difference being it's interest on a provable debt.

MR DICKER: Yes, although currency conversion claims are the unpaid balance, one may say, of a provable debt. It becomes a very fine distinction.
Perhaps a more substantive point would be if the legislature intended a creditor with a foreign currency claim to be entitled to recover the balance of his full entitlement, why wouldn't the legislature equally concerned to ensure that a creditor should recover the full amount of interest that he was owed. One comes back to the overarching nature of this regime, which is, at it's most fundamental, creditors first, members last. That's not the outcome which the judge has ended up with.

LORD JUSTICE PATTEN: In terms of the purpose or policy, you say the two positions are inconsistent if the judge's construction is right.

MR DICKER: In policy terms, yes. It's very difficult to see what the justification for the two different

approaches would be.
When the judge talks about 2.88 being an exclusive code, we say it's helpful to stand back and think about the rules in relation to proof. Because if you focus on the rules in relation to proof, they say you can only prove for foreign currency claim converted into sterling as at the date of administration. That's all you can prove for.
They also say you can only prove for interest which has accrued up to the date of the administration.
Now, on the judge's approach, why don't the rules of proof operate as an exclusive code. They say you can only prove for this. They don't mention any residue but, nevertheless, it is consistently held that currency conversion claims post-insolvency interest are recoverable as non-provable liabilities. If the rules of proof are not an exclusive code, why is rule 2.88 an exclusive code?
So we say there's also an inconsistency there.
I think, as we understand it, one of the judge's answers was: well, if you look at 2.88, the rights you are given cut across your underlying rights.
You can really see we understand his reasoning to have been that it really only makes sense, in looking at what you are given under 2.88, if what Parliament was

intending was, essentially: forget about your underlying rights, you will have this new and different package of rights.

In relation to that, the judge referred to four submissions made by my learned friend on behalf of Wentworth. He set those out in paragraph 162 of his judgment. Just dealing with each of these:

"Mr Zacaroli correctly submits the regime introduced by rule 2.88 and equivalent provisions for liquidation and bankruptcy cut across such contractual or other rights as creditors would otherwise have had to the payment of interest."

Then, four points:

"First, interest is payable from the surplus after the payment of all proved debts to all creditors whether or not their debts were otherwise interest-bearing."

Now, that's correct, but we say the rationale for this is that the moratorium prevents creditors from obtaining a judgment. So the rules say that in event of a surplus they should be treated as if they had a judgment.

We would say that's not cutting across underlying rights, that's better described as reflecting underlying rights.

The second point he makes is in the case of interest

bearing debts where the contractual rate was less than judgment rate:

"Interest is payable at a rate higher than the rate to which they are otherwise entitled."

So the point here is: well, if you have a contractual rate of 2 per cent, you nevertheless have a right to Judgment Act rate interest. But, again, we say: so what? You are treated as if you had reduced your claim to a judgment and you are entitled to Judgment Act rate on that judgment.

The third point he makes is:

"Interest is payable on a principal sum which comprises both the capital amount of the interest and any interest accrued up to the date of administration."

Now, again, in what sense is that cutting across creditors' existing rights? If you imagine a creditor who had obtained a judgment, as at the date of administration, that judgment would be for principal and interest accrued to that date, and judgment of that interest would then run on that combined sum. So, again, nothing we say cutting across creditors' underlying rights.

Fourthly, he says:

"Judgment rate interest is payable on foreign currency claims converted into sterling, although if

a judgment were entered for the foreign currency debt, interest would be awarded under section 44 of the Administration of Justice Act 1970, such rate as the court thought fit, which is likely to be at a commercial rate rather than judgment rate."

Now, that's right. We say irrelevant here. Because the relevant claim is converted into sterling and, for the purposes of proof, having converted it into sterling, there is nothing odd at all in saying that the creditor ought to be entitled to interest on that sterling sum at the Judgment Act rate for sterling judgments. So if one stands back and looks at these four points and asks: can you tell from these four points that what Parliament was intending to do was to extinguish your existing underlying rights to interest, and replace them with an entirely new package of rights, essentially in consideration of giving up your old rights? We say: you simply don't get that.

Again, just to remind you, the consequences of excluding a non-provable claim do produce potentially unfair results. Go back to the example I gave of an insolvent company which has claims against its own debtors bearing interest and matching liabilities. On the judge's approach, something is inevitably lost during the period of the insolvency. Sums are received

from debtors. They are not paid to creditors, although creditors are owed a corresponding liability. Instead, they end up providing a windfall for shareholders. There doesn't seem, within the grand scheme of the insolvency regime, any sensible rationale for that at all.

So that's declaration 5.

Moving on to declaration 4 --

LORD JUSTICE PATTEN: I may have asked you this question yesterday, so forgive me if I did: if you are right and the judge was wrong about Bower v Marris applying, is there anything left in this point?

MR DICKER: Yes, if I was right on Bower v Marris but wrong on compound interest.

As you will see from the tables, Bower v Marris on simple interest doesn't give you as much as compound interest calculated in the normal way. If the judge was right in saying, "Compound interest effectively stops compounding once proved debts have been paid in full", then you will still have some creditors, namely those creditors with a right to compound interest who won't have been paid in full.

LORD JUSTICE PATTEN: Yes.

MR DICKER: There may conceivably be other contractual rights which don't fit within the judge's construction

of 2.88. If there were, we say the logic would be they would constitute non-provable liabilities.
LADY JUSTICE GLOSTER: Are you saying that the debtor with contractual compound interest would be better off running that argument than Bower v Marris?
MR DICKER: Yes.
LADY JUSTICE GLOSTER: Right.
MR DICKER: If they're entitled to compound interest contractually, and get it under rule 2.88, in accordance with the underlying right, they don't need Bower v Marris because interest is capitalised, interest accrues on interest. So it doesn't matter whether you notionally appropriate payments to principal or interest. The only reason for being concerned about doing that is to make sure you don't make a payment against a non-interest bearing debt.
LORD JUSTICE PATTEN: But if the right construction of the rule is that it leaves untouched the application of Bower v Marris to the -- his take, to use attribution or appropriation of dividends to interest first as opposed to principal, does it effect, at all, the argument that we're now on?
I understand what the arithmetical consequences are and where there's compound interest, but does it impact, at all, on the argument of construction as to whether or

not 2.88 should be construed in those circumstances as a complete code?
MR DICKER: No. We say the two are essentially separate issues. So, as a matter of analysis, the first question is: what comes within 2.88?
That's a question of construction of 2.88. We say, having done that, whatever construction you've ended up with, is not an exclusive code.
Now, the result is: if there is anything left over, it's a non-provable liability.
LORD JUSTICE BRIGGS: You would get more than you would with another contract, well, that's just the scheme and it's tough on the insolvent.
MR DICKER: To get more than you would under contract, yes, but in the sense of saying to a creditor, "Look you were prevented from getting a judgment, so we'll treat you as if you had a judgment", and --
LORD JUSTICE BRIGGS: You won't get a higher interest -- but, yes, I see. Yes.
MR DICKER: Obviously, the more that 2.88 covers, the less scope there will be for a non-provable liability. If a creditor is only entitled to simple interest, and Bower v Marris applies under rule 2.88, then I think it follows that he won't have a non-provable liability.
LORD JUSTICE PATTEN: Yes.

MR DICKER: But not so if he is entitled to compound interest, unless the judge was also wrong on issue 3.
LADY JUSTICE GLOSTER: Yes.
MR DICKER: Declaration 5 is a slightly different issue. It's a short point, and I can deal with it --
LADY JUSTICE GLOSTER: Sorry, declaration 5? I thought we'd done declaration 5?
MR DICKER: You are quite right, declaration 4.
Declaration 4 is:
"A creditor entitled to statutory interest is not entitled to any further interest or damages, or any other form of compensation in respect of the time taken for statutory interest to be paid."
I will just explain how this issue arises. The commercial problem is on the basis of the judge's approach the amount of statutory interest you will get is effectively fixed when each dividend is paid. So one works out what interest you are entitled to under 2.88, for the period between the date of administration and the date of the relevant dividend in respect of that amount. That's an amount of interest which is then fixed, regardless of when you will eventually receive it. That is all that you will receive.
LADY JUSTICE GLOSTER: This is the point you were making yesterday about however along the administrators take to

pay.
MR DICKER: Yes. So the legislature, we say, having effectively said creditors should be entitled to either the contractual rate of interest, and on the judge's approach, you calculated up to the date of the relevant date, freeze it at that point.
On the Judgment Act rate, again calculated up to the date of the dividend. Frozen at that date, regardless of how long it eventually takes to pay. So the result is creditors are simply not compensated for time taken to distribute the statutory interest.
LORD JUSTICE PATTEN: This still applies, does it, if Bower v Marris operate? That's what I cannot understand. This can't operate in those circumstances, can it, because you are never going to get that problem, are you?
MR DICKER: No. I think the logic must be unless someone more mathematically literate than I am says otherwise, is that if you have a claim for simple interest and you are entitled to appropriate dividends first and payment of interest, then essentially it will continue accruing interest unless and until you are paid, and will be doing so throughout the relevant period.
LADY JUSTICE GLOSTER: You still have a problem about the date of declaration of dividend and the date of payment

in relation to that gap, unless you project forward, and unless the administrators project forward to the actual fixed date of payment. I suppose they can do that.
MR DICKER: That's what we say should happen. So one gets to the stage the liquidator says, "Right, I'm now going to make a payment in respect of interest", that's the date when he needs to make whatever calculation he is going to make. At that stage, he works out --
LADY JUSTICE GLOSTER: Doesn't that happen, anyway, in liquidations or in administrations?
On the assumption Bower v Marris applies, I'm not sure quite what we're picking up here.
MR DICKER: Again, the answer to that may be nothing. But the issue with all of this is: if I'm wrong on previous arguments -- and this is, essentially, a last stage. Assume the judge is right. One gets to a stage where statutory interest is essentially fixed; is there any way of compensating creditors, at least for the period --
LADY JUSTICE GLOSTER: Between date of fixing and date of payment?
MR DICKER: Correct. Our short point in relation to this --
LADY JUSTICE GLOSTER: My point to you, effectively, is: does it arise, because don't administrators or liquidators simply project as to the date of payment and

it all gets calculated down to the foot of that date, as it were?
MR DICKER: They certainly can but, on the judge's approach, the figure that they will come up with on that date is the same figure that they would have come up with if they'd done the --
LADY JUSTICE GLOSTER: Thing on the earlier date?
MR DICKER: On the earlier date.
LADY JUSTICE GLOSTER: Yes.
LORD JUSTICE PATTEN: Sorry, Mr Dicker, I mean, I think I understand how it works arithmetically and if Bower v Marris applies, because I had assumed that Bower v Marris means that they keep having to pay until you get to a point where, on the relevant day, they are paying everything that is due up to that date. So you don't have this problem of a time lag between determination of what's due and its actual payment.
MR DICKER: In practice, that is something which an office holder would no doubt normally do. They would simply make interim distribution in respect of surplus.
LORD JUSTICE PATTEN: Let's forget Bower v Marris for a minute, because I think you've answered that question, but how does 4 relate to 5?
In other words, if you are right on 5, on the arguments we've just been hearing, does 4 fall away,

then?
MR DICKER: I think the answer to that may be: not necessarily.
LORD JUSTICE BRIGGS: It may be a priority because your declaration 5 is one step down the Waterfall from statutory interest.
MR DICKER: There's partly that. I think one has to identify who can have the benefit of the declaration 4 point and who can have the benefit of the declaration 5 point. Declaration 5, non-provable claims, requires you to establish you have an underlying right to interest whether contractual or statutory.
Declaration 4 doesn't because it's essentially concerned with your rights under rule 2.88. That's potentially important as far as 2.88(9) gives you a right to interest at the Judgment Act rate because you can't have a non-provable claim in respect of that right.
LORD JUSTICE PATTEN: If you have no contractual right to interest, then you can't come into 4, can you? Because you haven't the contractual right that you can assert once the end of the statutory process, whatever it may be, is complete.
MR DICKER: It may be that I haven't been clear because the answer to that is: you can. The logic of declaration 4

is to say: forget about underlying rights.
We're just focusing on the right under rule 2.88(7) and (9).
LORD JUSTICE PATTEN: I see. So this is just a question of whether for all persons who would be entitled to statutory interest -- which of course include people who aren't entitled to contractual interest -- this is intended to apply across the board, is it?
You will appreciate the reason for my question is I'd assumed that the administration 5 of your right means that people entitled to contractual interest, the problem can't arise. Because --
MR DICKER: I think in relation to them it can't, assuming that any claim under declaration 4 ranks together with any claim under declaration 5. Declaration 4 is really focusing on people who don't have an underlying right to interest.
LORD JUSTICE PATTEN: Yes. So they'll be the people who get statutory interest.
MR DICKER: At the Judgment Act rate.
LORD JUSTICE PATTEN: And have no other right.
MR DICKER: Their only source for that is 2.88(9).
So far as they are concerned, one calculates statutory interest they are to be paid. On the judge's approach, essentially that's frozen as and when

dividends are paid because the debts then cease to be outstanding. It may take four or five years to distribute that surplus, but there's no compensation. The only question here is: is there any scope for those creditors having an additional right?

LORD JUSTICE BRIGGS: On the assumption that once the debt is paid by the final dividend of 100 per cent, which is the sort of non-Bower v Marris assumption, you say there's a right to interest which can be calculated if it's a judgment debt right at that date, fixed. It may take another five-years for you to get it, you just get interest over that period of delay, which gives you the interest on interest in the form of compound.

MR DICKER: Yes, or another approach, and the way we've outlined it in the written skeleton argument is: if one focuses on rule 2.88(7), where it says:

"Any surplus remaining of after payment of the debts proved shall ... be applied in paying interest on those debts."

One way of construing that, we say, is that you pay debts proved, at that point the statutory scheme requires the surpluses applied in paying interest. In other words, the surplus is due and payable to creditors at that date. It may be that the administrators, as officers of the court, can't distribute it at that point

but it doesn't mean it's not due and payable, simply there's an exercise that they have to go through to work out who gets it and how much.

But if you can construe 2.88(7) in that way, then there is scope for a creditor saying: I was due interest, statutory interest, once proved debts have been paid in full. I haven't been paid it for five years. I have, for example, a Sempra Metals type claim for damages for non-payment of that interest against LBIE in respect of that period.

That's the short point. The point if it works involves construing 2.88(7) as essentially saying: once you've paid proved debts in full, you are meant to distribute the surplus. That's how the scheme works and if for whatever reason you don't, then creditors effectively have a claim for compensation for the delay.

It is a real and practical problem. We have an enormous sum of money, no doubt sitting in accounts or investments earning interest. At the moment, all of that interest will inure for the benefit of the subordinated creditors and the shareholders, not for the creditors.

LADY JUSTICE GLOSTER: We have that point.

LORD JUSTICE PATTEN: But that's not a reason in itself why it should be handed out to all and sundry, is it?

MR DICKER: No, although my clients would regard it as a commercial --

LADY JUSTICE GLOSTER: It's a merits point.

MR DICKER: But, with respect, not in our submission just a merits point.

LADY JUSTICE GLOSTER: No, it's a commercial point.

MR DICKER: Going back to the commercial logic underlying this whole statutory scheme -- creditors first, members last --

LADY JUSTICE GLOSTER: It cuts across that, you would say.

MR DICKER: -- it does come in at an equal level as well. So that's all on declaration 4.

LADY JUSTICE GLOSTER: Can I just raise a point on sub-rule 8. I mean, that cuts across contractual rights doesn't it? In the sense that you could have subordinated debt agreeing contractually that it won't get interest until other people have been paid. It won't --

MR DICKER: One has to be careful about the phrase "cutting across".

LADY JUSTICE GLOSTER: Okay, bearing contractual rights or obligations.

MR DICKER: But that's the issue, when one reads the various rules, whether in relation to proof or interest, are they actually varying the underlying rights or not?

Lord Hoffmann would say in White v Eckhardt, they are not because the whole scheme doesn't do that.

LADY JUSTICE GLOSTER: Just dealing with proof or distribution.

