

<p>1 Tuesday, 4 April 2017                  2 (10.30 am)                  3 Submissions by MR DICKER (continued)                  4 LADY JUSTICE GLOSTER: Yes, Mr Dicker.                  5 MR DICKER: Just a few points arising out of yesterday.                  6 Your Lordships asked a couple of questions in relation                  7 to paragraph 46 of the order of 1841. The order applied                  8 of Whittingstall v Grover. So far as the source of the                  9 power to make the order is concerned, the order at the                  10 top refers to the source of the power being 3 and 4                  11 Victoria C94(4) and (5) Victoria, they provided that                  12 orders made by the chancellor had the force of an Act of                  13 Parliament. Under the 1840 Act, the orders had force of                  14 an Act of Parliament once laid before Parliament and                  15 proved, but in the 1841 Act that changed. They had                  16 force of Parliament if after a certain number of weeks                  17 of the orders being made Parliament did not intervene                  18 and disprove them.                  19 So paragraph 46 of the 1841 order can effectively be                  20 treated as if it were a statute.                  21 LORD JUSTICE PATTEN: It's all delegated legislation, yes.                  22 MR DICKER: Our short point, as you know, is that                  23 analytically the 1841 order operates in the same way as                  24 rule 2.889, in the sense that it provides payment of                  25 interest to those who otherwise aren't entitled to</p> <p style="text-align: center;">Page 1</p>	<p>1 provided for orders in equity to carry interest --                  2 LADY JUSTICE GLOSTER: So the point I made yesterday was                  3 wrong? Yes.                  4 MR DICKER: Now, just in terms of the rationale for the                  5 provision, I mentioned a case yesterday called                  6 Garrard v Lord Dinorben. Can I just show you a very                  7 short passage from that and, indeed, there is only                  8 a short passage. It's authorities 1, tab 7. The                  9 Vice-Chancellor -- this is at the bottom of the first                  10 page -- says:                  11 "The object of the 46th order was to prevent                  12 injustice which often followed from the decree of the                  13 court preventing the creditor from enforcing his demand                  14 at law and thereby delaying the payment of the debt.                  15 The order therefore declares the creditor shall be                  16 entitled to interest on his debt out of any assets which                  17 may remain after satisfying the costs, the debts                  18 established and the interest payable by law. The                  19 interest on the other debts not carrying interest                  20 ... (Reading to the words)... creditor out of the fund                  21 which, but for the order, would have gone to the                  22 debtor."                  23 We say the basic rationale is essentially the same                  24 as that underlying the reference to the Judgment Act                  25 rate, in rule 2.88(9). In other words, he's being</p> <p style="text-align: center;">Page 3</p>
<p>1 interest, but only in the event of a surplus. So it's                  2 a statutory right conferring a new entitlement to                  3 interest, which arises if, and only if, there is                  4 a surplus.                  5 Now, we say, there's nothing inconsistent with that                  6 and the principle in Bower v Marris, one can see that                  7 from judgment of Mr Justice Chitty because he applied it                  8 in the that context. If it works in the context of the                  9 1841 order, we say there's absolutely no reason why, as                  10 a matter of analysis, it can't work equally in relation                  11 to rule 2.88.                  12 Now, so far as the scope of the 1841 order is                  13 concerned, the only examples we have been able to find                  14 are in the context of decrees for the administration of                  15 a deceased's estate. The reason for that may be that by                  16 the time one gets to order 55, which Mr Justice Chitty                  17 referred to in Whittingstall v Grover, order 55                  18 expressed it solely in that context. So whatever the                  19 scope may originally have been under the 1841 order, by                  20 the time one moved on a few years, it appears to have                  21 been limited to the administration of the deceased                  22 estate.                  23 We know that it can't have applied to orders for                  24 payment of sums of money made by the courts of equity,                  25 that's because section 18 of the Judgments Act already</p> <p style="text-align: center;">Page 2</p>	<p>1 prevented from enforcing your judgment, and it's only                  2 right, as Mr Justice Chitty said, that you should be put                  3 in the same position as if you had been able to do so.                  4 One can trace the order of 1841 through, as I said,                  5 order 55, rule 62 and 63, which are referred to by                  6 Mr Justice Chitty in Whittingstall v Grover, to                  7 order 44, rule 18(1) and (2) which applied from 1967                  8 onwards when order 44, rule 18(1) and (2) --                  9 LORD JUSTICE PATTEN: That was in the last version of the                  10 White Book before the CPR came in, wasn't it?                  11 MR DICKER: Yes.                  12 LADY JUSTICE GLOSTER: Why was that dealing with                  13 administration of estates?                  14 MR DICKER: Then, CPR 64.2(b) and CPR 40 Practice                  15 Direction 14, which I mentioned yesterday, so these                  16 rules were essentially continued being incorporated in                  17 subsequent Rules of Court through to the CPR. That's                  18 why I said yesterday there's a potential inconsistency                  19 in the light of the judge's judgment, because if the                  20 administration of estate which is solvent, it's governed                  21 by the CPR, and following Whittingstall v Grover through                  22 it would seem that Bower v Marris would still apply.                  23 But if you have an administration of estate which starts                  24 off insolvent and is therefore governed by the                  25 Insolvency Act, which nevertheless turns out to be</p> <p style="text-align: center;">Page 4</p>

1 solvent. According to the judgment, Bower v Marris  
 2 doesn't apply. It seems a slightly strange outcome.  
 3 Your Lordships asked, I think, about the meaning of  
 4 certain words in section 132, the Bankruptcy Act 1825.  
 5 The relevant phrase was:  
 6 "The remainder of the debts due to him."  
 7 I think the short explanation of this is, as was  
 8 suggested yesterday, as follows: section 63 of the Act  
 9 contained a general vesting provision. It vested all  
 10 the bankrupt's estate in the assignees, and included all  
 11 debts due or to become due to the bankrupt and provided  
 12 that after assignment the bankrupt has no right to  
 13 recover those debts.  
 14 Now, what section 132 essentially did was first to  
 15 require the assignee to hand over any surplus assets to  
 16 the bankrupt.  
 17 Second, to give back to the bankrupt the power to  
 18 recover any outstanding debts in the event that everyone  
 19 had been paid in full. In other words, reversing the  
 20 assignment which had originally occurred on the  
 21 bankruptcy under section 63.  
 22 LORD JUSTICE BRIGGS: That's what it looked like, but thank  
 23 you for confirming.  
 24 MR DICKER: Then, the phrase in section 132:  
 25 "To creditors whose debts are now by law entitled to

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1 carry interest."  
 2 This can't have referred to Judgment Act interest  
 3 for the simple reason that the Judgment Act hadn't yet  
 4 been introduced.  
 5 As Lord Justice Briggs suggested yesterday, it might  
 6 concern the effect of the Usury Act, because at the time  
 7 of 1825, the Usury Act of 1660, as amended by the  
 8 Usury Act of 1713 was still in force. It wasn't  
 9 repealed until 1854. The Usury Act of 1713 fixed  
 10 a maximum rate of interest to 5 per cent. So one  
 11 explanation of these words might be: where the Usury Act  
 12 applied, you were only entitled to 5 per cent under the  
 13 Act. That was intended to be covered by the phrase:  
 14 "Debts which are now by law entitled to carry  
 15 interest."  
 16 The alternative possibility is, it appears, and we  
 17 haven't been able to find any sufficiently clear  
 18 authority to this effect, that there were rights to  
 19 interest under the law merchant, in certain  
 20 circumstances.  
 21 The final point from yesterday concerned the  
 22 examples, which we said we agreed we would provide you  
 23 as to the operation of Bower v Marris and the operation  
 24 of the compound interest. We have prepared some.  
 25 They're in the course of being checked. I hope I'll be

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1 able to provide them to you at the short adjournment --  
 2 LADY JUSTICE GLOSTER: It would be helpful if they were  
 3 agreed so we're not having arguments about arithmetic.  
 4 So if you can just pass --  
 5 MR DICKER: We will see if we can achieve that, but they  
 6 shouldn't be controversial.  
 7 LADY JUSTICE GLOSTER: No.  
 8 MR DICKER: So those were the only points I had arising from  
 9 yesterday.  
 10 I had, at the end of yesterday, moved on to start  
 11 dealing with declarations 4 and 5, essentially  
 12 non-provable claims and the possibility of a claim to  
 13 interest on statutory interest, which was the second  
 14 declaration.  
 15 Just starting with non-provable claims for  
 16 interest --  
 17 LORD JUSTICE PATTEN: This is 5 at the moment, is it? We're  
 18 on declaration 5, are we?  
 19 MR DICKER: We are. In a sense, it's easier to take that  
 20 first.  
 21 As your Lordships know, this issue arises in the  
 22 following way: if we're wrong about the construction of  
 23 2.88 and it doesn't capture a creditor's full underlying  
 24 entitlement -- in other words, after payment of interest  
 25 under 2.88, there is still an unpaid balance of interest

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1 owing -- is the creditor entitled to recover that as  
 2 a non-provable liability?  
 3 We say the answer to this is yes.  
 4 The only point, I think, just so you're aware, this  
 5 declaration effectively raises the same issues as issues  
 6 29 and 30. The submissions I will make on this issue  
 7 effectively cover pretty much everything I need to say  
 8 in relation to those issues.  
 9 LORD JUSTICE BRIGGS: Sorry, which --  
 10 MR DICKER: They are point 9 and point 10 on the list of  
 11 issues. I will mention them briefly when I deal with  
 12 currency conversion claims and the relationship of those  
 13 claims to interest because 29 and 30 arise in that  
 14 connection, but they are essentially just another  
 15 example of a non-provable claim.  
 16 Again, just to emphasise --  
 17 LADY JUSTICE GLOSTER: This is on the hypothesis that you've  
 18 lost?  
 19 MR DICKER: Correct.  
 20 LADY JUSTICE GLOSTER: On the Bower v Marris point.  
 21 MR DICKER: Either on Bower v Marris or on compound  
 22 interest, or both, or on any other points that might  
 23 result in creditors receiving less than their full  
 24 entitlement to interest.  
 25 LORD JUSTICE PATTEN: So this is, essentially, all about