MR DICKER: Or distribution. Essentially, it's overlaying, on top of the underlying rights, a system for dealing with the collection of the assets and their distribution. Both at the stage of proof and also, now, at the stage of interest.

As I said, one could equally look at the rules in relation to proof and say foreign currency claims have to be proved by converting them to sterling. In one sense, that cuts across --

LADY JUSTICE GLOSTER: Yes, but you say only to limited extent.

MR DICKER: -- but it doesn't extinguish it. Similarly in relation to interest. It can't prove --

LORD JUSTICE PATTEN: Can you just help me on this, Mr Dicker. I'm sorry to go back to this, back to the position of the people who don't have contractual right to interest.

In their case, you are compensating them, as I understand it, under the argument under declaration 4 for the time it takes the administrators to provide them with the statutory interest they're entitled to, which

necessarily we have to assume for the argument post-dates the point to which it's calculated.

But the rationale -- if I've understood it correctly -- for giving them statutory interest -- going back to what you were saying earlier today -- is that they're not being compensated for a contractual right, because they don't have it. They are being compensated for being kept out of their ability to enforce the debt by means of getting the judgment and enforcing it.

Now, once that debt is paid by way of a dividend, why isn't it entirely appropriate, then, that the measure of compensation they receive by statutory interest should be limited to that period and not to any subsequent one?

Because, I mean, they are entitled to be compensated for the time it's taken to get their money, so to speak, but once they have their money, and once they get the interest that compensates them for that delay, why should they have some further period of --

MR DICKER: It's similar to the issue in relation to Bower v Marris. The legislature has decided you should get interest at an effective rate of 8 per cent.

LORD JUSTICE PATTEN: Yes.

MR DICKER: Just going back to Bower v Marris, if you apply Bower v Marris in relation to an actual judgment, which

one does absent the county court exception, then they end up receiving both principal and an effective rate of interest at 8 per cent.

On the judge's approach, they don't because, you are quite right, they're repaid principal. But one then has a sum which is 8 per cent as at that date, which, if paid five or ten years later is not an effective rate of interest so far as the creditors are concerned, that's why Bower v Marris applies generally to an actual judgment. That's why our first line of argument is that it should also apply to the reflection of that right in rule 2.88(9), but the same commercial logic drives the argument in relation to declaration 4. It's trying work out a way in which creditors can have interest at the effective intended rate because if you say, "I owe you X but it doesn't matter how long I take to pay you X", then, in a sense, whatever interest rate you specify becomes arbitrary. The one thing you haven't, in commercial terms, achieved is to ensure the creditor receives interest at 10 per cent.

LORD JUSTICE PATTEN: Yes, thank you.

MR DICKER: My next topic --

LADY JUSTICE GLOSTER: Would that be a convenient moment for the shorthand writers break? You are then going on to --

MR DICKER: Issue 7, contingent claims.

LADY JUSTICE GLOSTER: Very well, five minutes.

(11.45 am)

(A short break)

(11.50 am)

LADY JUSTICE GLOSTER: Yes, Mr Dicker.

MR DICKER: The next issue I want to deal with is issue 7.

LADY JUSTICE GLOSTER: Declaration 14.

MR DICKER: Declaration 14. On this issue, Wentworth is the appellant. The SCG and York are respondents, but subject to your Lordships I was going make our --

LADY JUSTICE GLOSTER: That's agreed, isn't it?

MR DICKER: The judge dealt with this in his judgment. For your note, paragraphs 184 to 225.

Again, like all issues, this one is financially significant to those involved. The administrators estimate, I think, is about half a billion turns on it.

There was a similar issue in relation to future debts. I will need to make some submissions in relation to that. That was issue 8. The issue, again in relation to future debts, is what date does interest run from in relation to a future date.

LADY JUSTICE GLOSTER: That's gone, hasn't it?

MR DICKER: That's gone. The judge held --

LADY JUSTICE GLOSTER: Gone in the sense not being appealed

by anybody.

MR DICKER: The judge held that the result was the same, interest on both contingent and future debts ran from the date of the administration.

Now, below, just so you know, the only party to argue to the contrary in relation to future debts was the administrators. They are not appealing this issue. Wentworth, below, conceded that in relation to future debts interest ran from the date of administration. They said that the position was different in relation to contingent debts. There was no appeal in relation to issue 8 in relation to future debts.

LADY JUSTICE GLOSTER: Yes, I see.

MR DICKER: We submit the judge reached the right conclusion on issue 7, essentially for the right reasons. There were three parts to his analysis. The first concerned the nature and effect of the statutory scheme which he dealt with in paragraphs 189 to 203 of the judgment. Just to identify three parts, 189 to 203 -- and I will come back to this -- deal with the nature and effect of the statutory scheme. Then, at 204 to 211, he dealt with the construction of the relevant rules.

The third, primarily in paragraph 212, he dealt with underlying principles of insolvency law. So just making a few submissions in relation to each of those three

stages. The first point the judge made in paragraph 189 is:

"This is an issue of construction of rule 2.88(7) which must be approached in the context of the scheme established by the legislation."

He then made, essentially, three main points so far as contingent debts are concerned. Firstly, to ensure pari passu distribution claims need to be valued by reference to a common date and that date is the date of the administration order. Obviously, if you are going to share out the assets equally, you need a common date for ascertaining and valuing those claims.

LADY JUSTICE GLOSTER: If the contingency comes into existence, you then prove, later down the track, do you, is that still the law?

MR DICKER: A second point is: contingent debts are provable debts within rule 13.12. The mere fact they are contingent doesn't prevent you from proving them. The point --

LADY JUSTICE GLOSTER: You can prove more if the contingency happens, can you?

MR DICKER: Either more or less --

LADY JUSTICE GLOSTER: Yes.

MR DICKER: -- depending on what hindsight indicates. But the first stage is: you need a common date for

ascertaining the claims. The second point is: contingent debts are provable debts.

LADY JUSTICE GLOSTER: And valued at the date of the uniform day.

MR DICKER: Absolutely. To ensure pari passu distribution, they need also to ascertain the value as at that same date. In other words, given the present value.

The third point is: once you have ascertained the value of various provable debts, the scheme requires you to treat them equally so far as dividends and distributions are concerned.

Just to say a little bit more about the nature of the process for estimating contingent claims. As I say, this is essentially concerned with putting a present value on the contingent date as at the date of administration. As the judge held, the estimate under rule 2.81, which is the provision for estimating uncertain claims, may be effected by the duration of the contingent debt. He made this point in paragraph 198, halfway through that paragraph he said:

"Submissions were made as to the extent of which the amount of the estimate is affected by the duration of the contingent debt. It's clear to me that in some cases it must play a part. Take the most obvious example, if the contingent debt cannot fall due for

payment of period, say, five years, the estimate of the liability must include an element of discount for that period. Equally, the estimate of a contingent liability, which may be outstanding over a long period, may include some element of discount."

Contingent debts, at least some contingent debts, can be seen as essentially future debt subject to a contingency.

So, in relation to contingent debts, there really are two parts to the estimation process in relation to such debts. First of all, looking at how likely the contingency is and what discount needs to be given for that.

Secondly, working out what the present value of the debt is if the liability is one which will only effectively arise in future.

LORD JUSTICE BRIGGS: A "whether" question, not a "when" question.

MR DICKER: Yes. The rules deal with future debts in a different way. There's a statutory formula for discounting future debts. We will see in moment, that's not the approach the rules take in relation to contingent debts, for the obvious reason. That rule has to achieve, essentially, two functions. It can't just do it by a mathematical formula.

We say that's plainly what the scheme requires. If authority is needed in relation to that, there are two authorities in the bundle -- I don't think I need take you to them but just to identify them -- that establish that when you are talking about contingent claims in the sense of claims which may only arise in the future, you need to give them a present value. Those cases are, firstly, in Re European Assurance Society. It's authorities volume 1, tab 18, pages 70 to 71. I wonder whether, on reflection, it isn't worth just briefly turning it up if you'll allow me. Volume 1, tab 18. It's a judgment of Lord Westbury.

LADY JUSTICE GLOSTER: In an arbitration, wasn't it?

MR DICKER: It concerns insurance liabilities. Just so you have the passages, the first relevant one is page 70, column 2. It's the passage at the top of the page. If I can pick it up about 15 lines down, there's a sentence in beginning of line beginning:

"These are claims to arise ..."

LORD JUSTICE PATTEN: Yes.

MR DICKER: "These are claims to arise as in the case of annuities from time to time in futuro. In the case of policies there contingent claims arising from a contingent event, namely the death of the person to whom the policy is granted. The legislature has

determined and in all insolvencies the same rule applies, that in course of the administration of the state of an insolvent company, these debts should be valued. They must be valued. You could not withhold, out of the assets of the company, a large sum of money, and keep it invested or in suspense to answer the claims when they arise. You must have a present value put on these future claims and that present value represents the sum for which this claimant, the holder of the claims, will be entitled to rank among the rest of the creditors."

There is a similar passage which starts in the last three lines of that column and runs to the end of the paragraph. It's the last three lines:

"When by 25th rule it is said the value of such debts and claims as made admissible to proof by the 158th section of the said Act shall, so far as it is possible, be estimated according to value thereof at the date of the order to wind up the company. I think that rule was a very correct one, correctly interpreted the meaning of the Act perfectly consistent with principle ..."

The other authority is a judgment of Mr Justice David Richards in a case called MF Global, and I will just give you the reference if you'll allow

here is the proved debt and, in the context of the statutory scheme, that debt is effectively treated as outstanding from the date of the administration order.

One obvious reason why it has, sensibly, to be treated as understanding is you discounted it back to the date of the administration order so it can rank equally with everyone else. To then say it's not treated as outstanding and doesn't accrue interest unless and until --

LADY JUSTICE GLOSTER: It's illogical.

MR DICKER: It would be completely illogical.

LADY JUSTICE GLOSTER: In fact, it's a statutory commutation of the underlying liability.

MR DICKER: Again, the only concern I have about that is: correct, provided you --

LADY JUSTICE GLOSTER: Agree that --

MR DICKER: -- commutation for the purposes of distributions in respect of proof. Obviously, one doesn't want to lose sight of Lord Hoffmann in White v Eckhardt.

LADY JUSTICE GLOSTER: Yes, absolutely.

MR DICKER: The judge said this is entirely consistent with the general image of liquidation. If one thinks about classic exposition in Re Dynamics Corporation of a notional collection and distribution of the assets on a single day.

me to that. It's authorities 3, tab 94. It's paragraph 54. Essentially, the judge says in the context of contingent claims:

"It is essentially a process of putting a present value on possible future events or outcomes."

Having dealt with the statutory context, the judge then turned to deal with the construction of rule 2.88(7) and, as I said, he did that in paragraphs 204 to 211. In 204, he said:

"With these provisions and principles in mind, I turned to the construction of rule 2.88(7). The issue, in short, is whether in providing that interest be paid on those debts in respect of the periods during which they have been [in quotes] 'outstanding' [close quotes] since the company entered administration, the sub-rule is referring to the underlying debts giving rise to the admitted proofs for whether it is referring to the debts as admitted to proof."

Wentworth's argument was that, essentially, if you have a contingent debt, the underlying contingent debt is not outstanding unless and until it becomes due and payable.

The judge's answer to that was essentially to say: well, that may be true in relation to the underlying debts, but what we're really concerned with

LADY JUSTICE GLOSTER: Yes.

MR DICKER: Again, if they're not paid on that single day then, in a sense, they're outstanding from that day. That's the point the judge refers to in paragraph 202. When he is discussing the statutory scheme, he says:

"The principle of insolvency law and realisation of assets, and the distribution of the proceeds among the creditors are treated as notionally taking place simultaneously and the date of the commencement of the liquidation or administration."

So one doesn't just have the discounting back. One also has the statutory scheme which is premised on, essentially, the debts being distributed on that date. If they're not, the logic is creditors should be compensated for the delay.

LADY JUSTICE GLOSTER: If the insured event occurs, I'm right that the creditor can come back and say: although I've been paid out on basis of the contingent valued claim, the fire's happened or whatever it is and I want more.

Was that MacFarland's(?) case or is that gone under the ADC(?).

MR DICKER: Under rule 2.81, you are entitled to review a proof. If one goes to volume 4 of the authorities, tab 171.

LADY JUSTICE GLOSTER: Yes, I see, 281.
MR DICKER: 281(1).
LADY JUSTICE GLOSTER: Changes in circumstances, yes.
MR DICKER: "You may revise any estimate previously made if you think fit by reference to any change in circumstances or to information becoming available to him. He should inform the creditor as to his estimate or any revision of it."
That can go right up to --
LADY JUSTICE GLOSTER: The date of final distribution.
MR DICKER: And indeed beyond. There's a decision of Mr Justice Hoffmann in a case called Re Stanhope, where you actually had a company which went through the final distribution, was dissolved. Subsequently a claim essentially came -- a contingent claim became realised. Further assets were identified. The creditor applied to restore the company to the register, essentially to get the liquidation back on full -- revised his proof at that stage and was entitled to payment. So, yes, you can review --
LADY JUSTICE GLOSTER: So the contract continues in existence. I'm wrong to say it's a commutation because it's not in any sense a contractual commutation.
MR DICKER: It's analogous to a commutation, in the sense that insofar as the distribution of the assets are

concerned it has the same effect. It's just that it goes on at a level which doesn't effect the underlying claim.
So we say the logic of the statutory scheme is that all debts are treated as due and payable from the date of the administration order. But we also say we don't actually need to go that far. One's concerned with the word "outstanding", which doesn't necessarily mean "due and payable".
We refer to one authority in this respect, it's Re Crystal Palace Football Club. Just to show you the relevant passage in that. It's authorities 3, tab 75, paragraph 52. It's obviously in the context that simply illustrates how the word "outstanding" can be construed. It was said, in 52:
"Except this submission, like any other clause in contract 2.29, must be construed in its context ...(Reading to the words)... includes unresolved, pending and especially the debt unsettled."
So if one asks, essentially: was this a pending unsettled debt? That's the right meaning of the phrase "outstanding", if the answer is, "Of course it was".
The judge dealt, as I said, with principal in paragraph 212. He says:
"For the reasons given earlier, the conclusion of

that interest is payable from the commencement of the administration on the debts proved is entirely consistent with the underlying principles of insolvency law."
I think I've dealt with this. The short point is: if you discount everyone back to the date of administration, you are not treating everyone equally if you give everyone else, but not contingent creditors, interest for the subsequent period.
One other aspect of the judge's reasoning was that, as I said, he held the same conclusion applies in relation to future debts. It's worth seeing how the rules operate, therefore, in relation to future debts. You'll find the relevant rule in the authorities volume 4, tab 178.
The way it works in relation to future debts is different from the way it works in relation to contingent debts. In relation to a future debt, you prove for the full face value amount of the debt, although it's only a future debt.
LADY JUSTICE GLOSTER: Then you discount it.
MR DICKER: Then, for the purposes of dividends, it's discounted under 2.105. It's worth noting two aspects of the rule. 2.105(2) says:
"For the purposes of dividend, the amount of the

creditor's admitted proof for a distribution previously made to him, the amount remaining outstanding in respect of his admitted proof shall be reduced by applying the following formula ..."
So, 2.105, in the context of future debts, treats the future debt as effectively outstanding from the date of the administration order. So, in relation to future debts, one of the points the judge made was there's effectively on express recognition of the effect of the statutory scheme.
You can see a similar recognition of that in that the formula -- for some reason not available on this print -- but the discounting formula of X divided by 1.05 to the power of N is defined such that, in 2.105(2)(b):
"N is the period beginning with the relevant date and ending with the date on which the payment of the creditor's debt would otherwise be due."
So, again, the judge said that's an indication that outside of this regime, the debt would otherwise have been due on the date that it would have matured. But for the purposes of this statutory scheme, it is effectively being treated as outstanding from the date of the administration order.
LORD JUSTICE BRIGGS: That's for the purpose of dividend and

for no other purpose.
MR DICKER: Correct.
Now, so far as future debts are concerned, in concluding that interest ran from the date of the administration order, the judge made two further points. The first point was same one I've already made in relation to contingent debts. If you discount back for the purposes of dividend, the logic is you ought to be paying interest from the date of the administration order, otherwise you have the same commercial issue. You are paying present value as at the date of administration, but that sum is in fact only being paid later, you need to compensate creditors for the intervening period.
Take an example --
LORD JUSTICE BRIGGS: The interest is payable on the full proof of debt, not the discounted rate?
MR DICKER: For the purposes of the dividend, you discount the debt --
LORD JUSTICE BRIGGS: The dividend but not the interest. Interest isn't paid on dividend, it's paid on debt. Or do I have that wrong?
MR DICKER: I'm not sure that deals with this point. The logic is that take a case where you have a future debt of -- make it easier -- a hundred pounds, payable in

year's time. You discount it back by the statutory formula to the date of administration so that it ranks equally with everyone else. Now assume that you only make a dividend payment after a year. At that stage, the creditor is owed a hundred pounds, and would have expected to receive a hundred pounds, in fact --
LORD JUSTICE BRIGGS: He only received the discounted amount.
MR DICKER: -- only received the discounted amount, so needs to be compensated for that --
LORD JUSTICE BRIGGS: He doesn't get interest on the discounted amount, does he? He gets interest on that which is proven, or is that wrong? How do you calculate interest on a future debt? You said the judge says it's payable from the cut-off date, but you haven't said by reference to what amount.
MR DICKER: I don't want to give your Lordship the wrong answer, so can I just think about that? It's not, I think, an issue that --
LORD JUSTICE BRIGGS: I know there's no pleading about it, but I was just going --
MR DICKER: I'm not sure it's an issue --
LORD JUSTICE BRIGGS: -- ask --
MR DICKER: I'm not even sure it's an issue the parties have necessarily focused on.

LADY JUSTICE GLOSTER: It would be illogical, wouldn't it, to have the interest paid on the full amount of the debt if the debt had not accrued due for payment?
MR DICKER: There are a number of oddities about -- just take it in stages.
LADY JUSTICE GLOSTER: It depends at what stage.
MR DICKER: One also needs to identify quite what the underlying right is because you could have a future debt that doesn't carry interest. But more often than not, future debts -- in the sense of loans repayable on maturity -- will carry interest in the intervening period. So one also needs to take that into account.
One of the points the judge makes is if you imagine a future debt, a loan repayable after a year, carrying there in the meantime, if you discount the debt for the purposes of dividend back to the date of administration, so that the sum the creditor receives when he receives a dividend is only the discounted amount, if you don't compensate him at that stage, there could be a double loss. Both he's not being compensated for the fact he's receiving, at that stage, a discounted amount. Secondly, he's not being compensated for the fact that under the underlying right he should have earned interest over --
LORD JUSTICE BRIGGS: He doesn't suffer a loss if he

received the discounted amount on the (Inaudible) date. That's the present value of the future debt.
MR DICKER: Well, he does suffer a loss if he receives the discounted amount later.
LORD JUSTICE BRIGGS: Later. So he should get interest.
My question is: how do you get paying interest on the discounted amount within 2.88(7) rather than the proved amount of the future debt, bearing in mind that the discounting formula is said to apply to payment of dividends and for no other purpose.
MR DICKER: That's the point I said I'd need to come back on.
LADY JUSTICE GLOSTER: Don't you just calculate it by residence to the specific circumstances?
So if your debt becomes due, you work out what the interest would have been from that date, you take it out of the credit you have received in the meantime.
MR DICKER: I don't want to give you an answer without having thought about it.
LADY JUSTICE GLOSTER: Anyway, why does it matter? Because we're not dealing with future debts, and why does the logic of this very interesting and detailed argument impact on the issue which we do have to decide?
MR DICKER: I'm not sure it does.
LADY JUSTICE GLOSTER: Shall we get on then, I'm just a bit

concerned, looking at the time, that we are not going the get through however more issues you have, particularly when you can pick up on some of this in reply.

I think you will need to come back, just because we are worried (Inaudible) think it might matter. I think we need to be told it doesn't matter, what the answer is to the question my Lord and I have asked.

MR DICKER: I will come back to it if I need to on that basis.

It's worth just adding this: the rules in relation to discounting future debts have a slightly checkered history. Lord Millett, in a case called Park Air Services, referred in disparaging terms to an earlier attempt to express the discounting rule. There was a long discussion, before the judge below, as to whether or not the present rule makes complete commercial sense. But, as I say, I'm not sure it's necessary to get into that, at this stage.

There is one other aspect of both contingent debts and future debts that I think I do need to deal with.

Sorry, just before I move on to that point, one further point. As I said, Wentworth accepts that, in relation to future debts, those are treated for whatever reason as outstanding from the date of the

administration. Not so in relation to contingent debts.

There is an issue, we say, as to precisely what is within their exception because, on their case, every provable debt, including future debts, are outstanding from the date of administration. The only category of debts which are not are what they call contingent debts.

Now, it's not entirely clear to us what is within that exception. There are a variety of reasons why a debt may be contingent. I mean, it may simply be contingent as to amount, or it may be contingent in the sense that it's repayable either after one year, or after five years.

Now, take the latter case, it would be very odd, we say, if a debt which was payable after five years, was treated as outstanding from date of administration, and the debt was that payable after one year was also treated as outstanding from date of administration, but a debt which might either be payable after one or five years, was not, because in some way it was contingent.

There's one other aspect of this that I do need to deal with, and that's where the debt has essentially become due and payable before a dividend is paid. So far I've been dealing with debts which have not matured, so future debts, or where the contingency hasn't

occurred by the time the dividend is payable. What happens if that's not the case?

This is simply the basis of Wentworth's argument on the merits. What they essentially say is: look, the way the rules work is that you only discount back to the date of administration if the debt is still contingent or has not yet matured contingent on future debts by the time the dividend is declared.

In relation to future debts, it's clear that isn't how it works if the future debt has matured by the date of the administration. At that stage, you've proved for the full amount, rule 2.105 doesn't operate because it only applies to a debt of which payment is not due at the date of declaration of the dividend. So where the future debt has matured before a dividend is declared there no discounting. So Wentworth says it would be unfair if such a debt carried interest from the date of the administration because you are not discounting it back, even for the purposes of dividends, but for applying interest to it.

That unfairness, firstly, doesn't exist if you are talking about a debt which itself carries interest. So if one thinks about the classic case of a loan carrying interest in the meantime, it may be that you don't discount it back. The creditor is nevertheless entitled

to interest for the corresponding period. There's nothing unfair, we say. It may have matured. He ought to be able to have interest for the relevant period.

Now, the way the judge approached this was essentially to say that: I know what happens in relation to matured future debts because rule 2.105 is clear.

LADY JUSTICE GLOSTER: Yes.

MR DICKER: Whatever happens to future debts must sensibly also have been intended to happen to contingent debts. If the legislator didn't think this approach was unfair in relation to future debts, more logically he would have thought it unfair in relation to contingent debts.

Essentially, he said the same answer must apply in relation to contingent debts as applies in relation to future debts for three reasons. First of all, he said that --

LADY JUSTICE GLOSTER: Paragraph?

MR DICKER: It's 219 to 221:

"Firstly, I do not consider there is any authority to do so in the legislation."

So there's no justification for discounting back a crystallised contingent claim, under 2.81, he said, because 2.81 only applies to a claim of an uncertain amount. Once the contingency has occurred, the amount is no longer uncertain.

So, in a sense, just like rule 2.105 only applies to debts which have not yet matured, similarly, rule 2.81, which is the estimating provision, only applies to contingencies which have not yet occurred. So you can't discount back in that situation, just as you can't in relation to future debts because 2.81 doesn't permit it.

The second point he made, in 220, was:

"If the legislation envisaged that in these circumstances a discount should nonetheless be applied, express provision would be made as in relation to unmatured future debts by rule 2.105."

Thirdly, he said:

"It would be extraordinary if matured contingent debts were the subject of a discount but, as is clearly the case by reason of the terms of rule 2.105, matured future debts are not subjected to any such discount."

It's also worth noting, in 222, he said that in his view this was consistent with observations of Lord Hoffmann in Stein v Blake in the passage he quotes, at 222.

So we're dealing with a situation in which future debt has matured, contingent debt has matured. The judge says, under 2.105, nevertheless a regime which is interest being paid. He said, essentially, the same must be equally true in relation to contingent debts.

LORD JUSTICE BRIGGS: You must record in relation to future debts, the interest, if it had matured by the time of dividend, the interest would be paid on the full amount of the future debt right back from the date of the administration.

MR DICKER: Yes. I think that must be right.

Now, we had an --

LORD JUSTICE BRIGGS: Even though it wasn't due then.

MR DICKER: We had an alternative submission in relation to contingent debts which the judge dealt with, in 223 and 224. The alternative submission was, essentially: look, if there is an issue in relation to crystallised contingent claims, the solution is -- and our submission was -- that they are also discounted back to the date of the administration. That's the way of solving this particular issue.

We referred to various authorities which the judge referred to, in 223 and 224, which we suggested indicated that was a possible route.

The one thing which we say cannot be the solution is that suggested by Wentworth because Wentworth's case, essentially, is: look at the position in relation to a crystallised contingent claim. If you pay interest on that for the full amount, for a period before it had otherwise crystallised, you're essentially over

compensating them.

But its solution is essentially to say: therefore you don't pay interest on any contingent debt.

So if one then moves to contingent debts, which are still contingent by the date of dividend, which are discounted back to the date of administration, Wentworth's case is: well, they are discounted back to the date of administration. When the dividend is eventually paid, it will only be the discounted amount which you receive but you are not entitled to interest as compensation for that delay.

So although everyone's claims had been ascertained and valued by reference to the same date, although they are meant to be treated equally, they're not.

We say that can't be the right answer in relation to contingent claims. If there is an issue in relation to crystallised contingent claims, the sensible solution, and a perfectly permissible one, is to say: 2.88(1) still permits you to discount back to the date of administration and to pay interest for that period.

LADY JUSTICE GLOSTER: So, looking at declaration 14, the declaration doesn't cater for the difference between a contingent debt that hasn't crystallised as at the date of payment, and one that has. Albeit that it is not crystallised as at the date of administration.

MR DICKER: That's correct. That's because the judge said the position was the same in relation to each.

Essentially, the judge said all contingent claims are treated as outstanding from date of administration. Wentworth's case is none of them are.

LADY JUSTICE GLOSTER: Do you get interest at the amount of proof, even though there's been a subsequent crystallisation, or do you get it as from a particular date on the amount of crystallisation?

MR DICKER: If the contingent claim has not yet crystallised.

LADY JUSTICE GLOSTER: That's easy, if it's not crystallised --

MR DICKER: You get it on the amount of the proof. If it has crystallised --

LADY JUSTICE GLOSTER: In the intervening period?

MR DICKER: -- you get it on -- assuming the creditor has applied to revise its proof -- you get it on the crystallised amount. The question that then arises is, well --

LADY JUSTICE GLOSTER: What about the earlier period?

MR DICKER: What is that crystallised amount, in a sense. If you have a contingent debt, say a loan repayable in five years unless some remote contingency occurs, and it turns out the remote contingency doesn't occur, are you

essentially able, at that stage, to say, "Well, I'll treat it effectively as a future debt and I will discount it back"?

Now, the judge's approach, just so we're clear, is: no, that wouldn't be right because that's not how future debts themselves are treated; the same should apply to contingent debts.

So his logic is the legislature has effectively decided you don't discount back.

LORD JUSTICE BRIGGS: He says it may not be perfect but it works.

MR DICKER: One only has to go through the history of the rules in relation to discounting future debts to realise how difficult those drafting them have found it over the years.

As we say, in a sense, our submissions are, essentially, that it cannot possibly be right that interest isn't paid from the date of administration on any contingent --

LADY JUSTICE GLOSTER: No, I can see that. It's a slightly more refined situation where there's a crystallisation, maybe not just, as it were, because of a future date, but because of a future event. So like an insurance claim, rather than simply a loan claim, as an example --

LORD JUSTICE BRIGGS: So much depends on which kind of debt.

If this was payment on a life policy, say somebody was aged 20 and took out a life insurance policy on a very good medical report, and the liquidation cut-off date is when he's aged 21, and he is run over by car two years later. Apparently, not only does he get the full amount, his executors can revise their proof to claim for the full amount, but also he gets interest on it right back to the date of the administration, which seems to be illogical because life policy pay-outs don't carry interest until you die. Whereas if it's a loan, you just come up with a completely different answer in your head, and yet the scheme seemed to apply to all kinds of debts regardless of what the underlying debt is.

MR DICKER: Part of the difficulty is there are a multiplicity of contingent debt, whether it's contingent only to amount, as to date some combination of the two. I mean, there are essentially three points. First of all, some contingent debts are undoubtedly discounted back to date of administration, and to treat them equally with everyone else, of course they're entitled to receive interest.

Our second point is, along with the judge, it's clear the rules in relation to future debts don't provide that where the future debt has matured by the

time the dividend is declared. Our second point is we aligned ourselves with the judge when he says:

"Statutory regime appears to indicate, for whatever reason, the result is the same for contingent debts."

Our third point is if that's wrong, the way of resolving this conundrum must be to discount even crystallised contingent claims back to the date of administration, so we can go back to a regime where everyone valued and ascertained at the same date, treated equally and they should receive interest.

The one thing that shouldn't happen is you get some people who are discounted, they later are not compensated in the meantime.

LADY JUSTICE GLOSTER: Yes. Okay. Well, you are, as it were, replying to the (Inaudible).

MR DICKER: The next issue is declaration 17, issue 10, which is the offset of statutory interest and currency conversion claims. This issue was concerned with the relationship between statutory interest under 2.88, on the one hand, and a non-provable currency claim, on the other. Again, Wentworth is the appellant on this issue.

The essential issue is whether and, if so, how the calculation of a currency conversion claim should take into account statutory interest paid to the relevant creditor by the joint administrators.

So one has the various priority levels in the statutory Waterfall, we have provable debts, statutory interest and non-provable liabilities. This is essentially concerned with the second and third of those levels. When you come to the third level, foreign currency creditor says, "I have a foreign currency claim", does he have to give credit for the statutory interest that he has received? The judge held no. We say he was right.

Now, it's important to note, declaration 17 is concerned solely with claims to principal and not with non-provable claims to interest. So declaration 17 expressly excludes any non-provable claim to interest.

LADY JUSTICE GLOSTER: So you say there's no double-counting?

MR DICKER: Yes, and the easiest way to illustrate it is take two situations, compare the effect of the statutory scheme on two claims to principal. One denominated in sterling, and one denominated in a foreign currency, neither of which carries any underlying right to interest. So creditor A is owed a sterling sum, creditor B is owned a foreign currency claim, neither of them have any underlying right to interest. How does the statutory scheme work?

Well, in relation to the sterling creditor, he

receives dividends on his proved debt, amounting to a hundred pence in the pound, thereby satisfying his underlying claim in full because he's been paid all that he's owed. In the event of a surplus, he is also entitled to interest under rule 2.88 at the Judgment Act rate. Regardless of the fact he has no underlying right to interest. That's a separate statutory right intended to compensate him for delay in payment of his proved debt, so that's the sterling.

One then turns to consider the foreign currency creditor. His claim is converted into sterling as at the date of the administration order, using the exchange rate of that date. He then receives dividends on his sterling proved debt, which amount to a hundred pence in the pound. Just assume sterling has depreciated in the meantime, leaving him with an unpaid balance on his foreign currency claim. At this stage, there's nothing he can do about that. If that's relevant at all, it's of a non-provable liability further down the Waterfall. So the first thing he gets, like the sterling creditor, is a hundred pence in the pound, on the sterling equivalent he is proved debt.

The next is in the event of a surplus. This creditor, like the sterling creditor, is entitled to interest of the Judgment Act rate under rule 2.88

because that's a right which the rules give him. He also receives that from his sterling admitted proof like the sterling creditor.

Now, the final stage is if there's a surplus after payment of such interest, he has a non-provable claim for the unpaid balance of a principal amount of his foreign currency claim. That's how we say it works, and there's no offset between the second and third stages. Calculating his currency conversion claim, he doesn't have to give credit for the statutory interest that he receives. The reason for that is essentially quite simple, if --

LADY JUSTICE GLOSTER: It's not part of his loss, is it? When he's formulating his loss, it's outside it. It's beyond the claim he's made.