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<p>1 whether rule 2.88(7) is an exhaustive code.                  2 MR DICKER: Right, the judge had two points. First of all,                  3 he said it's an exclusive code and, secondly, he said it                  4 cuts across creditors' existing rights. By that, we                  5 understand him to have meant, effectively, what you're                  6 given is sufficiently different, that you can tell that                  7 what you previously had is effectively extinguished and                  8 you no longer have a right to pick it up. Again, I will                  9 deal with that a second.                  10 What I was going to do is start by emphasising                  11 a point which I made yesterday, which is that this is                  12 a secondary argument. We say that there is at least                  13 some force in the judge's point that you wouldn't                  14 naturally expect Parliament to say you should be                  15 entitled to recover one slug of interest under 2.88 but                  16 leave another slug to be recovered as a non-provable                  17 liability. Not impossible. Certainly not impossible,                  18 but we do say the first reaction -- if that's where you                  19 get to -- should be to go back and reconsider the                  20 construction of 2.88 to see whether or not what has been                  21 omitted can in fact be covered on the true construction                  22 of 2.88. Because the alternative -- which is the                  23 alternative the judge effectively adopted -- is that the                  24 unpaid balance effectively falls into a black hole. We                  25 say that is a much less likely outcome. Parliament</p> <p style="text-align: center;">Page 9</p>	<p>1 applied in satisfaction of the company's liabilities                  2 pari passu, and subject to that application shall,                  3 unless the Articles otherwise provide, be distributed                  4 among the members according to their rights and interest                  5 in the company."                  6 Statutory provision talks about pari passu                  7 distribution and talks about, subject to that, the                  8 assets being distributed amongst the members. There's                  9 no reference to non-provable claims.                  10 Similarly, for compulsory liquidations, in the next                  11 tab, section 143, although slightly more ambiguously,                  12 143(1):                  13 "The functions of the liquidator of a company that                  14 is being wound up by the court are to secure the assets                  15 of the company are got in, realised and distributed to                  16 company's creditors and if there is a surplus to the                  17 persons entitled to it."                  18 Again, no express reference to unprovable claims,                  19 where they rank, or when or how they're paid.                  20 The way in which the legislation works, as                  21 interpreted by the courts, was recently summarised by                  22 Lord Neuberger in Re Nortel. Can I show you the                  23 relevant passages in that. It's bundle 3, tab 96. The                  24 relevant paragraph is paragraph 39.                  25 LADY JUSTICE GLOSTER: I think we're all there.</p> <p style="text-align: center;">Page 11</p>
<p>1 can't have intended creditors should lose part of their                  2 entitlement and the amount of the shortfall should be                  3 paid to shareholders.                  4 Just starting, briefly, with a few submissions in                  5 relation to non-provable claims. I'm conscious that                  6 this will be familiar to at least some of your                  7 Lordships. We say it's a fundamental principle, company                  8 insolvency law, the claims of creditors have to be                  9 satisfied before any distributions could be made to                  10 shareholders. That has always been part of the                  11 architecture of the statutory scheme, although not, as                  12 I said yesterday, something you can find expressly dealt                  13 with.                  14 Just showing you the two main relevant statutory                  15 provisions. They are sections 107 in a voluntary                  16 liquidation, 143 in a compulsory --                  17 LADY JUSTICE GLOSTER: I don't think you need to take us                  18 there, do you? We are all pretty familiar with those.                  19 LORD JUSTICE PATTEN: Those of us who have short memories,                  20 you might at least remind us what they say.                  21 MR DICKER: It's volume 4, tab 184 and 184A. 184 is in                  22 relation to that voluntary winding up. Section 107:                  23 "Subject to the provisions of this Act as to                  24 preferential payments the company's property and                  25 voluntary winding up shall, on the winding up, be</p> <p style="text-align: center;">Page 10</p>	<p>1 MR DICKER: Paragraph 39, Lord Neuberger starts by                  2 summarising, setting out the relevant provisions. Then,                  3 at the top of page 231, says:                  4 "The effect of these as interpreted and extended by                  5 the courts is the order of priority for payment out of                  6 the company's assets is in summary terms as follows ..."                  7 Obviously, we are primarily concerned with                  8 categories 5, 6 and 7:                  9 "Unsecured proof of debt, statutory interest and                  10 non-provable liabilities."                  11 Just before we move away from Nortel, paragraph 54,                  12 just identified the issue in that case. The detail                  13 doesn't matter. Essentially, it concerned how                  14 a financial support directive under the Pensions Act                  15 ranked. Lord Neuberger says, line 4:                  16 "The courts below both held a potential liability                  17 constitutes an expense of the administration falling                  18 within category 2. So it took priority over the normal                  19 run of unsecured creditors, even over the threshold of                  20 creditors. Four possibilities have been canvassed                  21 before us. The first is: the courts below were right.                  22 The second is: the potential liabilities and ordinary                  23 provable unsecured debt ranking pari passu with other                  24 unsecured debts falling within category 5. The third                  25 possibility is that it is not a provable debt within</p> <p style="text-align: center;">Page 12</p>

1 13.12 and, therefore, it falls within category 7."  
 2 We emphasise the word "therefore" simply because  
 3 that reflects the fact that if a debt is not either in  
 4 whole or in part provable, it is therefore  
 5 a non-provable liability.  
 6 Now, it's easiest to see this if one recalls how the  
 7 concept -- the categories of provable claims, and  
 8 non-provable liabilities changed over the years.  
 9 Because, when bankruptcy started, the category of  
 10 provable claims was very narrow indeed. Essentially,  
 11 only liquidated debts were provable. Everything else  
 12 was a non-provable claim. So when Lord Hardwicke in  
 13 Bromley v Goodere said that you pay off the proved  
 14 debts, he was, at that stage, talking about only  
 15 liquidated debts. When he says that every other  
 16 liability had to be paid before the surplus was returned  
 17 to the bankrupt, in that case ten years later, however  
 18 long it was, he was talking about further liabilities  
 19 which a creditor had a right to against the bankrupt, as  
 20 at the date the surplus was retained. Those liabilities  
 21 could have been considerably more expensive than any of  
 22 the claims which could have been proved.  
 23 Proof in respect certain types of contingent claims  
 24 was increasingly permitted by various Acts between 1745  
 25 and 1869. I don't think I need to give you the details.

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1 There's a short summary of the process by  
 2 Mr Justice David Richards in T&N. Just for your  
 3 reference it is authorities 2, tab 74, paragraphs 76 to  
 4 85.  
 5 Non-provable claims remained relevant by 1986 and,  
 6 indeed, afterwards. One tends perhaps now to forget  
 7 that, at the time of the 1986 Act, unliquidated claims  
 8 for damages in tort were still not provable. That only  
 9 changed with the introduction of the 1986 Act and,  
 10 indeed, had to be amended further in the light of the  
 11 judgment of Mr Justice David Richards in T&N, I think in  
 12 about 2001. So categories of non-provable claims  
 13 continues to exist. It continues to exist, indeed, past  
 14 1986. You can see from Lord Neuberger's judgment, in  
 15 Nortel, certain types of statutory liabilities, for  
 16 example, which only arise on the basis of  
 17 Lord Neuberger's test after the date of administration,  
 18 will be non-provable liabilities. As he said in his  
 19 judgment, the category may have narrowed, and the  
 20 category may have become less visible over the years.  
 21 It's nevertheless one that exists. It is essentially  
 22 the residue, any sum to which a creditor was entitled  
 23 and which he hasn't received through the process of  
 24 proof and dividends on his proof.  
 25 That's connected to this: the process of liquidation

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

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

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<p>1 a cut-off date, the courts held, is that currency                  2 conversion claimants are provable but are recoverable in                  3 the event of a surplus. Post-insolvency interest isn't                  4 provable but, again, is recoverable in the event of                  5 a surplus.                  6 One can see how this operated prior to 1986 in                  7 a liquidation, because post-insolvency interest in                  8 a liquidation before 1986 was simply recoverable as                  9 a non-provable liability. There was no specific                  10 statutory provision dealing with it, but the courts                  11 starting in Humber Ironworks said.                  12 "Potentially, the cut-off date means you can't prove                  13 a post-insolvency interest but, nevertheless, in event                  14 of a surplus, you are entitled to be paid it before any                  15 distributions are made to shareholders.                  16 LADY JUSTICE GLOSTER: But the definition of what is                  17 a provable debt doesn't, you might argue, necessarily                  18 predicate that there is a variation of the underlying                  19 liability.                  20 MR DICKER: That is precisely what Lord Hoffmann says in                  21 White v Eckhardt and that was the basis of this court's                  22 judgment in Waterfall 1. Essentially, that if one of                  23 the grounds for the conclusion in that judgment was that                  24 if liquidation is simply a collective process of                  25 enforcement, and creditors' claims are only discharged</p> <p style="text-align: center;">Page 17</p>	<p>1 for which statutory obligations are provable -- I think                  2 it's paragraph 77 of his judgment -- one can well                  3 imagine statutory liabilities which don't satisfy that                  4 test and are therefore non-provable liabilities within                  5 the scope of his judgment.                  6 The judge, against this background, made two points                  7 as to why rule 2.88 did not permit non-provable claims.                  8 The first, as I said, is: it's an exclusive code.                  9 The second is: the rights that you are given cut                  10 across your underlying rights.                  11 Dealing with each of those, so far as the exclusive                  12 code point is concerned, rule 2.88(7) simply says:                  13 "The surplus is to be used in paying statutory                  14 interest before it is applied 'for any other purpose'".                  15 LORD JUSTICE PATTEN: I'm sorry, Mr Dicker, I was just                  16 thinking about what you've just been saying. Are you in                  17 his judgment now?                  18 MR DICKER: No.                  19 LORD JUSTICE PATTEN: Sorry, I thought you'd referred us                  20 to --                  21 MR DICKER: The relevant paragraphs of the judgment, where                  22 he deals with this, are 155 to 167.                  23 LADY JUSTICE GLOSTER: Where does he make the two points?                  24 MR DICKER: You can see, 160, there is a reference to                  25 Wentworth's submission:</p> <p style="text-align: center;">Page 19</p>
<p>1 to the extent that they have been paid, it necessarily                  2 follows that if when the creditor receives his sterling                  3 dividends and converts them into his foreign currency                  4 and finds there is a shortfall, he has a non-provable                  5 claim for the difference.                  6 The point, at this stage, is simply that                  7 non-provable liabilities are simply what is left after                  8 provable liabilities have been admitted and paid.                  9 Against that background, the judge gave --                  10 LORD JUSTICE BRIGGS: Is it right to say that now virtually                  11 nothing that is accrued before the cut-off date is                  12 non-provable. I know it's dangerous to say, "Never".                  13 MR DICKER: There are certain exceptions, I think in 12.3 of                  14 the rules. Certain things, I think, are specific to                  15 that date.                  16 LORD JUSTICE BRIGGS: Yes, but that's because there's --                  17 MR DICKER: As a general rule, your Lordship is absolutely                  18 right. If it is approved prior the administration                  19 order, it will be provable. It will also be provable if                  20 it's a claim or liability arising out of an obligation                  21 incurred before the administration order. The problem                  22 is when neither of those are satisfied, one can help                  23 with the Nortel issue.                  24 LORD JUSTICE BRIGGS: Yes.                  25 MR DICKER: Certainly, if one looks Lord Neuberger's test</p> <p style="text-align: center;">Page 18</p>	<p>1 "Rights of creditors are exhaustively stated in                  2 rule 2.88(7) to (9)."                  3 And, in 162, reference to Wentworth's submissions:                  4 "The regime introduced by rule 2.88 cuts across such                  5 contractual or other rights as creditors would otherwise                  6 have had."                  7 And reasons given as to how they cut across.                  8 LADY JUSTICE GLOSTER: Mr Zacaroli will explain all this,                  9 but "cut across" means actually vary or discharge,                  10 doesn't it?                  11 MR DICKER: Yes, that must be the logical consequence of his                  12 judgment. If you don't have a non-provable claim for                  13 the balance, that can only be because 2.88 has                  14 extinguished your underlying rights and given you rights                  15 to interest under 2.88.                  16 The two points are obviously connected. Just                  17 dealing with each, first, the bold proposition that 2.88                  18 is an exclusive code. We say, if one looks at the                  19 wording of rule 2.88(7), it simply says the surplus must                  20 be used to pay interest before it's used for any other                  21 purpose. There's no reason why any other purpose can't                  22 include non-provable liabilities. Indeed, it plainly                  23 does include non-provable liabilities because otherwise                  24 paragraph 3 would cease to exist. So the only question                  25 is: is it only remaining interest within that reserved</p> <p style="text-align: center;">Page 20</p>

<p>1 category of non-provable liabilities?</p> <p>2 There's nothing, we say, in 2.88, which expressly</p> <p>3 extinguishes a claim for balance of any interest which</p> <p>4 the creditor still owes. It doesn't say the existing</p> <p>5 underlying rights to interest are extinguished. There's</p> <p>6 no wording, in 2.88, which we say could have that</p> <p>7 effect. There's nothing else in the statutory scheme</p> <p>8 which has that effect.</p> <p>9 The consequence is that if that's right, then we say</p> <p>10 the normal position obtains any unpaid balances are</p> <p>11 non-provable liability.</p> <p>12 The judge's response to that, in paragraph 164, was</p> <p>13 to say:</p> <p>14 "If the SCG and York were right, the effect of the</p> <p>15 legislation is to prescribe one regime for the payment</p> <p>16 of interest as a first charge out of the surplus</p> <p>17 remaining after the payment of proved debts in full,</p> <p>18 leaving without any explicit recognition the possibility</p> <p>19 of the payment of further post-insolvency interest as</p> <p>20 a non-provable debt out of the surplus remaining after</p> <p>21 the satisfaction creditors' rights to statutory</p> <p>22 interest. I do not think that rule 2.88 can be read in</p> <p>23 this way."</p> <p>24 So one of the points the judge was making was if</p> <p>25 there is this category of non-provable interest, there's</p> <p style="text-align: center;">Page 21</p>	<p>1 to have an unprovable liability because the rule doesn't</p> <p>2 exclude it.</p> <p>3 Whereas those with a claim to interest, don't have</p> <p>4 a claim for any unpaid balance of interest because, on</p> <p>5 his construction, rule 2.88 does extinguish that claim.</p> <p>6 LORD JUSTICE BRIGGS: The difference being it's interest on</p> <p>7 a provable debt.</p> <p>8 MR DICKER: Yes, although currency conversion claims are the</p> <p>9 unpaid balance, one may say, of a provable debt. It</p> <p>10 becomes a very fine distinction.</p> <p>11 Perhaps a more substantive point would be if the</p> <p>12 legislature intended a creditor with a foreign currency</p> <p>13 claim to be entitled to recover the balance of his full</p> <p>14 entitlement, why wouldn't the legislature equally</p> <p>15 concerned to ensure that a creditor should recover the</p> <p>16 full amount of interest that he was owed. One comes</p> <p>17 back to the overarching nature of this regime, which is,</p> <p>18 at it's most fundamental, creditors first, members last.</p> <p>19 That's not the outcome which the judge has ended up</p> <p>20 with.</p> <p>21 LORD JUSTICE PATTEN: In terms of the purpose or policy, you</p> <p>22 say the two positions are inconsistent if the judge's</p> <p>23 construction is right.</p> <p>24 MR DICKER: In policy terms, yes. It's very difficult to</p> <p>25 see what the justification for the two different</p> <p style="text-align: center;">Page 23</p>
<p>1 no express recognition of that in rule 2.88. We say</p> <p>2 that point doesn't take one very far because there's no</p> <p>3 express recognition of non-provable liabilities anywhere</p> <p>4 in the Act at all. So it's not such a surprising point</p> <p>5 if there's no express recognition of them as well, in</p> <p>6 rule 2.88.</p> <p>7 LORD JUSTICE PATTEN: How does the judge's reasoning, on</p> <p>8 this point, tie in with his view about currency</p> <p>9 conversion claims?</p> <p>10 MR DICKER: Part of the basis on which he held currency</p> <p>11 conversion claims existed as non-provable liabilities</p> <p>12 is, if one looks at the rules for converting currency</p> <p>13 conversions claims into sterling, those rules say:</p> <p>14 "For the purposes of proof a creditor's claim is</p> <p>15 converted into sterling."</p> <p>16 He said that means for the purposes of proof and</p> <p>17 only for the purposes of proof.</p> <p>18 LORD JUSTICE PATTEN: So they leave the Humber Ironworks</p> <p>19 doctrine -- if that's the right way of describing it --</p> <p>20 intact.</p> <p>21 MR DICKER: Yes. The distinction that results from his two</p> <p>22 judgments is a consequence of his construction of the</p> <p>23 two rules.</p> <p>24 LORD JUSTICE PATTEN: Yes.</p> <p>25 MR DICKER: Essentially, foreign currency creditors continue</p> <p style="text-align: center;">Page 22</p>	<p>1 approaches would be.</p> <p>2 When the judge talks about 2.88 being an exclusive</p> <p>3 code, we say it's helpful to stand back and think about</p> <p>4 the rules in relation to proof. Because if you focus on</p> <p>5 the rules in relation to proof, they say you can only</p> <p>6 prove for foreign currency claim converted into sterling</p> <p>7 as at the date of administration. That's all you can</p> <p>8 prove for.</p> <p>9 They also say you can only prove for interest which</p> <p>10 has accrued up to the date of the administration.</p> <p>11 Now, on the judge's approach, why don't the rules of</p> <p>12 proof operate as an exclusive code. They say you can</p> <p>13 only prove for this. They don't mention any residue</p> <p>14 but, nevertheless, it is consistently held that currency</p> <p>15 conversion claims post-insolvency interest are</p> <p>16 recoverable as non-provable liabilities. If the rules</p> <p>17 of proof are not an exclusive code, why is rule 2.88</p> <p>18 an exclusive code?</p> <p>19 So we say there's also an inconsistency there.</p> <p>20 I think, as we understand it, one of the judge's</p> <p>21 answers was: well, if you look at 2.88, the rights you</p> <p>22 are given cut across your underlying rights.</p> <p>23 You can really see we understand his reasoning to</p> <p>24 have been that it really only makes sense, in looking at</p> <p>25 what you are given under 2.88, if what Parliament was</p> <p style="text-align: center;">Page 24</p>

<p>1 intending was, essentially: forget about your underlying 2 rights, you will have this new and different package of 3 rights. 4 In relation to that, the judge referred to four 5 submissions made by my learned friend on behalf of 6 Wentworth. He set those out in paragraph 162 of his 7 judgment. Just dealing with each of these: 8 "Mr Zacaroli correctly submits the regime introduced 9 by rule 2.88 and equivalent provisions for liquidation 10 and bankruptcy cut across such contractual or other 11 rights as creditors would otherwise have had to the 12 payment of interest." 13 Then, four points: 14 "First, interest is payable from the surplus after 15 the payment of all proved debts to all creditors whether 16 or not their debts were otherwise interest-bearing." 17 Now, that's correct, but we say the rationale for 18 this is that the moratorium prevents creditors from 19 obtaining a judgment. So the rules say that in event of 20 a surplus they should be treated as if they had 21 a judgment. 22 We would say that's not cutting across underlying 23 rights, that's better described as reflecting underlying 24 rights. 25 The second point he makes is in the case of interest</p> <p style="text-align: center;">Page 25</p>	<p>1 a judgment were entered for the foreign currency debt, 2 interest would be awarded under section 44 of the 3 Administration of Justice Act 1970, such rate as the 4 court thought fit, which is likely to be at a commercial 5 rate rather than judgment rate." 6 Now, that's right. We say irrelevant here. Because 7 the relevant claim is converted into sterling and, for 8 the purposes of proof, having converted it into 9 sterling, there is nothing odd at all in saying that the 10 creditor ought to be entitled to interest on that 11 sterling sum at the Judgment Act rate for sterling 12 judgments. So if one stands back and looks at these 13 four points and asks: can you tell from these four 14 points that what Parliament was intending to do was to 15 extinguish your existing underlying rights to interest, 16 and replace them with an entirely new package of rights, 17 essentially in consideration of giving up your old 18 rights? We say: you simply don't get that. 19 Again, just to remind you, the consequences of 20 excluding a non-provable claim do produce potentially 21 unfair results. Go back to the example I gave of 22 an insolvent company which has claims against its own 23 debtors bearing interest and matching liabilities. On 24 the judge's approach, something is inevitably lost 25 during the period of the insolvency. Sums are received</p> <p style="text-align: center;">Page 27</p>
<p>1 bearing debts where the contractual rate was less than 2 judgment rate: 3 "Interest is payable at a rate higher than the rate 4 to which they are otherwise entitled." 5 So the point here is: well, if you have 6 a contractual rate of 2 per cent, you nevertheless have 7 a right to Judgment Act rate interest. But, again, we 8 say: so what? You are treated as if you had reduced 9 your claim to a judgment and you are entitled to 10 Judgment Act rate on that judgment. 11 The third point he makes is: 12 "Interest is payable on a principal sum which 13 comprises both the capital amount of the interest and 14 any interest accrued up to the date of administration." 15 Now, again, in what sense is that cutting across 16 creditors' existing rights? If you imagine a creditor 17 who had obtained a judgment, as at the date of 18 administration, that judgment would be for principal and 19 interest accrued to that date, and judgment of that 20 interest would then run on that combined sum. So, 21 again, nothing we say cutting across creditors' 22 underlying rights. 23 Fourthly, he says: 24 "Judgment rate interest is payable on foreign 25 currency claims converted into sterling, although if</p> <p style="text-align: center;">Page 26</p>	<p>1 from debtors. They are not paid to creditors, although 2 creditors are owed a corresponding liability. Instead, 3 they end up providing a windfall for shareholders. 4 There doesn't seem, within the grand scheme of the 5 insolvency regime, any sensible rationale for that at 6 all. 7 So that's declaration 5. 8 Moving on to declaration 4 -- 9 LORD JUSTICE PATTEN: I may have asked you this question 10 yesterday, so forgive me if I did: if you are right and 11 the judge was wrong about Bower v Marris applying, is 12 there anything left in this point? 13 MR DICKER: Yes, if I was right on Bower v Marris but wrong 14 on compound interest. 15 As you will see from the tables, Bower v Marris on 16 simple interest doesn't give you as much as compound 17 interest calculated in the normal way. If the judge was 18 right in saying, "Compound interest effectively stops 19 compounding once proved debts have been paid in full", 20 then you will still have some creditors, namely those 21 creditors with a right to compound interest who won't 22 have been paid in full. 23 LORD JUSTICE PATTEN: Yes. 24 MR DICKER: There may conceivably be other contractual 25 rights which don't fit within the judge's construction</p> <p style="text-align: center;">Page 28</p>