MR DICKER: One way of looking at it is to say the statute says you are entitled to statutory interest, even if you if you have no underlying right to interest, so he gets that. He's entitled to it, along with everyone else.

If he has to give credit for that when calculating his foreign currency claim, then there's really only two possibilities: either he isn't receiving the statutory interest, which the statute says he should get along with everyone else, or he's not receiving the full amount of his underlying currency conversion claim. The

same sum of money can't effectively perform both purposes. The whole point of the statutory regime in this situation is that you are entitled to both the payment in full, if you're a sterling creditor at level one, if you are a foreign currency creditor through proof and non-provable liability and, in addition, without having to give credit, you are entitled to interest under the rules.

LORD JUSTICE BRIGGS: Is one way of putting it that the currency conversion claim really deals with the loss suffered by the creditor due to the depreciation of sterling during the period following the cut-off date? Whereas the statutory interest merely deals with the high value of that for which he can claim caused by the delay?

MR DICKER: Yes. Yes --

LORD JUSTICE BRIGGS: I don't know if that's what the judge meant, I am just trying to work it out for myself.

MR DICKER: The clearest way I think we saw it is, essentially, you deal with each of the levels of priority. Essentially, you have to exhaust them before any question can arise in relation to the next one.

The second one is everyone is entitled to interest by statute at the judgment at rate if they haven't another right to interest.

LADY JUSTICE GLOSTER: Why don't you come back to this in reply? It's clear the point you make.

MR DICKER: So that was declaration 17, issue 10.

The next one is declaration 6, which is concerned with interest on a non-provable claim. The judge dealt with this in paragraphs 168 to 170. 168, he deals with the nature of a currency conversion claim. In the last sentence, at 168, he says his claim is for "the unpaid portion of the debt" due to him. Then, in 169:

"No provision in the legislation for the payment of interest on such non-provable claims, 2.88 applies to the payment of interest on proved, not non-provable debts. Contract between the company and the creditor provides interest on the unpaid part of the debt. The creditor is, in my judgment, entitled to include such interest, despite his non-provable claim. The position of rule 2.88 is a complete code relating to the payment of post administration interest does not, in my judgment, interfere with the enforcement of this contractual right as part of a non-provable claim. Neither explicitly nor implicitly does it interfere with a creditors contractual right to interest on a non-provable debt."

So what one's dealing with is a foreign currency creditor who has a non-provable claim for the shortfall.

That non-provable claim is one which also carries interest. What the judge held was that part of his foreign currency to repay is converted into sterling as at the date of administration. He is entitled to interest on that sum in accordance with rule 2.88.

Rule 2.88 is an exclusive code such that he can't receive any more interest on that proved sterling equivalent.

The judge also said, "Well, in my Waterfall 1 judgment, the unpaid balance of the foreign currency claim is a non-provable liability."

Rule 2.88 isn't concerned with that because it's solely concerned with interest on proved debts. So if the creditors' underlying foreign currency claim hasn't been extinguished and he can prove for the unpaid balance of a non-provable claim, he can also prove for any interest which he is entitled to in respect of that unpaid balance as a matter of contract or otherwise.

I think the easiest way to visualise it is if your Lordships go to our reply skeleton argument, which is in the same bundle as the judgment, tab 15, paragraph 9. Tab 15, page 5. There's a diagrammatic representation of what the judge decided. You have the underlying claim in the foreign currency. Part of it is proved in sterling, and you get interest on that pursuant to

rule 2.88. The dividends in respect of the proved sterling sum aren't sufficient when converted into the foreign currency. Repay the foreign currency claim in full leaving an unpaid balance which is his currency conversion claim. That's unaffected. He's entitled to pursue that, but part of the rights which essentially have not been affected and which he is entitled to pursue, include his right to interest on that unpaid balance of his underlying claim. That's the effect of the judge's approach.

Now, we say, in a sense, on our primary argument, we don't get here because, on our argument, 2.88 is not an exclusive code and these sort of issues don't arise. But the consequence, at least, of this element of the judge's judgment is that what we, in our respectful submission, say is the defect of his exclusive code approach, at least isn't carried across to extinguish the interest on the unpaid balance, as well.

LADY JUSTICE GLOSTER: So this is another example of his illogicality, you say, on the first bit of the issues we've been considering.

MR DICKER: Again, so we're clear: the foreign currency creditor will have lost, will have not been paid the full amount of interest that he is owed on the judge's approach. Because if you go through the diagram, part

of it is -- assume an underlying claim of a hundred pounds carrying interest of 10 per cent -- a hundred dollars carrying interest of 10 per cent. Part of that is converted into sterling. 10 per cent of the converted sterling amount is less than 10 per cent of a hundred US dollars.

LORD JUSTICE BRIGGS: Not on the cut-off date, only on the dividend date.

MR DICKER: Only if sterling has depreciated.

LORD JUSTICE BRIGGS: Yes, and then only on the dividend date, not the cut-off because on the cut-off date you have hundred per cent of the dollar amount because it was converted at the then currency conversion rates, in full. It's not a part proof of the cut-off date, it's a full proof.

MR DICKER: That's right. But the logic of the non-provable liability in relation to foreign currency claims is: he is entitled to say, "When I eventually received my dividends --"

LORD JUSTICE BRIGGS: Yes, "I didn't get my full amount".

MR DICKER: "When the creditor effectively paid me through this process of collective execution, and I converted it back into dollars, I haven't been paid the full amount".

LORD JUSTICE BRIGGS: That's an injustice which has only matured at the time of the dividend. It didn't resist

at all on the cut-off date.

MR DICKER: But he is also entitled, we say, at that point, to say, "And, actually, if you look at my underlying rights, what I should have had was interest equal to 10 per cent on my foreign currency claim. What I eventually received was not interest at 10 per cent on my foreign currency claim, I received interest at 10 per cent on my depreciated sterling equivalent".

So the left-hand part of this diagram doesn't necessarily result in the foreign currency creditor receiving the full amount of its interest. But that's going back to our major issues about submissions about whether or not 2.88 is an exclusive code et cetera. That is going back to issue 2A, and whether or not you have a non-provable claim for any shortfall.

This is dealing, essentially, with the consequence of the judge's earlier decision that 2.88 is an exclusive code. At this stage, he says, "Well, it is but only in relation to the proved sterling debt, not in relation to foreign currency balance".

In relation to the foreign currency balance, what's preserved is your underlying claim for the balance plus your underlying claim to interest on that balance.

LADY JUSTICE GLOSTER: So you are with the judge on that?

MR DICKER: Yes.

LADY JUSTICE GLOSTER: But you say it's illogical --
MR DICKER: If we have lost on our earlier arguments, we are with the judge on this point, yes.
LORD JUSTICE BRIGGS: As I understand it, what this declaration doesn't do, because the previous ones, in brackets, there's no declaration about this, is determined how you -- if at all -- you give credit to the interest received against the interest you would have received on a non-provable claim.
MR DICKER: That is dealt with in the next declaration, declaration 4, supplemental issue 3, which I was going to come to next.
LORD JUSTICE BRIGGS: Yes.
MR DICKER: I wonder whether this might be a convenient moment, and then return to that?
LADY JUSTICE GLOSTER: Well, okay. 2.00 pm.
(12.58 pm)
(The short adjournment)
(2.00 pm)
LADY JUSTICE GLOSTER: Yes, Mr Dicker. Are we moving on to some of your appeals now? Have you dealt with ...
MR DICKER: I have said all I think I need to say, at this stage, in relation to declaration 6.
LADY JUSTICE GLOSTER: Yes. How are we doing for time, generally?

MR DICKER: We're doing fine.
LADY JUSTICE GLOSTER: How are you doing, rather than "we"?
MR DICKER: I had assumed there was a relationship.
LADY JUSTICE GLOSTER: Well, there might be and there might be a bit of guillotine. But you are all confident that we are on time.
MR DICKER: I hope to be finished by 3.00 pm.
LADY JUSTICE GLOSTER: Okay, fine.
MR DICKER: I was going to move on to item 8 on the list of issues. Supplemental declaration 4, and supplemental issue 3. It's connected to the issue I've just dealt with.
The declaration is that a non-provable claim to interest on a currency conversion claim, in other words, what we've just been dealing with, is not to be reduced by statutory interest paid to the creditor under rule 2.88(7).
LADY JUSTICE GLOSTER: Yes.
MR DICKER: I've dealt already with question of off-set between principal and interest. This is now a question of off-set between statutory interest, on the one hand, and on the interest on the non-provable claim, on the other.
LADY JUSTICE GLOSTER: Yes.
MR DICKER: Again, Wentworth is the appellant on this issue.

The judge dealt with this in his supplemental judgment. If you go to bundle A2, tab 1, you will see the section, at paragraph 48, headed "Supplemental issue 3". He deals with this between 48 and 54.
I can deal with this very shortly. The essential point is that which the judge dealt with, at paragraph 53. He says:
"The essential point is that statutory --"
LADY JUSTICE GLOSTER: It's the same point.
MR DICKER: Same point.
All the submissions I made in relation to the earlier off-set apply here. You can't make the same sum of money essentially doing two different things at the same time.
LADY JUSTICE GLOSTER: Yes.
MR DICKER: So the next two issues on the list are 29 and 30.
LADY JUSTICE GLOSTER: Yes.
MR DICKER: I've said I have already, essentially, made my submissions in relation to these. They're both concerned with non-provable claims. Though if one starts with issue 30 --
LADY JUSTICE GLOSTER: You've already made your submissions -- if I can fine my note ...
MR DICKER: Everything I said in relation to non-provable

claims, in our submission, provides the answer to 29 and 30, as well.
LADY JUSTICE GLOSTER: Yes.
MR DICKER: That then leaves -- so far as my opening is concerned -- only two things. First of all, item 11, declaration 10, issue 4 and the illustrations in relation to Bower v Marris and compound interest, which I'll deal with right at the end.
Item 11, declaration 10, issue 4. This concerns, as you will see from the declaration, the judge's ruling:
"The words for rates applicable to the debt apart from the administration in rule 2.88(9) of the rules include a foreign judgment rate of interest applicable to a foreign judgment obtained prior to the date of administration."
There's no issue in relation to that:
"But do not include a foreign judgment rate of interest applicable to a foreign judgment debt obtained after the date of administration, or the foreign judgment rate of interest which would have become applicable to the debt if the creditor had obtained a foreign judgment when it did not in fact do so."
Now, the judge dealt with this in his main judgment in part A, core bundle volume 1, tab 2, paragraphs 171 to 183, under the heading, "Issue 4".

LADY JUSTICE GLOSTER: Yes.
MR DICKER: The judge dealt with it by dealing with what one might call the hypothetical judgment, which is subparagraph (b) of the declaration. He dealt with that first. He then dealt with a situation in which one had actually obtained a judgment post-administration order. He dealt with that second.

173 deals with the hypothetical judgment. 178 deals with the actual.

Now, for the purposes of my submissions, I was going to deal with it in the order in which I dealt with it below, which is the reverse order, and deal first with the situation in which you actually obtain a judgment post-administration. The analysis in relation to the two declarations is in fact very different.

LADY JUSTICE GLOSTER: Is different?
MR DICKER: Is different.

So there's no difficulty, obviously, if you have obtained a judgment prior to date of administration order, that is provable like any other claim. The next question therefore is: what happens if you obtain a judgment, a foreign judgment, entitling you to the judgment interest rate under the foreign legislation but only do so after the date of administration?

As between the creditor and the company, the

creditor has a right to interest at the foreign judgment rate from the date of judgment. That's leaving aside the effect of the insolvency. He has a new right which he has obtained, post the administration order, entitling him to payment of interest at the relevant rate. The question is whether or not he's entitled to be paid such interest from the date of his judgment before any distribution is made to subordinated creditors or shareholders. There are two ways in which he might be entitled to receive such payment. The first is under rule 2.88(7) and (9). The second is as a non-provable claim.

So far as 2.88(9) is concerned, the answer obviously depends on the construction of the rule. The point is a short one. In our submission, the words "the rate applicable to the debt apart from the administration" are wide enough to cover a rate pursuant to a judgment which has actually been obtained after the date of administration. The judge accepted, in paragraph 181, as a matter of language, those words are capable of including:

"A rate applicable at or at any time after the commencement of the administration."

So the judge's view, as expressed in 181, is that the wording of 2.88(9) is capable of being read so as to

apply to such a judgment. So why, then, does the judge hold it's nevertheless not covered?

He gave five reasons for doing so, which you'll see in paragraph 180. Recording my learned friend's submissions for Wentworth, first, he says:

"It is as necessary for the operation of rule 2.88 as it is for the ascertainment of provable debts, there should is a single cut-off date."

Secondly:

"His submission is consistent with the requirement of 2.88(9) that the default rate, his judgment rate as at the date of the administration, further suggests a comparison with a rate to which the creditor may otherwise be entitled under rights existing as at that date."

Third:

"If it is consistent with the extension of the provision for statutory interest beyond the recommendation of the Cork Committee of a single rate applicable to all debts at judgment rate as at the date liquidation."

Then, ten lines down:

"Fourthly, submissions made by Mr Dicker in relation to the inefficiency is unfairness of permitting creditors to obtain judgments after the commencement of

the administration to payment of interest at the rate applicable to such a judgment support the proposition the rights to interest are to be determined as at the commencement."

Fifthly:

"As a matter of construction of sub-rule 7 and 9 of rule 2.88, the words 'rate applicable to the debt apart from the administration' refer back to the debts proved in sub-rule 7. If the creditor does not have a judgment at the date of administration, the debt proved by the creditor is not a judgment subsequently obtained but the debt as at the date of administration ...(Reading to the words)... unascertained claim the later judgment quantifies the claim that was not the judgment debt which is the subject of proof."

So post-administration judgment is capable of being in the wording, within the wording. It's not, however, caught by 2.88(9) for the five reasons identified by the judge.

Now, the main point is, it seems to us, his first point, that there needs to be a single cut-off date in case there is a shortfall in interest. The judge appears to have assumed that that that cut-off date must necessarily be the date of the administration order. Otherwise, there's no issue.

We say there's no justification for this. It can equally be the date when all proved debts have been paid in full and the surplus comes to be distributed. Indeed, it would be more natural to take that date because, obviously, the premise of the rule is that there's been a delay between the date of the administration order and the date when the surplus is to be distributed, and you are being compensated for that delay. When the administrator in practice comes to work out how much is owing, he will obviously do it as at that date, looking back to work out what happened.

LADY JUSTICE GLOSTER: Yes.

MR DICKER: So we say if one reads 2.88(7) and (9) as effectively requiring a cut-off date, in the sense that if there a shortfall, obviously, claims to interest need to abate rateably, there's absolutely no reason why you can't have that same cut-off date when the administrator performs what 2.88(7) says he is to perform. Namely, use the surplus to make payment of interest, abate claims ratably at that point, but include claims to interest which exist by the time he comes to do that. So that's the short submission in relation to 2.88.

The alternative approach is, of course, that again, such a creditor would have a non-provable claim. He would have a non-provable claim because his rights would

not have been satisfied in full by the process of collective execution, distribution in effect of proved debts, payment of interest under rule 2.88. He would be entitled to have his unpaid claim paid before any distributions were made to shareholders.

Again, there's a similar point in relation to the cut-off date on this variant. There is a cut-off date for the ascertainment of proved debts. There is not -- or rather the same cut-off date does not apply to ascertainment for non-provable liabilities.

I mentioned this yesterday, but there are a number of examples of this in the authorities. I referred to tort claims, for example, which only come into existence after the administration date. They don't arise -- assume it doesn't arise under any obligation incurred before, they are therefore not provable. They are nevertheless payable as non-provable liabilities before any surplus is distributed.

LORD JUSTICE BRIGGS: Presumably, it has a surplus that could go all the away to shareholders? You don't need a cut-off date at all at this stage in the process. You just pay everything that's due to everybody else before you pay the shareholders, but if there's a shortfall for any class of creditor lying ahead of the shareholders, then you need to make another one.

MR DICKER: Yes. The Australians have this concept, the sort of second round of proofs.

LORD JUSTICE BRIGGS: Yes.

MR DICKER: The authorities have never really dealt with a shortfall in respect of non-provable liabilities to work out -- I think your Lordship said this in the Waterfall 1 judgment.

LORD JUSTICE BRIGGS: I touched on it.

MR DICKER: Touched on it.

LORD JUSTICE BRIGGS: Yes.

MR DICKER: It may be worth just looking at the way Mr Justice David Richards dealt with this in Re T&N, which you will see in volume 2, tab 74. The facts don't matter, but it concerns personal injury as a result of asbestos.

There was an issue about whether or not they were contingent claims for the purposes of a scheme arrangement or provable claims in a liquidation. Mr Justice David Richards held they weren't. The rules were changed, subsequently, to accommodate them. But the relevant part of the judgment, for present purposes, is 106 and 107. One of the submissions that was made to him was they ought to be provable under the rules because, otherwise, if they're not provable, then essentially the assets would be distributed to the

shareholders without reference to these claims. The way Mr Justice David Richards dealt with this you can see in so 106 and 107. He says, 106:

"Pressed with a fifth consequence, submitted that if all provable debts and liquidation expenses were paid in full, the balance of assets would be distributed among shareholders. No payment or provision would be made for non-provable claims, such as claims in tort accruing after the liquidation date. Submitted this resulted from, first, the liquidator's statutory duty to distribute the assets in accordance with section 107 ...

"

Secondly:

"The changes made by the Insolvency Act 1986 and the Insolvency Rules 1986, which meant there was no longer any mechanism for proving such tort claims even in a solvent liquidation."

107:

"It would indeed be extraordinary if a company's assets could be and were required --"

LADY JUSTICE GLOSTER: We can read this. Can we read this to ourselves?

MR DICKER: Yes, I'm sorry. So 107.

LADY JUSTICE GLOSTER: All the paragraphs would you like ...

(Pause)

Yes.
MR DICKER: So he, essentially, said this is another mechanism. Lord Justice Briggs in Waterfall 1 said, well, actually, the answer is, if one goes back to cases like Bromley v Goodere, it's always the liquidator's responsibility to deal with non-provable liabilities. In our submission, that's absolutely right.
Mr Justice David Richards, in fairness to him, being addressed on this point rather more briefly in Re T&N says the same result would occur but by a slightly different route, which is if the company is insolvent, why on earth wouldn't you allow creditors to execute and recover?
LADY JUSTICE GLOSTER: Yes.
MR DICKER: We say that's how it works in relation to any other non-provable liability which arises post the administration date, what on earth is the difference between those and the right under a foreign judgment obtained post administration order?
It is a right the creditor has against the company. It does require to be paid before any surplus is distributed to shareholders, like any other non-provable liability.
I think, just again so your Lordships have the reference, I think the reference to Lord Justice Briggs'

comment about the possible need for a second cut-off date is paragraph 165 of the Waterfall 1 judgment. So that's paragraph A of the declaration.
Paragraph B concerns what I've referred to as a hypothetical judgment. In other words, a judgment which a creditor could have obtained after the commencement date but has not obtained.
This is the argument which the judge rejected, at 174 to 177. It raises a further question of construction in relation to rule 2.88(9) which is, essentially, when you see the words:
"The rate applicable to the debt apart from the administration."
Does that entitle one, essentially, to say: well, what would have happened had there not been an administration?
In other words, had there not been a moratorium. If the answer to that question is: well, the creditor would have obtained a judgment and would have obtained a foreign judgment, then he ought to be entitled to interest at that rate.
Now, the judge, I think --
LADY JUSTICE GLOSTER: Even though it's a rate in a different currency, despite the fact that the proved debts -- because we are talking about proved debt at

this stage, aren't we, not non-provable claims?
MR DICKER: We are talking about proved debts, correct --
LADY JUSTICE GLOSTER: Proved debt.
MR DICKER: -- because this is a right under 2.88(9).
LADY JUSTICE GLOSTER: If they were foreign judgments, prior to administration or post-administration, they would have all been converted into sterling?
MR DICKER: Correct.
LADY JUSTICE GLOSTER: So what you are seeking to do is to apply a non-sterling rate of interest which could be said to be a bit weird.
MR DICKER: All I'm going to say about this is: I think the judge correctly recorded our submissions in the course of his judgment.
LADY JUSTICE GLOSTER: Yes.
MR DICKER: There's not really much more I can add, at this stage.
LADY JUSTICE GLOSTER: Okay.
MR DICKER: This is plainly a step beyond, but we do submit there is a big analytical distinction to be drawn between a judgment which has actually been obtained. There is no reason why, we say, there can't be a non-provable liability, on the one hand, and a purely hypothetical judgment, on the other.
LADY JUSTICE GLOSTER: Are there any better ways you could

submit a (Inaudible) claim, couldn't you?
MR DICKER: If you had obtained a foreign judgment.
LADY JUSTICE GLOSTER: Yes.
MR DICKER: In our submission, yes, it would be a non-provable liability. If you didn't, because you were concerned about the effect of the moratorium, and the moratorium in practice prevented you from obtaining a foreign judgment -- I will come back to that in one moment -- then that option essentially wasn't open to you.
Now, it might be said in answer: the moratorium is territorial in scope, so it couldn't necessarily have prevented a foreign judgment creditor from actually obtaining a judgment.
That's not necessarily the end of it because the foreign creditor has a presence within the jurisdiction. It's possible to injunct him from taking proceedings which might interfere with the administration. But, as I say, I don't think I can really add much on that.
The final thing I wanted to do was hand up to your Lordships two documents which set out some illustrations in relation to both Bower v Marris and compound interest. Can I stress we have not, I'm afraid, time --
LADY JUSTICE GLOSTER: Let's hand them up anyway. If there are any complaints about them, Mr Zacaroli or anyone

else can raise them.
MR DICKER: If we do have one for each.
(Handed)
LADY JUSTICE GLOSTER: Are you going to walk us through or are they self-explanatory?
MR DICKER: Just in case, perhaps for my own benefit. The two documents, the first provides two illustrations in relation to Bower v Marris, so you'll see the assumptions, at the top:
"Proved claim, hundred pounds, rate of interest 10 per cent, and the interest methodology is simple."
Then, the first example shows simple interest computed according to the rule in Bower v Marris, essentially, and you get to the stage of notionally reallocating the dividends and being applied first to interest. Secondly, to principal.
The second shows simple interest computed according to the judge's judgment. You can see the difference in outcome for each.
Then, the second sheet provides four scenarios in relation to compound interest, so this is in context of issue 3.
The first shows how compound interest works as a matter of right.
The second I should just explain. Compound interest

shown with interest paid down first according to the rule in Bower v Marris. That produces the same figure. It essentially produces the same figure because if you're dealing with compound interest, because interest is capitalised, treated as part of the principal, it doesn't actually matter whether you notionally allocate payments to principal or interest. Interest will continue to run on whatever is left.
So illustration 2 is simple simply to illustrate if you are in the world of compound interest. Bower v Marris doesn't add anything.
Third, compound interest computed with the cut-off for the judge's judgment, so that's essentially compound interest continues to run until proved debts have been paid in full, at which point whatever sum of interest is still unpaid, no longer accrues interest.
That's item 3.
Item 4 is a worked example of the example I gave you where, instead of paying principal in full, when it comes to the final dividend, the liquidator holds back £1, at which point interest continues to accrue on all the unpaid interest plus, obviously, the outstanding £1. You can see from the bottom right, that someone ends up in that situation simply by withholding £1, is £143.66 which compares to the judge's approach of cut-off

£135.91 and 143.45, which is how it would work. So, essentially, by reserving just £1, on the judge's approach, you can in fact achieve pretty much what you would achieve but only if you hold back the pound. If you pay the final pound, the whole thing freezes.
LADY JUSTICE GLOSTER: Yes.
MR DICKER: For some reason you are £8 worse off. All for the sake of a pound. We say it just illustrates the illogicality, in my respectful submission, in the conclusion the judge reached.
LADY JUSTICE GLOSTER: That's very helpful. To actually see it worked out like that.
MR DICKER: Unless you have any further questions for me, that is all I was going to say, at this stage.
LADY JUSTICE GLOSTER: Thank you very much, Mr Dicker.
Submissions by MR SMITH
MR SMITH: Thank you. My Lady, my Lords, by way of introduction, like --
LADY JUSTICE GLOSTER: Don't refer to me separately. It will add almost a quarter of an hour to everything.
MR SMITH: I am grateful.
By way of introduction, like Mr Dicker's clients, my clients are also unsecured creditors of LBIE. We are in a slightly different position to Mr Dicker's clients in that our claim arises under a prime brokerage agreement

which does not carry with it any right to contractual interest, and that's the position in relation to all the claims against LBIE under prime brokerage agreements, as far as we are aware.
On the other hand, Mr Dicker's clients have substantial claims under the ISDA master agreement, where there is contractual right to interest. So there is that difference between us, although it's fair to say: in relation to most of the issues our interests are aligned.
In relation to the issues which Mr Dicker has been addressing where we are also an appellant alongside Mr Dicker's clients, we simply adopt Mr Dicker's submissions.
There's just three points I'd like to add, if I may, very briefly by way of supplement, to what Mr Dicker said. The first relates to the authority of Whittingstall v Grover, which you will recall Mr Dicker addressed you on in the context of issue 2, dealing with Bower v Marris.
Perhaps if I could just trouble you to turn that up again. It's in tab 24 of authorities bundle 1. You recall this was the judgment of Mr Justice Chitty. It concerned the testamentary estate of Mr Whittingstall who had carried on a banking business in partnership.

One of the questions which arose was the issue of interest which Mr Dicker showed you was dealt with by the judge, on page 217.

Just to note, the question he was dealing with, one sees about a third of the way down the page, was whether between joint creditors of the testator, on the one hand, and the separate creditors, on the other hand, whose debts do not by law carry interest, who had priority. So he was looking at the position as between joint creditors and separate creditors as to who had priority. In both cases, debts did not by law carry interest.

It's interesting to note, in our submission, what he describes by way of the legislative basis for the right to interest, which he deals with slightly further on in the same column. He says:

"Previously to the orders of 1841, the court of Chancery did not give interest to a creditor coming in under a decree for the administration of the estate of a deceased person."

LORD JUSTICE BRIGGS: Where are you?

MR SMITH: I'm slightly further on. It's about halfway down the page, the left-hand side column.

LORD JUSTICE BRIGGS: Which?

MR SMITH: 217. It's a passage about halfway down the page.

It begins:

"Previously to the orders of 1841 the Court of Chancery did not give interest to a creditor coming in under a decree for the administration of the estate of a deceased person where the debts did not by law carry interest."

Then, he refers to the orders of 1841, which Mr Dicker showed you yesterday. He says:

"The orders of 1841 relating to interest were in substance repeated in the consolidated orders of 1861 and are now embodied in the subsisting rules of court, order 55, rule 62 and 63."

So the subsisting rules at the time were those in order 55, rules 62 and 63.

In our submission, it's interesting to look at what those rules actually provided because we do suggest they have some similarity to rule 2.88. You will find those in the fourth authorities bundle, behind tab 151. This is taken from the rules of the Supreme Court in 1883, but we have checked and they appear to have been made in the same form throughout this period.

If you go over to the second page of the tab, you will see the two rules. Under the heading "interest". There's firstly rule 62, which deals with the position where the debts do bear interest. Then, more relevantly

for our purposes is rule 63, which deals with the position where there's a creditor whose debt does not carry interest. What this provides, you will see, the creditor whose debt does not carry interest who comes in and establishes the same before the judge in chambers under a judgment or order and so on:

"Shall be entitled to interest upon his debt at the rate of 4 per cent per annum from the date of the judgment or order out of any assets which may remain after satisfying the costs of the cause or matter, the debts established and the interest of such debts as by law carry interest."

So the right to interest under rule 63 only arose after the principal debts had first been discharged. You see that from the wording after "satisfying the debts established".

Now, that's not in the same language as rule 2.88(7), but it obviously bears a similarity to the central concept in rule 2.88(7), which is that the right to statutory interest only arises after the debts proved have been paid.

Now, just looking back at Whittingstall v Grover, you can see that language and that provision wasn't any bar to the application of the rule in Bower v Marris for the purposes of calculating interest.

Now, we know that the testamentary estate in Whittingstall v Grover included debts which did not by law carry interest. Because that was the question Mr Justice Chitty was concerned with, and which he set out in the passage in the left-hand column, on page 217, and which I referred to a moment ago.

So he was therefore dealing with, at least in part, debts which did not by law carry interest and where, in our submission, the right to interest must have arisen under rule 63.

But what he nonetheless held was that the rule in Bower v Marris applied for the purposes of calculating that interest. You see that from the very final paragraph, again, which Mr Dicker showed you yesterday, on the right-hand column, at page 217, where he said that the interest was to be calculated applying the rule in Bower v Marris, in other words, by treating the dividends as ordinary payment on account and applying each dividend in the first place to the payment of interest and only then in discharge of principal.

Now, in our submission, that's important. Then two points arise from it which are relevant for present purposes. The first point is that the language, in order 55, rule 63, to the effect that the right to interest only arose after satisfaction of the debts

established, ie the principal sums, was not regarded as precluding the application in Bower v Marris, in calculating entitlements to interest.

So the fact that the right only arose after the principal had been paid was not considered to be a reason why, when it came to working out the interest entitlement, you couldn't apply Bower v Marris for those purposes and treat the payments in the way described by Mr Justice Chitty.

In our submission, that language, which talks in terms of satisfaction of the debts established, is very similar indeed to the language you find in rule 2.88(7) which talks about payment of the debts proved. One asks oneself: well, if the rule in Bower v Marris was capable of being applied on the basis the language in rule 63, why isn't it capable of being applied, equally, in relation to rule 288?

That's the first point.

The second point is that, in our submission, this also shows that the operation and application of the principle in Bower v Marris is not dependent on the doctrine of appropriation. Because if you think, in relation to Whittingstall v Grover, of a creditor whose debt did not by law carry interest, at the time he received a payment --

LADY JUSTICE GLOSTER: He can't appropriate.

MR SMITH: He discharged his principal. He had no right to interest because the right to interest only arose once; the principal had been paid in full. So what this demonstrates is that contrary to Wentworth's submissions, the principle in Bower v Marris is not dependent on the doctrine of appropriation and, clearly, Mr Justice Chitty didn't regard that as being in any way central to the operation of the principle.

So that's what we wanted to add in relation to -- we thought it was quite helpful to look at the language in the rule. As I say, we do submit there is some similarity in relation to rule 2.88.

The second point I just wanted to comment on, very briefly, is in relation to issue 2A and declaration 5. This, in particular, is the argument that if Bower v Marris cannot be applied to the calculation of statutory interest under rule 2.88, a creditor may nonetheless have a non-provable claim to the interest to which he would have been entitled on his underlying claim calculating in accordance with Bower v Marris.

Basically, the idea is that if you can't get Bower v Marris under rule 2.88, a creditor may nonetheless have a non-provable claim to what he would have received if interest on his underlying claim had

been calculated in accordance with Bower v Marris.

Now, in our submission, it would be very odd to end up in a position where Bower v Marris did not apply to the calculation of statutory interest under rule 2.88, where a creditor might have a non-provable claim of this nature. We submit that would be a very odd outcome.

The reason for that is that it appears that such a non-provable claim would only be available to a creditor who had an existing contractual or other legal right to interest as at the commencement of the insolvency. The reason for that is that the non-provable claim is based on the idea that the creditor has remitted back to his underlying rights to extent they have not actually been discharged by payments made in course of insolvency. So in order to have that non-provable claim, you need a contractual right to interest or some similar legal right.

Now, that, we submit, would lead to an odd position where creditors who did have an existing legal right to interest could potentially recover interest calculated on a Bower v Marris basis as a non-provable claim. But creditors who had no such existing rights at the commencement of the insolvency, could not. So, essentially, there'd be a difference in treatment between creditors depending on whether they had

an existing right to interest as at the commencement of the insolvency. That's notwithstanding the creditors without an existing right to interest are equally kept out of their money by the insolvency.