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

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

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

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

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

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

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

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

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<p>1 dividends are paid because the debts then cease to be 2 outstanding. It may take four or five years to 3 distribute that surplus, but there's no compensation. 4 The only question here is: is there any scope for those 5 creditors having an additional right? 6 LORD JUSTICE BRIGGS: On the assumption that once the debt 7 is paid by the final dividend of 100 per cent, which is 8 the sort of non-Bower v Marris assumption, you say 9 there's a right to interest which can be calculated if 10 it's a judgment debt right at that date, fixed. It may 11 take another five-years for you to get it, you just get 12 interest over that period of delay, which gives you the 13 interest on interest in the form of compound. 14 MR DICKER: Yes, or another approach, and the way we've 15 outlined it in the written skeleton argument is: if one 16 focuses on rule 2.88(7), where it says: 17 "Any surplus remaining of after payment of the debts 18 proved shall ... be applied in paying interest on those 19 debts." 20 One way of construing that, we say, is that you pay 21 debts proved, at that point the statutory scheme 22 requires the surpluses applied in paying interest. In 23 other words, the surplus is due and payable to creditors 24 at that date. It may be that the administrators, as 25 officers of the court, can't distribute it at that point</p> <p style="text-align: center;">Page 37</p>	<p>1 MR DICKER: No, although my clients would regard it as 2 a commercial -- 3 LADY JUSTICE GLOSTER: It's a merits point. 4 MR DICKER: But, with respect, not in our submission just 5 a merits point. 6 LADY JUSTICE GLOSTER: No, it's a commercial point. 7 MR DICKER: Going back to the commercial logic underlying 8 this whole statutory scheme -- creditors first, members 9 last -- 10 LADY JUSTICE GLOSTER: It cuts across that, you would say. 11 MR DICKER: -- it does come in at an equal level as well. 12 So that's all on declaration 4. 13 LADY JUSTICE GLOSTER: Can I just raise a point on 14 sub-rule 8. I mean, that cuts across contractual rights 15 doesn't it? In the sense that you could have 16 subordinated debt agreeing contractually that it won't 17 get interest until other people have been paid. It 18 won't -- 19 MR DICKER: One has to be careful about the phrase "cutting 20 across". 21 LADY JUSTICE GLOSTER: Okay, bearing contractual rights or 22 obligations. 23 MR DICKER: But that's the issue, when one reads the various 24 rules, whether in relation to proof or interest, are 25 they actually varying the underlying rights or not?</p> <p style="text-align: center;">Page 39</p>
<p>1 but it doesn't mean it's not due and payable, simply 2 there's an exercise that they have to go through to work 3 out who gets it and how much. 4 But if you can construe 2.88(7) in that way, then 5 there is scope for a creditor saying: I was due 6 interest, statutory interest, once proved debts have 7 been paid in full. I haven't been paid it for 8 five years. I have, for example, a Sempra Metals type 9 claim for damages for non-payment of that interest 10 against LBIE in respect of that period. 11 That's the short point. The point if it works 12 involves construing 2.88(7) as essentially saying: once 13 you've paid proved debts in full, you are meant to 14 distribute the surplus. That's how the scheme works and 15 if for whatever reason you don't, then creditors 16 effectively have a claim for compensation for the delay. 17 It is a real and practical problem. We have an 18 enormous sum of money, no doubt sitting in accounts or 19 investments earning interest. At the moment, all of 20 that interest will inure for the benefit of the 21 subordinated creditors and the shareholders, not for the 22 creditors. 23 LADY JUSTICE GLOSTER: We have that point. 24 LORD JUSTICE PATTEN: But that's not a reason in itself why 25 it should be handed out to all and sundry, is it?</p> <p style="text-align: center;">Page 38</p>	<p>1 Lord Hoffmann would say in White v Eckhardt, they 2 are not because the whole scheme doesn't do that. 3 LADY JUSTICE GLOSTER: Just dealing with proof or 4 distribution. 5 MR DICKER: Or distribution. Essentially, it's overlaying, 6 on top of the underlying rights, a system for dealing 7 with the collection of the assets and their 8 distribution. Both at the stage of proof and also, now, 9 at the stage of interest. 10 As I said, one could equally look at the rules in 11 relation to proof and say foreign currency claims have 12 to be proved by converting them to sterling. In one 13 sense, that cuts across -- 14 LADY JUSTICE GLOSTER: Yes, but you say only to limited 15 extent. 16 MR DICKER: -- but it doesn't extinguish it. Similarly in 17 relation to interest. It can't prove -- 18 LORD JUSTICE PATTEN: Can you just help me on this, 19 Mr Dicker. I'm sorry to go back to this, back to the 20 position of the people who don't have contractual right 21 to interest. 22 In their case, you are compensating them, as 23 I understand it, under the argument under declaration 4 24 for the time it takes the administrators to provide them 25 with the statutory interest they're entitled to, which</p> <p style="text-align: center;">Page 40</p>

<p>1 necessarily we have to assume for the argument                  2 post-dates the point to which it's calculated.                  3 But the rationale -- if I've understood it                  4 correctly -- for giving them statutory interest -- going                  5 back to what you were saying earlier today -- is that                  6 they're not being compensated for a contractual right,                  7 because they don't have it. They are being compensated                  8 for being kept out of their ability to enforce the debt                  9 by means of getting the judgment and enforcing it.                  10 Now, once that debt is paid by way of a dividend,                  11 why isn't it entirely appropriate, then, that the                  12 measure of compensation they receive by statutory                  13 interest should be limited to that period and not to any                  14 subsequent one?                  15 Because, I mean, they are entitled to be compensated                  16 for the time it's taken to get their money, so to speak,                  17 but once they have their money, and once they get the                  18 interest that compensates them for that delay, why                  19 should they have some further period of --                  20 MR DICKER: It's similar to the issue in relation to                  21 Bower v Marris. The legislature has decided you should                  22 get interest at an effective rate of 8 per cent.                  23 LORD JUSTICE PATTEN: Yes.                  24 MR DICKER: Just going back to Bower v Marris, if you apply                  25 Bower v Marris in relation to an actual judgment, which</p> <p style="text-align: center;">Page 41</p>	<p>1 MR DICKER: Issue 7, contingent claims.                  2 LADY JUSTICE GLOSTER: Very well, five minutes.                  3 (11.45 am)                  4 (A short break)                  5 (11.50 am)                  6 LADY JUSTICE GLOSTER: Yes, Mr Dicker.                  7 MR DICKER: The next issue I want to deal with is issue 7.                  8 LADY JUSTICE GLOSTER: Declaration 14.                  9 MR DICKER: Declaration 14. On this issue, Wentworth is the                  10 appellant. The SCG and York are respondents, but                  11 subject to your Lordships I was going make our --                  12 LADY JUSTICE GLOSTER: That's agreed, isn't it?                  13 MR DICKER: The judge dealt with this in his judgment. For                  14 your note, paragraphs 184 to 225.                  15 Again, like all issues, this one is financially                  16 significant to those involved. The administrators                  17 estimate, I think, is about half a billion turns on it.                  18 There was a similar issue in relation to future                  19 debts. I will need to make some submissions in relation                  20 to that. That was issue 8. The issue, again in                  21 relation to future debts, is what date does interest run                  22 from in relation to a future date.                  23 LADY JUSTICE GLOSTER: That's gone, hasn't it?                  24 MR DICKER: That's gone. The judge held --                  25 LADY JUSTICE GLOSTER: Gone in the sense not being appealed</p> <p style="text-align: center;">Page 43</p>
<p>1 one does absent the county court exception, then they                  2 end up receiving both principal and an effective rate of                  3 interest at 8 per cent.                  4 On the judge's approach, they don't because, you are                  5 quite right, they're repaid principal. But one then has                  6 a sum which is 8 per cent as at that date, which, if                  7 paid five or ten years later is not an effective rate of                  8 interest so far as the creditors are concerned, that's                  9 why Bower v Marris applies generally to an actual                  10 judgment. That's why our first line of argument is that                  11 it should also apply to the reflection of that right in                  12 rule 2.88(9), but the same commercial logic drives the                  13 argument in relation to declaration 4. It's trying work                  14 out a way in which creditors can have interest at the                  15 effective intended rate because if you say, "I owe you X                  16 but it doesn't matter how long I take to pay you X",                  17 then, in a sense, whatever interest rate you specify                  18 becomes arbitrary. The one thing you haven't, in                  19 commercial terms, achieved is to ensure the creditor                  20 receives interest at 10 per cent.                  21 LORD JUSTICE PATTEN: Yes, thank you.                  22 MR DICKER: My next topic --                  23 LADY JUSTICE GLOSTER: Would that be a convenient moment for                  24 the shorthand writers break? You are then going on                  25 to --</p> <p style="text-align: center;">Page 42</p>	<p>1 by anybody.                  2 MR DICKER: The judge held that the result was the same,                  3 interest on both contingent and future debts ran from                  4 the date of the administration.                  5 Now, below, just so you know, the only party to                  6 argue to the contrary in relation to future debts was                  7 the administrators. They are not appealing this issue.                  8 Wentworth, below, conceded that in relation to future                  9 debts interest ran from the date of administration.                  10 They said that the position was different in relation to                  11 contingent debts. There was no appeal in relation to                  12 issue 8 in relation to future debts.                  13 LADY JUSTICE GLOSTER: Yes, I see.                  14 MR DICKER: We submit the judge reached the right conclusion                  15 on issue 7, essentially for the right reasons. There                  16 were three parts to his analysis. The first concerned                  17 the nature and effect of the statutory scheme which he                  18 dealt with in paragraphs 189 to 203 of the judgment.                  19 Just to identify three parts, 189 to 203 -- and I will                  20 come back to this -- deal with the nature and effect of                  21 the statutory scheme. Then, at 204 to 211, he dealt                  22 with the construction of the relevant rules.                  23 The third, primarily in paragraph 212, he dealt with                  24 underlying principles of insolvency law. So just making                  25 a few submissions in relation to each of those three</p> <p style="text-align: center;">Page 44</p>