Now, we suggest that that is also particularly odd, or would be a particularly odd result when you bear in mind that one of the main purposes of the changes made to statutory interest in 1986 was to place creditors with an existing right to interest on their debt, and those without such a right, on the essentially the same basis. That was one of the main changes made in 1986.

You will recall that, prior to 1986, only creditors with an existing right to interest, such as a contractual right, could recover post-insolvency interest in a company liquidation. That was then remedied, in 1986, when rules were changed and it was basically said creditors who do have existing right to interest, and those who don't, are both entitled to recover statutory interest in the event of a surplus. That was in fact the principal change which was made in rule 2.88. One sees that from the Cork Report amongst others places.

So, in circumstances where the legislature has specifically remedied and removed the difference in treatment between creditors with existing rights to

interest and those without, we suggest must be somewhat odd for that same difference to persist in relation to the entitlement of creditors to receive interest calculated in accordance with Bower v Marris. What one would basically be saying is that the difference remains but the difference, instead of being at the level of entitlement to interest, is at the level of entitlement to have that interest calculated in accordance with Bower v Marris. For those reasons, we do submit that would be an odd outcome and it does support the submission, we suggest, that rule 2.88 should be construed as permitting statutory interest to be calculated in a accordance with Bower v Marris and thereby available to all creditors, whether or not they have an existing right to interest at the commencement of the insolvency.

So that's the second point.

The third point, very briefly, in relation to issue 7, which is the issue concerning interest on contingent debts and the question of time from which that interest begins to run.

I just wanted to remind you of an additional point which the judge made in his judgment at paragraph 211. It's page 52 of bundle A1, tab 2. This was the point he made which, in our submission, is a good point in

relation to the position under the old law, pre-1986.

The position there was that in the case of bankruptcy, section 33(8) made explicitly clear that interest was paid on all debts proved in the bankruptcy from the date of the receiving order. So it was made explicitly clear that you received interest from the date of the receiving order, on all the proved debts. It was also the position that in bankruptcy, under the 1914 Act, a contingent debt was capable of being proved, section 30(3), which we have in the bundle, authorities 4, tab 151A.

So tying those provisions together, it was quite clear, pre-1986, that a creditor in a bankruptcy could prove for a contingent debt and that in the event of a surplus interest was to be paid on all proved debts, including a contingent debts, from the date of the receiving order. Although one can't find an authority which specifically makes that good in relation to the 1914 Act, in our submission that was the clear effect of that Act on its proper construction.

Now, the judge is obviously right to say, "One needs to treat that with a little bit of caution because that's one legislation, things can change".

But there's not a hint of any evidence that there was an intention to make a change. In the Cork Report,

for example, there's no suggestion of any intention to make a change in the position. In our submission, the point which the judge makes in paragraph 211 is a good one, in that, all things being equal, one construes the new language used in the 1986 Act and the 1986 rules in essentially the same way and leading to the same result.

Those are the only points I wish to add by way of supplement to Mr Dicker.

LADY JUSTICE GLOSTER: Thank you very much. Yes, Mr Zacaroli, you next.

Submissions by MR ZACAROLI

MR ZACAROLI: My Lords, I propose to deal with the issue in a slightly different order than those taken by Mr Dicker. Only slightly.

I propose to start with the question of Bower v Marris and his application to rule 2.88. Picking up after that the issue of whether compound interest continues after the payment of the final dividend.

Secondly, I was going to move to non-provable claims to interest. In particular, whether rule 2.88 represents a complete or exclusive code.

Then, departing from the order of Mr Dicker, I was going take my Lords to the question of off-set of statutory interest against the currency conversion

claims.

The reason for doing that is that issue is far more complex than has been so far presented to the court. In particular, there's a number of moving parts in relation to that issue.

LADY JUSTICE GLOSTER: Could you just identify on the issue sheet. You are dealing with declaration 3, issue 2, and declaration 8, issue 3, first.

MR ZACAROLI: Yes. Then I'll be dealing with the third issue, that is declaration 5, issue 2A. Also declaration 4, issue 2A. Then, I'm going to move to question of the off-set of statutory interest against currency conversion claims. Those are a number issues. Let me just make sure I get them all.

LADY JUSTICE GLOSTER: I'm working from the issue sheets --

MR ZACAROLI: I understand.

LADY JUSTICE GLOSTER: It's important I'm on the right one.

MR ZACAROLI: So it's the sixth issue, that's issue 10.

LADY JUSTICE GLOSTER: Yes, number 6, issue 10 is your third point.

MR ZACAROLI: Also, picking up with that -- because there's various other points that go with that ...

LADY JUSTICE GLOSTER: Don't forget you have been living with these issue for a long time.

MR ZACAROLI: I know, but not in this order.

LORD JUSTICE BRIGGS: That's supplemental 3, isn't it?
MR ZACAROLI: Yes, that's correct. Yes.
LADY JUSTICE GLOSTER: Which one are you looking at now?
MR ZACAROLI: That's supplemental issue 3, which is declaration 4 of the --
LADY JUSTICE GLOSTER: Supplemental issue 3.
MR ZACAROLI: It's number 8 on the table my Lady is working from. I think it's those two that I'm picking up in relation to off-set.
LORD JUSTICE BRIGGS: Yes.
MR ZACAROLI: Then I'm going to turn to the question of whether the rate of interest, under 288(9), includes a rate applicable to a post administration foreign judgment either actual or hypothetical. That is declaration 10. It's issue 11 on the list, declaration 10, issue 4.
LADY JUSTICE GLOSTER: Yes.
MR ZACAROLI: Then, this leaves, I think, only the question of contingent debts and the date from which interest runs on contingent debts. That's issue 7, which is issue number 5 on the list, declaration 14.
LADY JUSTICE GLOSTER: Yes.
MR ZACAROLI: I was just explaining the reason for that order change is because we say there's a close connection between the question of whether there's

a non-provable claim to interest, on the basis 288 is not a complete code, and the question of whether there should be an off-set between currency conversion claims and statutory interest. The answer would be different, or the arguments are very different, we say, if there is or isn't a complete code.
LADY JUSTICE GLOSTER: Right. I would be grateful, when you move to another section, if you could identify, for purposes of the transcript, which on this page you are dealing with, so there's no doubt about it.
MR ZACAROLI: Yes.
So starting with issue 2 -- and I propose to deal with this through three broad points, which I'll then develop at more length.
The first broad point is that it's common ground we are here dealing with a question of statutory construction. We say, really, the beginning and the end of this is a relatively straightforward question of statutory construction. The judge was correct for the reasons he gave, at paragraphs 134 to 137 of the judgment.
Rule 2.88(7) is clear and unambiguous. It's a direction to the administrator to pay from a surplus in a particular manner. Most importantly, it identifies and requires interest to be paid at a defined rate.

That is the Judgments Act rate for a contractual rate of hire. On a defined sum, that is the proved debts for a defined period. That is the period those proved debts were outstanding since the date of administration.
Those three elements are both the essential and the sufficient elements in order to calculate an amount of interest due from the surplus. No more is needed. Those words neither require, nor permit, that the interest is to be calculated upon, firstly, the basis that the surplus is used to discharge any part of the proved debt, or that it is to be assumed that the dividends already paid were made in respect of interest, or that the surplus is to be used in paying interest accruing long after the date when the proved debts are paid in full. Each of which is an integral part and consequence of applying the so-called rule in Bower v Marris to rule 2.88(7). That's our first broad point.
It's a relatively straightforward question of statutory construction. When I deal with that point, I will take my Lords through the position as it existed prior to 1986 and why we say that's the right reading of the words in 1986.
The second broad point is to properly characterise the so-called principle in Bower v Marris. Now, the

SCG, my learned friend, Mr Dicker's clients, would like you to think that there was some general equitable principle applicable to payments from a fund that any distributions from it are applied, first, towards interest and secondly towards principal. They would also like you to think this was a principle that was applied in winding up in liquidations for 200 years before the 1986 legislation came along. Such that it cannot have been the intention of Parliament, in 1986, to overturn two centuries of learning.
Now, that was a picture undoubtedly attractively painted but, we say, ultimately flawed because it misunderstands the principle to be derived from the case of Bower v Marris, and the subsequent cases in which that same principle has been applied.
In very brief summary, there are only two propositions for which Bower v Marris, the case, can stand. The first is a negative proposition relating to the common law of appropriation and that negative proposition is that distribution from an insolvency estate being made under process of law do not constitute appropriations made by the debtor. So that if the creditor otherwise has a right of appropriation between two different debts, at the time a payment is made to it, its entitlement to appropriate remains in place.

The second principle, which one gets at least partially from Bower v Marris but also from other cases on the same subject matter, is that where a creditor has a concurrent right to principal and interest at the time of a distribution to it, it is a matter of assumption or presumption in the absence of a contrary indication, that it would appropriate first towards interest and second towards principal, because that is generally what is in its economic interest. But it's a matter of the court assuming what would be in the interest of the creditor and applying that rule.

So three reasons leading to the conclusion that the rule does not apply under 2.88(7). The first is those propositions that one derives from the case are capable of application only where the conditions for the exercise of a right of appropriation otherwise exist. That is where at the time of any payment to the creditor that creditor has two accrued rights to principal and to interest.

Second, and it follows from that, that it's a prerequisite to the operation of the principle in the insolvency context that the relevant statutory scheme which governs that insolvency deals with the creditor's right to post-liquidation interest, or post administration interest, by remitting that creditor to

whatever rights it would have had but for the insolvency, ie remission to its contractual rights.

When I use the phrase "contractual rights" it's a shorthand, I have to stress, for whatever rights to interest it had prior to the insolvency. It might be pursuant to a judgment or a statute but I'm using the phrase "contractual rights" in --

LORD JUSTICE BRIGGS: You say it only works if the process remitted to is contractual rights?

MR ZACAROLI: Yes, in that broad sense of the word.

LADY JUSTICE GLOSTER: When you say, "Prior to the bankruptcy", you are not accepting that they subsist alongside the bankruptcy? You use the words "prior to bankruptcy", are you using that meaning?

MR ZACAROLI: No, I'm using it in the sense that at the date of the bankruptcy, it had an existing contractual right to interest.

LADY JUSTICE GLOSTER: Right.

MR ZACAROLI: The timing point I will come back to later, but I'm not trying to make a subtle point there.

LADY JUSTICE GLOSTER: Fine.

MR ZACAROLI: Just by way of aside, that point, that the statutory scheme can only incorporate Bower v Marris if it operates by way of a remission to contractual rights -- it is in fact the case that if all the cases

in England and Australia -- and we say all cases apart from two which are outliers, which I will come to -- apart from those two outlier cases, it was indeed the basis on which the statutory scheme operated, it was a remission of contractual rights.

The two cases are the case in Ireland, Hibernian, which has been mentioned in passing, and the Canadian case of the Confederation Trust, also mentioned in passing. I will come to those later. We say those are wrong. The point wasn't fully argued in either case. They are simply wrong. Or distinguishable, but we say, primarily, wrong.

My third point here is that those conditions that I've mentioned, those two conditions, do not exist under the 1986 statutory code. Rule 2.88(7) operates not by remission to contractual rights in any sense, but by creating a new and universal right for all creditors to be paid statutory interest.

Now, I've used the phrase "so-called principle in Bower v Marris" deliberately, because we have to be careful, I submit, with using a label like "the principle in Bower v Marris" as if it was a well-known principle of application generally in bankruptcy and winding up prior to 1986. It's a principle that obviously we've lived with greatly and, therefore, it's

a shorthand we use.

However, so far as England is concerned, the truth is as follows: there is no reported case in bankruptcy that has applied the so-called principle in Bower v Marris since a statutory right to interest was first introduced, in 1824.

LORD JUSTICE BRIGGS: Is this your third main point?

MR ZACAROLI: No, this is still my second point.

LORD JUSTICE BRIGGS: Okay.

MR ZACAROLI: These are, in a sense, warning points about how one should be careful with using or assuming there is this principle which is applied in bankruptcy and insolvency for so long.

LORD JUSTICE BRIGGS: No English case.

MR ZACAROLI: Yes, has purported to apply the principle in the bankruptcy context since the statutory code for interest was first introduced, in 1824. The only case, in fact, is Bower v Marris, which, as my Lords know, was not actually concerned -- it mentions the Act but it wasn't concerned with the Act. The Act did not apply to bankruptcy in Bower v Marris, and was in any event a case actually concerned with the rights of a co-obligor, so everything to do with the bankrupt is obiter.

My learned friend referred, I think referred, to

some supposed many other cases in England which had applied Bower v Marris in bankruptcy. He didn't cite them to the court, none were cited to the judge below, that is judgment paragraph 65. The judge records that fact, nobody had managed to cite a case to him in bankruptcy on Bower v Marris since 1841 which is the date of the case.

The leading bankruptcy textbook throughout the entire period, from the end of the 19th century onwards, was Williams, later Williams v Neil Hunter(?) , that has never made any reference in any edition to the principle of Bower v Marris. Judgment paragraph 141 is where that is --

LADY JUSTICE GLOSTER: Was it cited at all in Williams v Neil Hunter(?).

MR ZACAROLI: No.

In the context of winding up, there are two occasions on which the rule has been applied.

The first was in the Humber Ironworks cases. There was a series of four decisions but they all relate to the same liquidation, around the end of 1860s/beginning of the 1870s. Then, nothing further until it was a matter of common ground between counsel in Lines Brothers case number 2, that the court has seen. The fact that there's no reference between those dates

is referred to at paragraph 75 of the judgment.

LORD JUSTICE PATTEN: What's this; Mr Pott's researches?

LADY JUSTICE GLOSTER: Or Mr Stubbs.

LORD JUSTICE PATTEN: Or Mr Stubbs.

LADY JUSTICE GLOSTER: So it's an ask in chambers.

LORD JUSTICE PATTEN: Sleeping beauty awoke.

MR ZACAROLI: We don't say they were wrong, indeed we accept that in relation to the companies that was the right approach because there was a remission to contractual rights. But what --

LORD JUSTICE BRIGGS: Shades of Cherry v Boultbee.

MR ZACAROLI: Well, another example of appropriation. But what I'm saying here is that to assume this principle was so well known to draftsman in the 1986 legislation that he can't have intended to overrule, firstly, to construe the principle in way I have described it and, secondly, makes an assumption this was a principle so well-known it was something the draftsman would have been aware of.

Now, that's my second broad point.

The third broad point is this: where the Bower v Marris calculation applies, we say it can only ever logically apply to creditors with an interest bearing debt. So, in the modern sphere, if it applies at all between 2.88(7) it can only apply to those

creditors who actually had a right to interest from the background, so contractual rights at the beginning of the administration.

For reasons we'll come on to, we say it doesn't but if it can apply at all, it's only in that context.

That is because it's rationale is to ensure that creditors' contractual rights are satisfied from the surplus before anything goes back to creditors and for that you must have an accrued contractual right, by definition.

Now, that was a refrain that recurred in my learned friend's submissions, that creditors must have their contractual rights respected through the statutory process before we turn to members(?) Although we suggest that that was a submission made rather conflating the question whether one was looking at a matter of construction at rule 2.88 or a separate question: well, if doesn't come within rule 2.88, is there some fall-back, non-provable claim?

We say, if the court is persuaded by those arguments that it would be unfair or contrary to some principle and policy that creditors are not getting the full contractual benefits they would have outside of an administration, if that's concerning the court, then the answer to that comes in at the latter stage of

a non-provable claim for the shortfall, similar to the currency conversion claims.

We have arguments in relation to that as to why it doesn't come in there as well, but if these arguments have traction, it is not because they require a different construction of rule 2.88 separate to its natural one but because creditors' contractual rights, if not fully satisfied by the statutory scheme, remain extant and come in as a non-provable claim at the end.

LADY JUSTICE GLOSTER: Your primary argument is they don't come in, even at that stage.

MR ZACAROLI: That's correct, yes.

So those are the three broad points in overview. I'm going turn to the first one, which is the question of professional construction. The first thing to do is to put the 1986 legislation in context, partly to meet the appellant's point that the judge gave insufficient weight to that context. We say he gave exactly the right weight for the pre-1986 law.