<p>1 stages. The first point the judge made in paragraph 189 2 is: 3 "This is an issue of construction of rule 2.88(7) 4 which must be approached in the context of the scheme 5 established by the legislation." 6 He then made, essentially, three main points so far 7 as contingent debts are concerned. Firstly, to ensure 8 pari passu distribution claims need to be valued by 9 reference to a common date and that date is the date of 10 the administration order. Obviously, if you are going 11 to share out the assets equally, you need a common date 12 for ascertaining and valuing those claims. 13 LADY JUSTICE GLOSTER: If the contingency comes into 14 existence, you then prove, later down the track, do you, 15 is that still the law? 16 MR DICKER: A second point is: contingent debts are provable 17 debts within rule 13.12. The mere fact they are 18 contingent doesn't prevent you from proving them. The 19 point -- 20 LADY JUSTICE GLOSTER: You can prove more if the contingency 21 happens, can you? 22 MR DICKER: Either more or less -- 23 LADY JUSTICE GLOSTER: Yes. 24 MR DICKER: -- depending on what hindsight indicates. But 25 the first stage is: you need a common date for</p> <p style="text-align: center;">Page 45</p>	<p>1 payment of period, say, five years, the estimate of the 2 liability must include an element of discount for that 3 period. Equally, the estimate of a contingent 4 liability, which may be outstanding over a long period, 5 may include some element of discount." 6 Contingent debts, at least some contingent debts, 7 can be seen as essentially future debt subject to 8 a contingency. 9 So, in relation to contingent debts, there really 10 are two parts to the estimation process in relation to 11 such debts. First of all, looking at how likely the 12 contingency is and what discount needs to be given for 13 that. 14 Secondly, working out what the present value of the 15 debt is if the liability is one which will only 16 effectively arise in future. 17 LORD JUSTICE BRIGGS: A "whether" question, not a "when" 18 question. 19 MR DICKER: Yes. The rules deal with future debts in 20 a different way. There's a statutory formula for 21 discounting future debts. We will see in moment, that's 22 not the approach the rules take in relation to 23 contingent debts, for the obvious reason. That rule has 24 to achieve, essentially, two functions. It can't just 25 do it by a mathematical formula.</p> <p style="text-align: center;">Page 47</p>
<p>1 ascertaining the claims. The second point 2 is: contingent debts are provable debts. 3 LADY JUSTICE GLOSTER: And valued at the date of the uniform 4 day. 5 MR DICKER: Absolutely. To ensure pari passu distribution, 6 they need also to ascertain the value as at that same 7 date. In other words, given the present value. 8 The third point is: once you have ascertained the 9 value of various provable debts, the scheme requires you 10 to treat them equally so far as dividends and 11 distributions are concerned. 12 Just to say a little bit more about the nature of 13 the process for estimating contingent claims. As I say, 14 this is essentially concerned with putting a present 15 value on the contingent date as at the date of 16 administration. As the judge held, the estimate under 17 rule 2.81, which is the provision for estimating 18 uncertain claims, may be effected by the duration of the 19 contingent debt. He made this point in paragraph 198, 20 halfway through that paragraph he said: 21 "Submissions were made as to the extent of which the 22 amount of the estimate is affected by the duration of 23 the contingent debt. It's clear to me that in some 24 cases it must play a part. Take the most obvious 25 example, if the contingent debt cannot fall due for</p> <p style="text-align: center;">Page 46</p>	<p>1 We say that's plainly what the scheme requires. If 2 authority is needed in relation to that, there are two 3 authorities in the bundle -- I don't think I need take 4 you to them but just to identify them -- that establish 5 that when you are talking about contingent claims in the 6 sense of claims which may only arise in the future, you 7 need to give them a present value. Those cases are, 8 firstly, in Re European Assurance Society. It's 9 authorities volume 1, tab 18, pages 70 to 71. I wonder 10 whether, on reflection, it isn't worth just briefly 11 turning it up if you'll allow me. Volume 1, tab 18. 12 It's a judgment of Lord Westbury. 13 LADY JUSTICE GLOSTER: In an arbitration, wasn't it? 14 MR DICKER: It concerns insurance liabilities. Just so you 15 have the passages, the first relevant one is page 70, 16 column 2. It's the passage at the top of the page. If 17 I can pick it up about 15 lines down, there's a sentence 18 in beginning of line beginning: 19 "These are claims to arise ..." 20 LORD JUSTICE PATTEN: Yes. 21 MR DICKER: "These are claims to arise as in the case of 22 annuities from time to time in futuro. In the case of 23 policies there contingent claims arising from 24 a contingent event, namely the death of the person to 25 whom the policy is granted. The legislature has</p> <p style="text-align: center;">Page 48</p>

<p>1 determined and in all insolvencies the same rule                  2 applies, that in course of the administration of the                  3 state of an insolvent company, these debts should be                  4 valued. They must be valued. You could not withhold,                  5 out of the assets of the company, a large sum of money,                  6 and keep it invested or in suspense to answer the claims                  7 when they arise. You must have a present value put on                  8 these future claims and that present value represents                  9 the sum for which this claimant, the holder of the                  10 claims, will be entitled to rank among the rest of the                  11 creditors."                  12 There is a similar passage which starts in the last                  13 three lines of that column and runs to the end of the                  14 paragraph. It's the last three lines:                  15 "When by 25th rule it is said the value of such                  16 debts and claims as made admissible to proof by the                  17 158th section of the said Act shall, so far as it is                  18 possible, be estimated according to value thereof at the                  19 date of the order to wind up the company. I think that                  20 rule was a very correct one, correctly interpreted the                  21 meaning of the Act perfectly consistent with                  22 principle ..."                  23 The other authority is a judgment of                  24 Mr Justice David Richards in a case called MF Global,                  25 and I will just give you the reference if you'll allow</p> <p style="text-align: center;">Page 49</p>	<p>1 here is the proved debt and, in the context of the                  2 statutory scheme, that debt is effectively treated as                  3 outstanding from the date of the administration order.                  4 One obvious reason why it has, sensibly, to be                  5 treated as understanding is you discounted it back to                  6 the date of the administration order so it can rank                  7 equally with everyone else. To then say it's not                  8 treated as outstanding and doesn't accrue interest                  9 unless and until --                  10 LADY JUSTICE GLOSTER: It's illogical.                  11 MR DICKER: It would be completely illogical.                  12 LADY JUSTICE GLOSTER: In fact, it's a statutory commutation                  13 of the underlying liability.                  14 MR DICKER: Again, the only concern I have about that                  15 is: correct, provided you --                  16 LADY JUSTICE GLOSTER: Agree that --                  17 MR DICKER: -- commutation for the purposes of distributions                  18 in respect of proof. Obviously, one doesn't want to                  19 lose sight of Lord Hoffmann in White v Eckhardt.                  20 LADY JUSTICE GLOSTER: Yes, absolutely.                  21 MR DICKER: The judge said this is entirely consistent with                  22 the general image of liquidation. If one thinks about                  23 classic exposition in Re Dynamics Corporation of                  24 a notional collection and distribution of the assets on                  25 a single day.</p> <p style="text-align: center;">Page 51</p>
<p>1 me to that. It's authorities 3, tab 94. It's                  2 paragraph 54. Essentially, the judge says in the                  3 context of contingent claims:                  4 "It is essentially a process of putting a present                  5 value on possible future events or outcomes."                  6 Having dealt with the statutory context, the judge                  7 then turned to deal with the construction of                  8 rule 2.88(7) and, as I said, he did that in paragraphs                  9 204 to 211. In 204, he said:                  10 "With these provisions and principles in mind,                  11 I turned to the construction of rule 2.88(7). The                  12 issue, in short, is whether in providing that interest                  13 be paid on those debts in respect of the periods during                  14 which they have been [in quotes] 'outstanding' [close                  15 quotes] since the company entered administration, the                  16 sub-rule is referring to the underlying debts giving                  17 rise to the admitted proofs for whether it is referring                  18 to the debts as admitted to proof."                  19 Wentworth's argument was that, essentially, if you                  20 have a contingent debt, the underlying contingent debt                  21 is not outstanding unless and until it becomes due and                  22 payable.                  23 The judge's answer to that was essentially to                  24 say: well, that may be true in relation to the                  25 underlying debts, but what we're really concerned with</p> <p style="text-align: center;">Page 50</p>	<p>1 LADY JUSTICE GLOSTER: Yes.                  2 MR DICKER: Again, if they're not paid on that single day                  3 then, in a sense, they're outstanding from that day.                  4 That's the point the judge refers to in paragraph 202.                  5 When he is discussing the statutory scheme, he says:                  6 "The principle of insolvency law and realisation of                  7 assets, and the distribution of the proceeds among the                  8 creditors are treated as notionally taking place                  9 simultaneously and the date of the commencement of the                  10 liquidation or administration."                  11 So one doesn't just have the discounting back. One                  12 also has the statutory scheme which is premised on,                  13 essentially, the debts being distributed on that date.                  14 If they're not, the logic is creditors should be                  15 compensated for the delay.                  16 LADY JUSTICE GLOSTER: If the insured event occurs, I'm                  17 right that the creditor can come back and say: although                  18 I've been paid out on basis of the contingent valued                  19 claim, the fire's happened or whatever it is and I want                  20 more.                  21 Was that MacFarland's(?) case or is that gone under                  22 the ADC(?).                  23 MR DICKER: Under rule 2.81, you are entitled to review                  24 a proof. If one goes to volume 4 of the authorities,                  25 tab 171.</p> <p style="text-align: center;">Page 52</p>

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

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

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

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1 creditor's admitted proof for a distribution previously  
 2 made to him, the amount remaining outstanding in respect  
 3 of his admitted proof shall be reduced by applying the  
 4 following formula ..."  
 5 So, 2.105, in the context of future debts, treats  
 6 the future debt as effectively outstanding from the date  
 7 of the administration order. So, in relation to future  
 8 debts, one of the points the judge made was there's  
 9 effectively on express recognition of the effect of the  
 10 statutory scheme.  
 11 You can see a similar recognition of that in that  
 12 the formula -- for some reason not available on this  
 13 print -- but the discounting formula of X divided by  
 14 1.05 to the power of N is defined such that, in  
 15 2.105(2)(b):  
 16 "N is the period beginning with the relevant date  
 17 and ending with the date on which the payment of the  
 18 creditor's debt would otherwise be due."  
 19 So, again, the judge said that's an indication that  
 20 outside of this regime, the debt would otherwise have  
 21 been due on the date that it would have matured. But  
 22 for the purposes of this statutory scheme, it is  
 23 effectively being treated as outstanding from the date  
 24 of the administration order.  
 25 LORD JUSTICE BRIGGS: That's for the purpose of dividend and