What the legislator was faced with, in 1986, were two different regimes, one for corporates, one for bankruptcy. So far as winding up was concerned, there was no statutory right to post-insolvency interest at all. Just a remission to contractual right as a matter of judge-made law. So far as bankruptcy was concerned,

for over a hundred years there had been a statutory rights to interest at a fixed percentage for all creditors, and nothing more from the statutory scheme, no remission to contractual rights.

It's an aside, but it may be worth noting that there was a rule relating to post-insolvency interest in the liquidation as early as 1862 in the winding up rules. But the judges decided in a series of cases, in particular a case called Re Herefordshire Banking Company that that rule was ultra vires. So there had been an attempt to introduce a rule in relation to post-liquidation interest, in 1862, held to be ultra vires.

I then take my Lords to the cases -- it's all dealt with summarily but clearly in paragraphs 69 and 70 of the judgment below.

So, in winding up, it was a matter of judge-made law. The first case to look at is Humber Ironworks case, for which there are two passages I need to show the court. That's bundle 1, tab 16.

The passages, first of all, in the judgment of Lord Justice Selwyn, the last paragraph on the second half of the page. About five lines down, towards the end of line, says:

"I apprehend that. In whatever manner the payments

may have been made, whether originally they may have been made in respect of capital or in respect of interest, still inasmuch as they have been paid in process of law and without any contract or agreement between the parties [I just highlight that] the rule is always subject to a contrary intention, the rule of appropriation is always a matter of intention."

Then, following it down, the rule is part of the reference to Bower v Marris:

"By treating the dividends as ordinary payments on account and applying each debt, in the first place, to the payment of interest due at the date of such dividends."

So it's an essential part of the test, as he puts it, that interest must be due at the date of the dividend.

At page 647, in the judgment of Lord Justice Gifford, the bottom paragraph, on page 647, beginning, "For these reasons ...", three lines from the end, he says:

"Operates by the creditor whose debt carries interest is remitted to his rights under his contract. On the other hand, a creditor who is not ...(Reading to the words)... for interest does not get it."

So it essentially works by giving you what you would

have had under your contract. Would that be a convenient moment to give the shorthand writers a break?

LADY JUSTICE GLOSTER: Certainly, we will rise for five minutes.

(3.16 pm)

(A short break)

(3.22 pm)

LADY JUSTICE GLOSTER: Yes, Mr Zacaroli.

MR ZACAROLI: My Lord, the second case then was Re Lines Brothers Number 2, which is in bundle 1, tab 48. The court has seen this, so I'm just going to turn to page 457 which is the supplemental judgment -- no, sorry. It's the argument during the supplemental hearing, the second hearing. The argument of Mr Potts, between letters B and D, paragraph beginning, "As to whether ..."

My Lords could remind themselves of that paragraph.

(Pause)

The two points to note in it are the submission being made which was accepted and all agreed, just by letter C:

"The principle in Bower v Marris aims to bring about payment to the creditor ...(Reading to the words)... Would have received had no liquidation taken place."

Then, the last sentence says:

"You stop the calculation at the date of final payment. Then creditor does not get full payment, and is thus not remitted to his contract in the full sense."

So the whole essence of the principle is remission to contractual rights as if there had been no insolvency.

LORD JUSTICE PATTEN: Park this, if you want to, for when it's convenient to deal with it. But, I mean, when you apply Bower v Marris, it's only ultimately a tool of calculation, isn't it? In the sense that everybody seems to agree on, more or less, it's not question of appropriation as such.

MR ZACAROLI: We disagree with that.

LORD JUSTICE PATTEN: I know you do, but it's not in the purest way -- well, all right, you can tell me when you come to this point.

When a dividend is paid it's likely to be paid by the administrator by reference to it in the satisfaction of the principal, the proved debt.

I mean, it's not going to be paid by reference to some interest calculation that's running alongside the outstanding principal. So what's going through my mind is: is there a divergence, at any point, in terms of how 2.88 operates between, if you like, the Bower v Marris

calculation and, actually, what the rule requires in terms of how -- this really comes down to how statutory interest operates; I mean, do you follow what I'm trying to put to you?

It seems to me, it's one thing to say, simply on a basis of a reversion to contractual rights, "Oh well, if you're free to apply Bower v Marris, then you have to do this calculation and monies coming out of the liquidation or the bankruptcy, or the administration, and it's a question of you working out by appropriating it or attributing it to the interest account, as opposed to the principal in the first instance, ultimately to be able to say when you have enough money to satisfy the totality of your contractual claim.

But unless the Bower v Marris principle actually subverts the terms of rule 2.88, the question of what interest you're entitled to may arguably depend simply on that.

I mean, that's where I think there's this conflict between the operation of the principle in terms of -- looked at simply as a matter of statutory construction.

MR ZACAROLI: If I think I've understood that correctly, first of all, we do submit -- and we'll develop this -- that it is a rule of appropriation at its very heart. That's what the rule is about. It's not a rule of

calculation. It's a rule of appropriation. It results in a different number, yes, that the creditor will receive, ultimately, but that's done pursuant to a method of appropriation. That is fundamental to its operation.

So I disagree with the premise, with respect to my Lord, of my Lord's question, but we do say it's inconsistent with the operation of the rule. That's a question of statutory construction. I'll come on to that, if I may, when I deal with how the rule cuts across or how application of Bower v Marris would cut across the rule in specific ways. We say it does indeed do that. But perhaps I can park that point until I come to looking at the words of the rule we're concerned with. Yes. So the point I've made so far is: in liquidations, undoubtedly, prior to 1986, the operation of the principle was based upon there being a remittance(?) to contractual rights and the fact that there was a contractual entitlement to interest which had accrued due at the time the payment of dividend was made. Excepting, there's this nuance, that the right to be paid the interest is deferred. Nevertheless, it's very clear the rule works on the basis that the right to interest had accrued post liquidation. We see that from the words of Humber Ironworks but, also, when we look at

Bower v Marris that's the words used by Lord Cottenham.

In contrast, in bankruptcy, this is looking at the position as at 1986 and what existed in the prior regimes, in bankruptcy, as I intimated a moment ago, the headline point is that for a hundred years, that is since 1883, there had been a single and simple rule in relation to post-bankruptcy interest. That was all creditors are entitled to interest that fixed 4 per cent rate out of the surplus, whether or not they had interest-bearing debts.

Just very briefly, the history of the -- I think my Lords have seen this enough, you know that section 132 of the 1825 Act first of all introduced a rule which allowed interest pursuant to a contractual or other legal rate and then only the surplus thereafter became available at 4 per cent for creditors.

If we can turn up, however, the Bankruptcy Act 1883, this is in bundle 4. It's tabs 145A and tab 146.

LORD JUSTICE BRIGGS: Which one do we go to first?

MR ZACAROLI: 145A first, which is section 40(5). This is the provision for interest at 4 per cent on all debts proved in the bankruptcy.

The next tab, 65, requires the surplus:

"... after payment in full of creditors with interest as by this Act provided back to the bankrupt."

The judge dealt with this at paragraph 140. We say he was right again for the reasons he gave; that is, that this was the sole rights to interest provided by the statutory scheme in relation to bankruptcy at all times following 1883. And that is the clear reading of the surplus going back to the bankrupt after payment in full of his creditors "as by this Act provided".

There is one other reference to pick up in this Act. That's at tab 149, which is in a schedule to the Act dealing with proof of debts. It's the second schedule, tab 149. The first eight paragraphs deal with proof in ordinary cases, and the beginning of the page, proof by secured creditors. And the particular rule is rule 17 at the bottom of that page:

"Subject to the provisions of rule 12 ..."

You will see rule 12 is to do with valuation of security, and if dissatisfied it can be very valued or sold.

"... a creditor in no case receive more than 20 shillings in the pound and interest as provided by this Act."

There's a further point to make on this which -- I'm afraid I wasn't expected to get to this quite so quickly, but we have the 1883 Bill which is the precursor to the 1883 Act. I am afraid we haven't yet

circulated it electronically, we have copies. If I could hand those up now.
LADY JUSTICE GLOSTER: Will you make sure that someone behind you gets to all our clerks the electronic updates.
MR ZACAROLI: Yes.
LORD JUSTICE BRIGGS: (Inaudible) admissible we are here construing the Insolvency Act 1986 and we are looking at the bill for the Bankruptcy Act 1883.
MR ZACAROLI: The point this goes to is whether section 40(5) of the 1883 Act was the sole entitlement to interest out of the bankruptcy estate for creditors or whether there could have been some other right to interest before the surplus was (inaudible). So it's that point of construction on the 1883 Act this goes to. What this shows is a deliberate decision by the legislator not to go down the route that had been in the 1825 Act in two respects. The first provision is paragraph 36 --
LORD JUSTICE PATTEN: Can you just tell me where this is supposed to go in the bundle? I have A there, but what is it?
MR ZACAROLI: I'm being told 198A. There's a new index apparently.
LORD JUSTICE PATTEN: Thank you.

LORD JUSTICE BRIGGS: We will presumably get this electronically in due course.
LADY JUSTICE GLOSTER: Yes, I've asked for it.
MR ZACAROLI: The first provision is paragraph 36(5) which starts at the bottom of the third page of the tab:
"If there is any surplus after payment of the foregoing debt it should be applied as follows."
Then over the page:
"First, in payment of interest from the date of the receiving order at the rate reserved or payable by law on all debts proved in the bankruptcy and carrying interest.
"Secondly, in payment of interest from the date of the receiving order at the rate of £4 per cent(sic) per annum on other debts proved."
So there's an obvious, very deliberate difference between that provision, the one we then see in the Act, which is just 4 per cent per annum for all creditors, irrespective of the right to interest. And secondly --
LORD JUSTICE BRIGGS: Much like the old section 132.
MR ZACAROLI: It's like the old section 132 --
LORD JUSTICE BRIGGS: (Inaudible words) still in force.
MR ZACAROLI: There were subsequent Bankruptcy Acts, yes, in the same form.
The second provision is paragraph 60 on the last

page of this tab:
"The bankrupt shall be entitled to any surplus remaining after payment in full of his creditors and of the costs charged and expense of proceedings on the bankruptcy petition."
What's missing but then comes in in the section itself, which is section 65, is the words "payment in full with interest as by this Act provided."
So those words are a deliberate insertion into paragraph 65.
LADY JUSTICE GLOSTER: What do we get from that?
MR ZACAROLI: You get reinforcement of the point, which I say you get anyway from the clear words in the section; that the only entitlement to interest contemplated by the Bankruptcy Act 1883 was the right to 4 per cent for all creditors. There is no question of remission to contractual rights at all.
LORD JUSTICE BRIGGS: Remind me, does the discharge of the bankrupt relieve him from his contractual rights or not, when you have the estate back?
MR ZACAROLI: Of course we don't have all of the 1883 Acts and I haven't looked to see precisely what the discharge provisions did. Perhaps if my Lord's interested in knowing the answer to that we will look at it.
LORD JUSTICE BRIGGS: If you like, the other side of the

coin. If you are going to construe the Act as saying: and by the way, you don't get your full contractual rights if for example your right to interest was greater than 4 per cent. One might (inaudible words) on the consequences of the discharge.
MR ZACAROLI: Yes. The point we will make in respect -- well --
LORD JUSTICE BRIGGS: You say it means that anyway. I didn't quite understand.
MR ZACAROLI: Yes. There are two points, I think, to make, in a broad sense, but we'll come back to the detail of the Act in due course. But the two broad points are these: first of all, we would say that section 40(5) is a complete code, so far as the right to interest post-bankruptcy is concerned. And secondly, we would say the concept that the bankrupt remaining liable for post-bankruptcy interest after his discharge is we say so absurd that it cannot have been intended. Because if he is discharged anything but a -- well, rewind a minute. The premise is that this debt is not provable because you can only prove for interest accruing after the date of the bankruptcy. If the creditor is entitled to go against the bankrupt for that non-provable debt, irrespective of discharge, that would be so whether or not the creditor had been paid in full interest from the

statute. So assuming that the estate remains insolvent there's no grounds for any surplus being payable under the bankruptcy estate because it never goes into surplus.

The same would apply. The bankrupt is discharged except for any debt which wasn't provable which would include interest accruing from the date of the bankruptcy order, and therefore remains liable. That would be simply absurd. It cannot have been any statutory intention whether then or under the current Act. We say discharge of the debt must carry with it discharge of any interest accruing on that debt.

Just so you are aware of it, the position remained the same in 1914, the 1914 Bankruptcy Act. The relevant sections are section 33(8), which is tab 153 of bundle 4; and then section 69, which is the same as section 65 of the 1883 Act and that's at tab 156 of bundle 4, including the words "payment in full with interest as by this Act provided."

But there is a further point to make on the 1914 Act because by this time a provision had come into force -- it's at tab 155 -- this dealt with excess interest where a creditor had a debt which carried interest at a rate exceeding 5 per cent.

LADY JUSTICE GLOSTER: What section are we looking at?

MR ZACAROLI: Section 66(1), tab 155:

"Where a debt has been proved and the debt includes interest for any pecuniary consideration in lieu of interest, such interest or consideration shall, for the purposes of dividend, be calculated as a rate not exceeding 5 per cent per annum without prejudice to the right of a creditor to receive out of the estate any higher rate of interest to which he may be entitled after all debts proved in the estate have been paid in full."

Now this relates solely to proof. So under the words "interest accruing after the date of the bankruptcy order" that's all (inaudible).

We say, however, the fact the statute has dealt expressly with interest that is above the rate otherwise allowed in this context demonstrates that it did not intend to provide for any interest above the rate allowed of 4 per cent in relation to post-bankruptcy interest. So it's another statutory or contextual reinforcement of that conclusion.

LADY JUSTICE GLOSTER: So you say this makes it clear that Bower v Marris wasn't applying at this stage?

MR ZACAROLI: It's a slightly different point, but yes, we say that because by this stage the Act provided a self-contained provision of interest at 4 per cent

irrespective of any contractual right --

LADY JUSTICE GLOSTER: Express provision.

MR ZACAROLI: Yes. Bower v Marris had no application. And there is, as I have made clear, no case which has sought to apply, or to be fair, considered Bower v Marris in relation to that Act or any Act since.

LORD JUSTICE BRIGGS: You say this cuts down proof that pre-bankruptcy interest to that rate unless there's a surplus.

MR ZACAROLI: That's right. Then you get that surplus. I think in fact before anything goes to -- in relation to post-bankruptcy interest it's only related to the proved portion of your interest claim.

That point, that it's relating to only proved portion of the debt, is made clear in the Cork Report which is the next place to go which is the pre-legislative material (inaudible) 1986. You can go to the Cork Report and look at this point first. It's bundle 5, tab 211 and the internal page numbering is page 310, under the heading "Chapter 31, Interest on Debts". Paragraph 1364 deals with section 66(1) of the 1914 Act. My Lords read that paragraph, and the last sentence makes clear that it's relating to proof only.

(Pause)

LORD JUSTICE BRIGGS: That applies in corporate insolvency

as well.

MR ZACAROLI: No, this is just bankruptcy.

LORD JUSTICE BRIGGS: That's not what he says at the beginning of 1364.

MR ZACAROLI: Yes, there's a provision in liquidation for a while -- post-liquidation interest was dealt with by reference across the Bankruptcy Act I'm pretty sure.

LADY JUSTICE GLOSTER: And this is about pre-liquidation.

MR ZACAROLI: Yes, only in the case of insolvency. So in the case of insolvency, one read across to the Bankruptcy Act for the purposes of the interest provisions. My Lords may remember reference -- I think it's in the judgment somewhere -- to the fact that the reason for the bankruptcy provision into post-bankruptcy interest did not get brought across into the winding up regime was because of a decision someone will remind me the name of -- Fine Industries Commodities(?), I am very grateful -- where the judge concluded that it only applied in the case of insolvent winding up and if the company turned out to be solvent then you didn't then read across the bankruptcy rules.

But yes, this applies obviously in the case of insolvency without leaving a surplus, hence it applied in corporate law as well.

LORD JUSTICE PATTEN: I suppose the point that

Lord Justice Briggs asked you, although it says it apply in -- it goes on a few paragraphs later to say it was believed it didn't in fact apply. I'm looking at paragraph 1368.