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<p>1 for no other purpose.  2 MR DICKER: Correct.  3 Now, so far as future debts are concerned, in  4 concluding that interest ran from the date of the  5 administration order, the judge made two further points.  6 The first point was same one I've already made in  7 relation to contingent debts. If you discount back for  8 the purposes of dividend, the logic is you ought to be  9 paying interest from the date of the administration  10 order, otherwise you have the same commercial issue.  11 You are paying present value as at the date of  12 administration, but that sum is in fact only being paid  13 later, you need to compensate creditors for the  14 intervening period.  15 Take an example --  16 LORD JUSTICE BRIGGS: The interest is payable on the full  17 proof of debt, not the discounted rate?  18 MR DICKER: For the purposes of the dividend, you discount  19 the debt --  20 LORD JUSTICE BRIGGS: The dividend but not the interest.  21 Interest isn't paid on dividend, it's paid on debt. Or  22 do I have that wrong?  23 MR DICKER: I'm not sure that deals with this point. The  24 logic is that take a case where you have a future debt  25 of -- make it easier -- a hundred pounds, payable in</p> <p style="text-align: center;">Page 57</p>	<p>1 LADY JUSTICE GLOSTER: It would be illogical, wouldn't it,  2 to have the interest paid on the full amount of the debt  3 if the debt had not accrued due for payment?  4 MR DICKER: There are a number of oddities about -- just  5 take it in stages.  6 LADY JUSTICE GLOSTER: It depends at what stage.  7 MR DICKER: One also needs to identify quite what the  8 underlying right is because you could have a future debt  9 that doesn't carry interest. But more often than not,  10 future debts -- in the sense of loans repayable on  11 maturity -- will carry interest in the intervening  12 period. So one also needs to take that into account.  13 One of the points the judge makes is if you imagine  14 a future debt, a loan repayable after a year, carrying  15 there in the meantime, if you discount the debt for the  16 purposes of dividend back to the date of administration,  17 so that the sum the creditor receives when he receives  18 a dividend is only the discounted amount, if you don't  19 compensate him at that stage, there could be a double  20 loss. Both he's not being compensated for the fact he's  21 receiving, at that stage, a discounted amount.  22 Secondly, he's not being compensated for the fact that  23 under the underlying right he should have earned  24 interest over --  25 LORD JUSTICE BRIGGS: He doesn't suffer a loss if he</p> <p style="text-align: center;">Page 59</p>
<p>1 year's time. You discount it back by the statutory  2 formula to the date of administration so that it ranks  3 equally with everyone else. Now assume that you only  4 make a dividend payment after a year. At that stage,  5 the creditor is owed a hundred pounds, and would have  6 expected to receive a hundred pounds, in fact --  7 LORD JUSTICE BRIGGS: He only received the discounted  8 amount.  9 MR DICKER: -- only received the discounted amount, so needs  10 to be compensated for that --  11 LORD JUSTICE BRIGGS: He doesn't get interest on the  12 discounted amount, does he? He gets interest on that  13 which is proven, or is that wrong? How do you calculate  14 interest on a future debt? You said the judge says it's  15 payable from the cut-off date, but you haven't said by  16 reference to what amount.  17 MR DICKER: I don't want to give your Lordship the wrong  18 answer, so can I just think about that? It's not, I  19 think, an issue that --  20 LORD JUSTICE BRIGGS: I know there's no pleading about it,  21 but I was just going --  22 MR DICKER: I'm not sure it's an issue --  23 LORD JUSTICE BRIGGS: -- ask --  24 MR DICKER: I'm not even sure it's an issue the parties  25 have necessarily focused on.</p> <p style="text-align: center;">Page 58</p>	<p>1 received the discounted amount on the (Inaudible) date.  2 That's the present value of the future debt.  3 MR DICKER: Well, he does suffer a loss if he receives the  4 discounted amount later.  5 LORD JUSTICE BRIGGS: Later. So he should get interest.  6 My question is: how do you get paying interest on  7 the discounted amount within 2.88(7) rather than the  8 proved amount of the future debt, bearing in mind that  9 the discounting formula is said to apply to payment of  10 dividends and for no other purpose.  11 MR DICKER: That's the point I said I'd need to come back  12 on.  13 LADY JUSTICE GLOSTER: Don't you just calculate it by  14 residence to the specific circumstances?  15 So if your debt becomes due, you work out what the  16 interest would have been from that date, you take it out  17 of the credit you have received in the meantime.  18 MR DICKER: I don't want to give you an answer without  19 having thought about it.  20 LADY JUSTICE GLOSTER: Anyway, why does it matter? Because  21 we're not dealing with future debts, and why does the  22 logic of this very interesting and detailed argument  23 impact on the issue which we do have to decide?  24 MR DICKER: I'm not sure it does.  25 LADY JUSTICE GLOSTER: Shall we get on then, I'm just a bit</p> <p style="text-align: center;">Page 60</p>

<p>1 concerned, looking at the time, that we are not going                  2 the get through however more issues you have,                  3 particularly when you can pick up on some of this in                  4 reply.                  5 I think you will need to come back, just because we                  6 are worried (Inaudible) think it might matter. I think                  7 we need to be told it doesn't matter, what the answer is                  8 to the question my Lord and I have asked.                  9 MR DICKER: I will come back to it if I need to on that                  10 basis.                  11 It's worth just adding this: the rules in relation                  12 to discounting future debts have a slightly checkered                  13 history. Lord Millett, in a case called Park Air                  14 Services, referred in disparaging terms to an earlier                  15 attempt to express the discounting rule. There was                  16 a long discussion, before the judge below, as to whether                  17 or not the present rule makes complete commercial sense.                  18 But, as I say, I'm not sure it's necessary to get into                  19 that, at this stage.                  20 There is one other aspect of both contingent debts                  21 and future debts that I think I do need to deal with.                  22 Sorry, just before I move on to that point, one                  23 further point. As I said, Wentworth accepts that, in                  24 relation to future debts, those are treated for whatever                  25 reason as outstanding from the date of the</p> <p style="text-align: center;">Page 61</p>	<p>1 occurred by the time the dividend is payable. What                  2 happens if that's not the case?                  3 This is simply the basis of Wentworth's argument on                  4 the merits. What they essentially say is: look, the way                  5 the rules work is that you only discount back to the                  6 date of administration if the debt is still contingent                  7 or has not yet matured contingent on future debts by the                  8 time the dividend is declared.                  9 In relation to future debts, it's clear that isn't                  10 how it works if the future debt has matured by the date                  11 of the administration. At that stage, you've proved for                  12 the full amount, rule 2.105 doesn't operate because it                  13 only applies to a debt of which payment is not due at                  14 the date of declaration of the dividend. So where the                  15 future debt has matured before a dividend is declared                  16 there no discounting. So Wentworth says it would be                  17 unfair if such a debt carried interest from the date of                  18 the administration because you are not discounting it                  19 back, even for the purposes of dividends, but for                  20 applying interest to it.                  21 That unfairness, firstly, doesn't exist if you are                  22 talking about a debt which itself carries interest. So                  23 if one thinks about the classic case of a loan carrying                  24 interest in the meantime, it may be that you don't                  25 discount it back. The creditor is nevertheless entitled</p> <p style="text-align: center;">Page 63</p>
<p>1 administration. Not so in relation to contingent debts.                  2 There is an issue, we say, as to precisely what is                  3 within their exception because, on their case, every                  4 provable debt, including future debts, are outstanding                  5 from the date of administration. The only category of                  6 debts which are not are what they call contingent debts.                  7 Now, it's not entirely clear to us what is within                  8 that exception. There are a variety of reasons why                  9 a debt may be contingent. I mean, it may simply be                  10 contingent as to amount, or it may be contingent in the                  11 sense that it's repayable either after one year, or                  12 after five years.                  13 Now, take the latter case, it would be very odd, we                  14 say, if a debt which was payable after five years, was                  15 treated as outstanding from date of administration, and                  16 the debt was that payable after one year was also                  17 treated as outstanding from date of administration, but                  18 a debt which might either be payable after one or                  19 five years, was not, because in some way it was                  20 contingent.                  21 There's one other aspect of this that I do need to                  22 deal with, and that's where the debt has essentially                  23 become due and payable before a dividend is paid. So                  24 far I've been dealing with debts which have not matured,                  25 so future debts, or where the contingency hasn't</p> <p style="text-align: center;">Page 62</p>	<p>1 to interest for the corresponding period. There's                  2 nothing unfair, we say. It may have matured. He ought                  3 to be able to have interest for the relevant period.                  4 Now, the way the judge approached this was                  5 essentially to say that: I know what happens in relation                  6 to matured future debts because rule 2.105 is clear.                  7 LADY JUSTICE GLOSTER: Yes.                  8 MR DICKER: Whatever happens to future debts must sensibly                  9 also have been intended to happen to contingent debts.                  10 If the legislator didn't think this approach was unfair                  11 in relation to future debts, more logically he would                  12 have thought it unfair in relation to contingent debts.                  13 Essentially, he said the same answer must apply in                  14 relation to contingent debts as applies in relation to                  15 future debts for three reasons. First of all, he said                  16 that --                  17 LADY JUSTICE GLOSTER: Paragraph?                  18 MR DICKER: It's 219 to 221:                  19 "Firstly, I do not consider there is any authority                  20 to do so in the legislation."                  21 So there's no justification for discounting back                  22 a crystallised contingent claim, under 2.81, he said,                  23 because 2.81 only applies to a claim of an uncertain                  24 amount. Once the contingency has occurred, the amount                  25 is no longer uncertain.</p> <p style="text-align: center;">Page 64</p>



<p>1 So, in a sense, just like rule 2.105 only applies to 2 debts which have not yet matured, similarly, rule 2.81, 3 which is the estimating provision, only applies to 4 contingencies which have not yet occurred. So you can't 5 discount back in that situation, just as you can't in 6 relation to future debts because 2.81 doesn't permit it. 7 The second point he made, in 220, was: 8 "If the legislation envisaged that in these 9 circumstances a discount should nonetheless be applied, 10 express provision would be made as in relation to 11 unmatured future debts by rule 2.105." 12 Thirdly, he said: 13 "It would be extraordinary if matured contingent 14 debts were the subject of a discount but, as is clearly 15 the case by reason of the terms of rule 2.105, matured 16 future debts are not subjected to any such discount." 17 It's also worth noting, in 222, he said that in his 18 view this was consistent with observations of 19 Lord Hoffmann in <i>Stein v Blake</i> in the passage he quotes, 20 at 222. 21 So we're dealing with a situation in which future 22 debt has matured, contingent debt has matured. The 23 judge says, under 2.105, nevertheless a regime which is 24 interest being paid. He said, essentially, the same 25 must be equally true in relation to contingent debts.</p> <p style="text-align: center;">Page 65</p>	<p>1 compensating them. 2 But its solution is essentially to say: therefore 3 you don't pay interest on any contingent debt. 4 So if one then moves to contingent debts, which are 5 still contingent by the date of dividend, which are 6 discounted back to the date of administration, 7 <i>Wentworth's</i> case is: well, they are discounted back to 8 the date of administration. When the dividend is 9 eventually paid, it will only be the discounted amount 10 which you receive but you are not entitled to interest 11 as compensation for that delay. 12 So although everyone's claims had been ascertained 13 and valued by reference to the same date, although they 14 are meant to be treated equally, they're not. 15 We say that can't be the right answer in relation to 16 contingent claims. If there is an issue in relation to 17 crystallised contingent claims, the sensible solution, 18 and a perfectly permissible one, is to say: 2.88(1) 19 still permits you to discount back to the date of 20 administration and to pay interest for that period. 21 LADY JUSTICE GLOSTER: So, looking at declaration 14, the 22 declaration doesn't cater for the difference between 23 a contingent debt that hasn't crystallised as at the 24 date of payment, and one that has. Albeit that it is 25 not crystallised as at the date of administration.</p> <p style="text-align: center;">Page 67</p>
<p>1 LORD JUSTICE BRIGGS: You must record in relation to future 2 debts, the interest, if it had matured by the time of 3 dividend, the interest would be paid on the full amount 4 of the future debt right back from the date of the 5 administration. 6 MR DICKER: Yes. I think that must be right. 7 Now, we had an -- 8 LORD JUSTICE BRIGGS: Even though it wasn't due then. 9 MR DICKER: We had an alternative submission in relation to 10 contingent debts which the judge dealt with, in 223 and 11 224. The alternative submission was, essentially: look, 12 if there is an issue in relation to crystallised 13 contingent claims, the solution is -- and our submission 14 was -- that they are also discounted back to the date of 15 the administration. That's the way of solving this 16 particular issue. 17 We referred to various authorities which the judge 18 referred to, in 223 and 224, which we suggested 19 indicated that was a possible route. 20 The one thing which we say cannot be the solution is 21 that suggested by <i>Wentworth</i> because <i>Wentworth's</i> case, 22 essentially, is: look at the position in relation to 23 a crystallised contingent claim. If you pay interest on 24 that for the full amount, for a period before it had 25 otherwise crystallised, you're essentially over</p> <p style="text-align: center;">Page 66</p>	<p>1 MR DICKER: That's correct. That's because the judge said 2 the position was the same in relation to each. 3 Essentially, the judge said all contingent claims 4 are treated as outstanding from date of administration. 5 <i>Wentworth's</i> case is none of them are. 6 LADY JUSTICE GLOSTER: Do you get interest at the amount of 7 proof, even though there's been a subsequent 8 crystallisation, or do you get it as from a particular 9 date on the amount of crystallisation? 10 MR DICKER: If the contingent claim has not yet 11 crystallised. 12 LADY JUSTICE GLOSTER: That's easy, if it's not 13 crystallised -- 14 MR DICKER: You get it on the amount of the proof. If it 15 has crystallised -- 16 LADY JUSTICE GLOSTER: In the intervening period? 17 MR DICKER: -- you get it on -- assuming the creditor has 18 applied to revise its proof -- you get it on the 19 crystallised amount. The question that then arises is, 20 well -- 21 LADY JUSTICE GLOSTER: What about the earlier period? 22 MR DICKER: What is that crystallised amount, in a sense. 23 If you have a contingent debt, say a loan repayable in 24 five years unless some remote contingency occurs, and it 25 turns out the remote contingency doesn't occur, are you</p> <p style="text-align: center;">Page 68</p>

1 essentially able, at that stage, to say, "Well, I'll  
 2 treat it effectively as a future debt and I will  
 3 discount it back?"  
 4 Now, the judge's approach, just so we're clear,  
 5 is: no, that wouldn't be right because that's not how  
 6 future debts themselves are treated; the same should  
 7 apply to contingent debts.  
 8 So his logic is the legislature has effectively  
 9 decided you don't discount back.  
 10 LORD JUSTICE BRIGGS: He says it may not be perfect but it  
 11 works.  
 12 MR DICKER: One only has to go through the history of the  
 13 rules in relation to discounting future debts to realise  
 14 how difficult those drafting them have found it over  
 15 the years.  
 16 As we say, in a sense, our submissions are,  
 17 essentially, that it cannot possibly be right that  
 18 interest isn't paid from the date of administration on  
 19 any contingent --  
 20 LADY JUSTICE GLOSTER: No, I can see that. It's a slightly  
 21 more refined situation where there's a crystallisation,  
 22 maybe not just, as it were, because of a future date,  
 23 but because of a future event. So like an insurance  
 24 claim, rather than simply a loan claim, as an example --  
 25 LORD JUSTICE BRIGGS: So much depends on which kind of debt.

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1 If this was payment on a life policy, say somebody was  
 2 aged 20 and took out a life insurance policy on a very  
 3 good medical report, and the liquidation cut-off date is  
 4 when he's aged 21, and he is run over by car two years  
 5 later. Apparently, not only does he get the full  
 6 amount, his executors can revise their proof to claim  
 7 for the full amount, but also he gets interest on it  
 8 right back to the date of the administration, which  
 9 seems to be illogical because life policy pay-outs don't  
 10 carry interest until you die. Whereas if it's a loan,  
 11 you just come up with a completely different answer in  
 12 your head, and yet the scheme seemed to apply to all  
 13 kinds of debts regardless of what the underlying debt  
 14 is.  
 15 MR DICKER: Part of the difficulty is there are  
 16 a multiplicity of contingent debt, whether it's  
 17 contingent only to amount, as to date some combination  
 18 of the two. I mean, there are essentially three points.  
 19 First of all, some contingent debts are undoubtedly  
 20 discounted back to date of administration, and to treat  
 21 them equally with everyone else, of course they're  
 22 entitled to receive interest.  
 23 Our second point is, along with the judge, it's  
 24 clear the rules in relation to future debts don't  
 25 provide that where the future debt has matured by the

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1 time the dividend is declared. Our second point is we  
 2 aligned ourselves with the judge when he says:  
 3 "Statutory regime appears to indicate, for whatever  
 4 reason, the result is the same for contingent debts."  
 5 Our third point is if that's wrong, the way of  
 6 resolving this conundrum must be to discount even  
 7 crystallised contingent claims back to the date of  
 8 administration, so we can go back to a regime where  
 9 everyone valued and ascertained at the same date,  
 10 treated equally and they should receive interest.  
 11 The one thing that shouldn't happen is you get some  
 12 people who are discounted, they later are not  
 13 compensated in the meantime.  
 14 LADY JUSTICE GLOSTER: Yes. Okay. Well, you are, as it  
 15 were, replying to the (Inaudible).  
 16 MR DICKER: The next issue is declaration 17, issue 10,  
 17 which is the offset of statutory interest and currency  
 18 conversion claims. This issue was concerned with the  
 19 relationship between statutory interest under 2.88, on  
 20 the one hand, and a non-provable currency claim, on the  
 21 other. Again, Wentworth is the appellant on this issue.  
 22 The essential issue is whether and, if so, how the  
 23 calculation of a currency conversion claim should take  
 24 into account statutory interest paid to the relevant  
 25 creditor by the joint administrators.

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1 So one has the various priority levels in the  
 2 statutory Waterfall, we have provable debts, statutory  
 3 interest and non-provable liabilities. This is  
 4 essentially concerned with the second and third of those  
 5 levels. When you come to the third level, foreign  
 6 currency creditor says, "I have a foreign currency  
 7 claim", does he have to give credit for the statutory  
 8 interest that he has received? The judge held no. We  
 9 say he was right.  
 10 Now, it's important to note, declaration 17 is  
 11 concerned solely with claims to principal and not with  
 12 non-provable claims to interest. So declaration 17  
 13 expressly excludes any non-provable claim to interest.  
 14 LADY JUSTICE GLOSTER: So you say there's no  
 15 double-counting?  
 16 MR DICKER: Yes, and the easiest way to illustrate it is  
 17 take two situations, compare the effect of the statutory  
 18 scheme on two claims to principal. One denominated in  
 19 sterling, and one denominated in a foreign currency,  
 20 neither of which carries any underlying right to  
 21 interest. So creditor A is owed a sterling sum,  
 22 creditor B is owed a foreign currency claim, neither of  
 23 them have any underlying right to interest. How does  
 24 the statutory scheme work?  
 25 Well, in relation to the sterling creditor, he