MR ZACAROLI: Perhaps I can come back to that. I'll think about that. It's irrelevant anyway for the purposes of the submissions I'm making. The point is only that in bankruptcy it didn't in any sense shift -- it reinforces the conclusion that in bankruptcy interest was not payable otherwise than pursuant to the Act.

The point then made at paragraph 1383 of the Cork Report, turn on two pages, which recites section 33(8) of the 1914 Act in terms which make it clear that once you've paid statutory interest at 4 per cent per annum, any balance then belongs to the bankrupt.

Looking at the Cork Report more generally, in particular between 1383 to the end of this section, that's to 1395, there are a number of points which come out of it. First of all, there's criticism made of the inequality of the position in winding up at 1384, noting that creditors with a right to interest get it but those who don't, don't get it. Noting the point made in 1385 that the whole purpose of interest beyond the date of the winding up was to compensate all the creditors for being kept out of their money whilst the administration

of the estate occurred. Then also, attention is drawn at 1386 to the anomaly between the two different sets of proceedings.

Under the heading "Our Proposals" on page 315 you see the matters they have taken into account in formulating the proposals:

"We consider there should be only one set of rules relating to the interest on debts in all forms of insolvency proceedings. In preparing the rules simplicity and certainty are essential."

And they go on to deal with the exorbitant rates of interest dealt with under section 66 are no longer a serious problem so we don't need that anymore.

And they note another criticism there:

"Moreover, the rules by which the rates are applied resulted in unequal treatment of different classes of creditors."

So their recommendation is at 1359, to repeal section 66. And then (c):

"During the insolvency, in the event of there being a surplus after payment of all admitted debts and liabilities, including interest prior to commencement of an insolvency, where applicable, interest should run on all such debts and liabilities until a final dividend is declared."

We say that's very important wording when one comes to the Act although when one sees the word "outstanding". Clearly under this wording, interest is due for a period, the period ending when the final dividend is declared.

And the recommendation is that:

"The rate should be that which applies to judgment debts at the commencement of the insolvency."

And the concept of it being the judgment rate at the commencement of the insolvency is carried through but we'll see in a moment the modification to that brought in by the White Paper.

The White Paper is at tab 212, the next tab. And at paragraph 88 we see the recommendation for a variation to the Cork Committee's proposal. That is that there should be interest at a minimum rate equivalent to the Judgments Act rate at the date of the relevant order:

"If, however, a higher contractual rate applies to the debt, post-insolvency interest will be chargeable at that rate."

So that brings us up to date, as it were, to 1986, to the legislation. Stepping back a moment, what was the position when the 1986 Act and rules came to be enacted? At its highest, we say that where the statute previously was silent as to post-liquidation interest

there was a judge-made rule that creditors were remitted to their full contractual entitlement when the surplus emerged, on the basis they should get interest as if there had been no winding up. And in that context dividends were to be treated as on account of the principal and interest which had accrued at the date of each dividend. In that case the creditors' entitlement to appropriate remained. That's why it's still a rule of appropriation. We will come to Bower v Marris in a moment. But that's what it was.

That is, we say, very far indeed from the concept of some general equitable principle about how to calculate interest from an insolvent estate. And certainly no support in the law of bankruptcy for at least a hundred years, and we will say longer, for any such principle.

Can I then turn to rule 2.88(7) itself, or rather I should say rule 2.88 because it's important to see the whole of the rule in construing sub-rule (7). The first point to note about it is that it does indeed implement the Cork Committee's proposal with the single modification proposed by the White Paper to allow a higher contractual rate if applicable.

The second point to note is it clearly does not operate by reference to the old companies' position, ie

remission to contractual rights, but adopts principally the bankruptcy method, which is to apply a right of interest to everybody, whether they had a right to interest or not. So looking at the rule, sub-rule (1) is important:

"Where a debt proved in the administration bears interest that interest is provable as part of the debt except insofar as it is payable in respect of any period after the company entered administration."

The definition of "proof" is at rule 2.72(1) and (2), tab 169 if you would rather look at it in the bundles, or it's in the Red Book. Sub-rule (1) of 2.72:

"A person claiming to be a creditor of the company and wishing to recover his debt in whole or in part must submit his claim in writing to the administrator.

"(2) The creditor who claims [it is referred to as proving] his debt the document at which he seeks to establish his claim is his proof."

So "proving" is just another word for claiming the amount you say is due to you.

So putting 2.72 and 2.88(1) together, the rules preclude a creditor from making a claim for any interest that accrues after the date of the administration. It's common ground that precisely or materially the same wording appears across the various insolvency

proceedings. So both in liquidation, all forms of it, and bankruptcy.

Having removed the creditors' right to prove claim for interest beyond the date of administration, what the rule then goes on to do is to provide the creditor with new rights -- creditors generally with new rights. And we do say these new rights are substantially different to the rights which creditors generally had prior to the administration. So for example --

LADY JUSTICE GLOSTER: There's no obligation on the creditor to prove his claim if he has assets outside the jurisdiction and he's not subject to the jurisdiction of this court, he can enforce in that way. If he has security he can enforce his security. So it's not compulsory for the creditor to submit to the process.

MR ZACAROLI: No, it's not compulsory.

LADY JUSTICE GLOSTER: And if he doesn't his contractual rights remain outstanding.

MR ZACAROLI: They may do so in relation to a right against security, or if one is talking about --

LADY JUSTICE GLOSTER: Or foreign assets or something.

MR ZACAROLI: Provided the creditor is a foreign creditor. If the creditor has a connection with this injunction he could be injuncted from taking steps abroad in --

LADY JUSTICE GLOSTER: We all know that, yes.

MR ZACAROLI: So that's right, that creditors who don't come in at all don't make a claim at all, are not subject to the scheme at all.

LORD JUSTICE BRIGGS: But then they cannot recover out of the estate.

MR ZACAROLI: That's right.

LADY JUSTICE GLOSTER: But then are you saying they'd be precluded from any surplus even if they did prove at that stage?

MR ZACAROLI: Yes. They can't come into the estate at all. If they have no connection with this jurisdiction they may simply stand outside the whole process, whether it be proved debts, non-provable debts, interest, whatever, they simply stand outside it. If there are assets in China that the Chinese creditor can get hold of so be it. If he can get them before the liquidator he gets recognition in China and takes the assets.

But if you stand wholly outside the scheme then you are outside it for all purposes. And the secured creditor, of course, is exercising a right against secured assets, which is in a sense his own property, it's a proprietary right he has.

So if you want to come into the statutory scheme the only way to do so is by making a claim. If you make a claim, then what you can't do is make a claim for any

interest accruing after the date of administration and in place of that the statutory scheme gives you what you see in rule 2.88.

And the rights are different in a number of ways, the most obvious difference being the creditor who has no contractual or other rights to interest is paid interest, notwithstanding that lack of any right. A creditor with a low rate of interest gets an uplift to the statutory rate. A creditor with a right to simple interest where interest is accruing at the date of administration gets a form of compounding because the proved debt means anything outstanding by way of principal or interest up to the date of administration. A future creditor whose debt is not discounted at all, nevertheless gets interest on that debt from the date of administration when contractually it wouldn't be entitled to it.

Depending on the court's answer to issue 7, certainly on the basis of the judge's answer to issue 7, a contingent creditor becomes entitled to a right to the interest at the date of administration even though its interest never actually falls in, ie it never becomes an actual creditor. That couldn't possibly happen outside administration or liquidation, whether by a judgment or otherwise. He couldn't obtain judgment for his

contingent claim. He has to wait to see if it falls in. So the Act, if we are wrong on issue 7, gives an important different right to creditors that doesn't exist outside of administration.

And the big picture point here, we say, is that the bundle of provisions in rule 2.88 substantially alter both sides of the equation.

First of all, collectively, the rights of creditors are altered. They're given, collectively, a bundle of different rights than those which they would have outside of insolvency and, on the other side of the coin, the debtor is subject to very different obligations than it would have had outside of the administration, ie the estate, as a whole, is having to bear, for example, the obligation to pay everybody at the Judgment Acts rate, even though many of those creditors would have had no right to interest.

The only concession to the rights that existed at the date of administration of the creditors is in sub-rule (9), where the draftsman has incorporated one aspect of the creditors' rights outside administration. Namely, the rate. The rate of interest applicable to its debt. If that rate is higher than the Judgments Act rate, then it's that rate of interest to which the creditor is entitled. That is, we say, as the judge

said, held, a limited incorporation of a creditor's rights, contractual rights.

It certainly doesn't indicate the rule was generally intended to operate by remission to contractual rights, indeed the opposite. The fact that some limited incorporation of the creditor's rights is identified and brought in the specific name of the rate. It suggests the opposite, the drafter did not intend to remit creditors generally to their contractual rights. This is a new statutory right, not a remission to contractual rights.

I'll come back, if I may, to the question whether the word rate, in rule 2.88(9), incorporates the right of appropriation based on Bower v Marris. We say it doesn't. I will come back to that, if I may.

As a matter of construction, rule 2.88(7) does not permit interest to be paid to creditors on the basis that prior dividends are treated as having discharged interest before principal. It's a direction as to what to do with the surplus if it arises. That obviously arises only when proved debts have been paid. I repeat the points I made in opening.

There are three elements you need to know in order to calculate the amount of interest you need to pay out of the surplus. The first is the rate. The second is

on what sum you are paying it, and the third is for what period. Those three things are all defined fully in 2.88(7). It therefore is all you need to know in terms of a blueprint for how to calculate interest.

The third point, that it's for a defined period, that is until the date the debts cease to be outstanding. That wording obviously comes directly from sub-rule (7). We say that means: until the dividends are received. The relevant surplus is that remaining after payment of the debts proved. What has to be outstanding is those proved debts.

It was common ground before the judge, and he held in his judgment that the reference to periods, in the plural, is deliberately there to cater for the fact that there may well be interim dividends. So if I made a hundred pounds, and I get paid £50 after one year, and the remaining £50 at the end of two years, I am entitled to interest on a hundred pounds for one year. But, after that, I have already been paid after the interest ceases to run on the 50, continues to run on the remaining 50.

That meaning of the word "outstanding", as I point out earlier, is wholly consistent with paragraph 1395(c) of the Cork Report, which referred in terms to the period of interest being payable until the final

dividend was declared.

The way in which Bower v Marris would operate would be, first of all, to assume that what's been paid to date is statutory interest, not the proved debt. Remembering the only right here is one to statutory interest. It's not a contractual right but it is just the statutory interest pursuant to this rule. For Bower v Marris to operate, one would have to assume that some of the payments that have been made to date were made in respect of statutory interest where statutory interest is not payable until all proved debts have been paid in full.

Secondly, the operation of Bower v Marris would require proved debt to be treated as not having to be paid in full.

Thirdly, the surplus would be applied under the Bower v Marris principle, to interest accruing long after the date the final dividend had been paid.

Finally, Bower v Marris principle would actually result in payments being made of something which is supposed to be statutory interest but in fact is repayment of parts of the proved debt. Not interest at all.

LADY JUSTICE GLOSTER: Can I ask what may be a foolish question, Mr Zacaroli: let's assume a very simple

liquidation where the liquidator, or the administrator for that matter, has distributed all the proved debts, and just before the administrators hand back the surplus to the company and its directors, a foreign creditor has not proved, comes in and says, "I haven't proved, but now there's a surplus. Not proving, I'm just asking you to pay out of the surplus -- which you are just about to hand back -- my contractual rights"; what happens then? He's not making a proof; is he obliged to make a proof or does he injunct the administrators? What's the legal position in that situation?

MR ZACAROLI: So a creditor --

LADY JUSTICE GLOSTER: Let's assume it's a foreign creditor. Everything has been wound up. All the debts have been paid. I appreciate we're not on point here, precisely, but there's a surplus and the foreign creditor comes along and says, "I have rights under a foreign contract which gives me interest on my debt", whether it's contingent or not may be another frill. "I want to be paid and I want to be paid my full contractual interest at my foreign rate, which I haven't been paid meantime".

MR ZACAROLI: So he has an option?

LADY JUSTICE GLOSTER: He didn't prove, but now there's a surplus. The administrators are about to hand back; what's the position as a matter of law there?

The foreign creditor with his claim says, "Well, don't hand back, pay it to me"; what happens in that very simple situation?

MR ZACAROLI: Well, I think the answer is he can't make any claim unless he proves. If it's a provable claim, he has to prove for it.

LORD JUSTICE BRIGGS: Otherwise it's a non-provable claim and we are back into Waterfall 1.

MR ZACAROLI: Yes, if it's a completely new claim, which has --

LADY JUSTICE GLOSTER: Matured in the meantime.

MR ZACAROLI: If it has matured, that suggests it was a pre-existing claim, which lays out an obligation prior which is therefore proven. The definition of provable claim is very wide.

LADY JUSTICE GLOSTER: It makes a difference, does it, whether's it's a provable claim?

MR ZACAROLI: Yes.

LADY JUSTICE GLOSTER: If it is a provable claim and he hasn't proved and everything else is being paid and the surplus is going back to the company you say he should have proved he is going and the administrators say, "Well, do what you like as against the company, but you can't adjunct us".

MR ZACAROLI: I need to think about that, if I may

because --

LADY JUSTICE GLOSTER: It may be a stupid question. I am just trying to understand how far your argument goes.

MR ZACAROLI: Anybody who wants to claim from the company has to prove, that's the start. If they have a provable debt, they can only get that debt --

LADY JUSTICE GLOSTER: Even once it goes into surplus, even once it flips into surplus?

MR ZACAROLI: Yes, it is still a question of proving.

LADY JUSTICE GLOSTER: Until the administrator has been formally discharged?

MR ZACAROLI: What I need to just check, and I may do overnight, is check the extent to which a note of the final dividend has been declared by the administrator and properly advertised at the time et cetera, the extent to which, having paid all dividends and paid statutory interest on all those dividends -- I just need to work out --

LADY JUSTICE GLOSTER: Yes, I am just trying to understand what, at the end of the road, the position is.

MR ZACAROLI: I need to work out whether the creditor can actually the come under stir -- you can never stir final --

LADY JUSTICE GLOSTER: There's no possibility of that. That's not in my --

MR ZACAROLI: The question is whether the right remains for that creditor to make a claim against the assets in the liquidation which remain.

I suspect he probably can, but I need to check that. But it has to be by way of proof. You just can't come in and say, "I'm a --"

LADY JUSTICE GLOSTER: Until the administrator has actually been discharged and paid over to the company.

Okay, the administrator is about to go into court and get his discharge, or however you do it, foul or something, and about to pay back the company. The creditor comes along and says, "I want an injunction. I can't pay it back to the company controlled by these creditors".

MR ZACAROLI: If I can take that away with me.

LADY JUSTICE GLOSTER: Okay, you may say it's a silly question but I'm just interested to know what ultimately down the track the position is.

LORD JUSTICE BRIGGS: Begs the question whether money is in fact at the end of administration paid to the company or direct to its shareholders.

MR ZACAROLI: It depends what sort of administration -- well, actually, it must --

LORD JUSTICE BRIGGS: If it is a distributing administration, which it by definition is, then does it

in fact go back to company or does it go to shareholders?
MR ZACAROLI: Goes to shareholders.
LORD JUSTICE BRIGGS: I don't think it goes back to the company. We are in a bankruptcy situation. That's not insolvency.
MR ZACAROLI: That's correct there's no concept of the company for it to go back to, at this stage.
LORD JUSTICE BRIGGS: No, the company dies, doesn't it? Once it's a distributing administration, it's like a winding-up.
LADY JUSTICE GLOSTER: It's like a liquidation. Okay, so the example then is not back to the company, but back to the shareholders.
LORD JUSTICE BRIGGS: Yes.
MR ZACAROLI: Simply, may I take it away?
LADY JUSTICE GLOSTER: Okay. Yes, please do. Is that a convenient moment?
MR ZACAROLI: It is.
LADY JUSTICE GLOSTER: You are well ahead.
MR ZACAROLI: I think so, yes.
LADY JUSTICE GLOSTER: Very well. Thank you very much. 10.30 tomorrow.
(4.15 pm)
(The hearing was adjourned until

the following day at 10.30 am)

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