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<p>1 receives dividends on his proved debt, amounting to                  2 a hundred pence in the pound, thereby satisfying his                  3 underlying claim in full because he's been paid all that                  4 he's owed. In the event of a surplus, he is also                  5 entitled to interest under rule 2.88 at the Judgment Act                  6 rate. Regardless of the fact he has no underlying right                  7 to interest. That's a separate statutory right intended                  8 to compensate him for delay in payment of his proved                  9 debt, so that's the sterling.                  10 One then turns to consider the foreign currency                  11 creditor. His claim is converted into sterling as at                  12 the date of the administration order, using the exchange                  13 rate of that date. He then receives dividends on his                  14 sterling proved debt, which amount to a hundred pence in                  15 the pound. Just assume sterling has depreciated in the                  16 meantime, leaving him with an unpaid balance on his                  17 foreign currency claim. At this stage, there's nothing                  18 he can do about that. If that's relevant at all, it's                  19 of a non-provable liability further down the Waterfall.                  20 So the first thing he gets, like the sterling creditor,                  21 is a hundred pence in the pound, on the sterling                  22 equivalent he is proved debt.                  23 The next is in the event of a surplus. This                  24 creditor, like the sterling creditor, is entitled to                  25 interest of the Judgment Act rate under rule 2.88</p> <p style="text-align: center;">Page 73</p>	<p>1 same sum of money can't effectively perform both                  2 purposes. The whole point of the statutory regime in                  3 this situation is that you are entitled to both the                  4 payment in full, if you're a sterling creditor at level                  5 one, if you are a foreign currency creditor through                  6 proof and non-provable liability and, in addition,                  7 without having to give credit, you are entitled to                  8 interest under the rules.                  9 LORD JUSTICE BRIGGS: Is one way of putting it that the                  10 currency conversion claim really deals with the loss                  11 suffered by the creditor due to the depreciation of                  12 sterling during the period following the cut-off date?                  13 Whereas the statutory interest merely deals with the                  14 high value of that for which he can claim caused by the                  15 delay?                  16 MR DICKER: Yes. Yes --                  17 LORD JUSTICE BRIGGS: I don't know if that's what the judge                  18 meant, I am just trying to work it out for myself.                  19 MR DICKER: The clearest way I think we saw it is,                  20 essentially, you deal with each of the levels of                  21 priority. Essentially, you have to exhaust them before                  22 any question can arise in relation to the next one.                  23 The second one is everyone is entitled to interest                  24 by statute at the judgment at rate if they haven't                  25 another right to interest.</p> <p style="text-align: center;">Page 75</p>
<p>1 because that's a right which the rules give him. He                  2 also receives that from his sterling admitted proof like                  3 the sterling creditor.                  4 Now, the final stage is if there's a surplus after                  5 payment of such interest, he has a non-provable claim                  6 for the unpaid balance of a principal amount of his                  7 foreign currency claim. That's how we say it works, and                  8 there's no offset between the second and third stages.                  9 Calculating his currency conversion claim, he doesn't                  10 have to give credit for the statutory interest that he                  11 receives. The reason for that is essentially quite                  12 simple, if --                  13 LADY JUSTICE GLOSTER: It's not part of his loss, is it?                  14 When he's formulating his loss, it's outside it. It's                  15 beyond the claim he's made.                  16 MR DICKER: One way of looking at it is to say the statute                  17 says you are entitled to statutory interest, even if you                  18 if you have no underlying right to interest, so he gets                  19 that. He's entitled to it, along with everyone else.                  20 If he has to give credit for that when calculating                  21 his foreign currency claim, then there's really only two                  22 possibilities: either he isn't receiving the statutory                  23 interest, which the statute says he should get along                  24 with everyone else, or he's not receiving the full                  25 amount of his underlying currency conversion claim. The</p> <p style="text-align: center;">Page 74</p>	<p>1 LADY JUSTICE GLOSTER: Why don't you come back to this in                  2 reply? It's clear the point you make.                  3 MR DICKER: So that was declaration 17, issue 10.                  4 The next one is declaration 6, which is concerned                  5 with interest on a non-provable claim. The judge dealt                  6 with this in paragraphs 168 to 170. 168, he deals with                  7 the nature of a currency conversion claim. In the last                  8 sentence, at 168, he says his claim is for "the unpaid                  9 portion of the debt" due to him. Then, in 169:                  10 "No provision in the legislation for the payment of                  11 interest on such non-provable claims, 2.88 applies to                  12 the payment of interest on proved, not non-provable                  13 debts. Contract between the company and the creditor                  14 provides interest on the unpaid part of the debt. The                  15 creditor is, in my judgment, entitled to include such                  16 interest, despite his non-provable claim. The position                  17 of rule 2.88 is a complete code relating to the payment                  18 of post administration interest does not, in my                  19 judgment, interfere with the enforcement of this                  20 contractual right as part of a non-provable claim.                  21 Neither explicitly nor implicitly does it interfere with                  22 a creditors contractual right to interest on                  23 a non-provable debt."                  24 So what one's dealing with is a foreign currency                  25 creditor who has a non-provable claim for the shortfall.</p> <p style="text-align: center;">Page 76</p>

<p>1 That non-provable claim is one which also carries 2 interest. What the judge held was that part of his 3 foreign currency to repay is converted into sterling as 4 at the date of administration. He is entitled to 5 interest on that sum in accordance with rule 2.88. 6 Rule 2.88 is an exclusive code such that he can't 7 receive any more interest on that proved sterling 8 equivalent. 9 The judge also said, "Well, in my Waterfall 1 10 judgment, the unpaid balance of the foreign currency 11 claim is a non-provable liability." 12 Rule 2.88 isn't concerned with that because it's 13 solely concerned with interest on proved debts. So if 14 the creditors' underlying foreign currency claim hasn't 15 been extinguished and he can prove for the unpaid 16 balance of a non-provable claim, he can also prove for 17 any interest which he is entitled to in respect of that 18 unpaid balance as a matter of contract or otherwise. 19 I think the easiest way to visualise it is if your 20 Lordships go to our reply skeleton argument, which is in 21 the same bundle as the judgment, tab 15, paragraph 9. 22 Tab 15, page 5. There's a diagrammatic representation 23 of what the judge decided. You have the underlying 24 claim in the foreign currency. Part of it is proved in 25 sterling, and you get interest on that pursuant to</p> <p style="text-align: center;">Page 77</p>	<p>1 of it is -- assume an underlying claim of a hundred 2 pounds carrying interest of 10 per cent -- a hundred 3 dollars carrying interest of 10 per cent. Part of that 4 is converted into sterling. 10 per cent of the 5 converted sterling amount is less than 10 per cent of a 6 hundred US dollars. 7 LORD JUSTICE BRIGGS: Not on the cut-off date, only on the 8 dividend date. 9 MR DICKER: Only if sterling has depreciated. 10 LORD JUSTICE BRIGGS: Yes, and then only on the dividend 11 date, not the cut-off because on the cut-off date you 12 have hundred per cent of the dollar amount because it 13 was converted at the then currency conversion rates, in 14 full. It's not a part proof of the cut-off date, it's 15 a full proof. 16 MR DICKER: That's right. But the logic of the non-provable 17 liability in relation to foreign currency claims is: he 18 is entitled to say, "When I eventually received my 19 dividends --" 20 LORD JUSTICE BRIGGS: Yes, "I didn't get my full amount". 21 MR DICKER: "When the creditor effectively paid me through 22 this process of collective execution, and I converted it 23 back into dollars, I haven't been paid the full amount". 24 LORD JUSTICE BRIGGS: That's an injustice which has only 25 matured at the time of the dividend. It didn't resist</p> <p style="text-align: center;">Page 79</p>
<p>1 rule 2.88. The dividends in respect of the proved 2 sterling sum aren't sufficient when converted into the 3 foreign currency. Repay the foreign currency claim in 4 full leaving an unpaid balance which is his currency 5 conversion claim. That's unaffected. He's entitled to 6 pursue that, but part of the rights which essentially 7 have not been affected and which he is entitled to 8 pursue, include his right to interest on that unpaid 9 balance of his underlying claim. That's the effect of 10 the judge's approach. 11 Now, we say, in a sense, on our primary argument, we 12 don't get here because, on our argument, 2.88 is not 13 an exclusive code and these sort of issues don't arise. 14 But the consequence, at least, of this element of the 15 judge's judgment is that what we, in our respectful 16 submission, say is the defect of his exclusive code 17 approach, at least isn't carried across to extinguish 18 the interest on the unpaid balance, as well. 19 LADY JUSTICE GLOSTER: So this is another example of his 20 illogicality, you say, on the first bit of the issues 21 we've been considering. 22 MR DICKER: Again, so we're clear: the foreign currency 23 creditor will have lost, will have not been paid the 24 full amount of interest that he is owed on the judge's 25 approach. Because if you go through the diagram, part</p> <p style="text-align: center;">Page 78</p>	<p>1 at all on the cut-off date. 2 MR DICKER: But he is also entitled, we say, at that point, 3 to say, "And, actually, if you look at my underlying 4 rights, what I should have had was interest equal to 5 10 per cent on my foreign currency claim. What 6 I eventually received was not interest at 10 per cent on 7 my foreign currency claim, I received interest at 8 10 per cent on my depreciated sterling equivalent". 9 So the left-hand part of this diagram doesn't 10 necessarily result in the foreign currency creditor 11 receiving the full amount of its interest. But that's 12 going back to our major issues about submissions about 13 whether or not 2.88 is an exclusive code et cetera. 14 That is going back to issue 2A, and whether or not you 15 have a non-provable claim for any shortfall. 16 This is dealing, essentially, with the consequence 17 of the judge's earlier decision that 2.88 is 18 an exclusive code. At this stage, he says, "Well, it is 19 but only in relation to the proved sterling debt, not in 20 relation to foreign currency balance". 21 In relation to the foreign currency balance, what's 22 preserved is your underlying claim for the balance plus 23 your underlying claim to interest on that balance. 24 LADY JUSTICE GLOSTER: So you are with the judge on that? 25 MR DICKER: Yes.</p> <p style="text-align: center;">Page 80</p>

1 LADY JUSTICE GLOSTER: But you say it's illogical --  
 2 MR DICKER: If we have lost on our earlier arguments, we are  
 3 with the judge on this point, yes.  
 4 LORD JUSTICE BRIGGS: As I understand it, what this  
 5 declaration doesn't do, because the previous ones, in  
 6 brackets, there's no declaration about this, is  
 7 determined how you -- if at all -- you give credit to  
 8 the interest received against the interest you would  
 9 have received on a non-provable claim.  
 10 MR DICKER: That is dealt with in the next declaration,  
 11 declaration 4, supplemental issue 3, which I was going  
 12 to come to next.  
 13 LORD JUSTICE BRIGGS: Yes.  
 14 MR DICKER: I wonder whether this might be a convenient  
 15 moment, and then return to that?  
 16 LADY JUSTICE GLOSTER: Well, okay. 2.00 pm.  
 17 (12.58 pm)  
 18 (The short adjournment)  
 19 (2.00 pm)  
 20 LADY JUSTICE GLOSTER: Yes, Mr Dicker. Are we moving on to  
 21 some of your appeals now? Have you dealt with ...  
 22 MR DICKER: I have said all I think I need to say, at this  
 23 stage, in relation to declaration 6.  
 24 LADY JUSTICE GLOSTER: Yes. How are we doing for time,  
 25 generally?

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

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1 The judge dealt with this in his supplemental judgment.  
 2 If you go to bundle A2, tab 1, you will see the section,  
 3 at paragraph 48, headed "Supplemental issue 3". He  
 4 deals with this between 48 and 54.  
 5 I can deal with this very shortly. The essential  
 6 point is that which the judge dealt with, at  
 7 paragraph 53. He says:  
 8 "The essential point is that statutory --"  
 9 LADY JUSTICE GLOSTER: It's the same point.  
 10 MR DICKER: Same point.  
 11 All the submissions I made in relation to the  
 12 earlier off-set apply here. You can't make the same sum  
 13 of money essentially doing two different things at the  
 14 same time.  
 15 LADY JUSTICE GLOSTER: Yes.  
 16 MR DICKER: So the next two issues on the list are 29 and  
 17 30.  
 18 LADY JUSTICE GLOSTER: Yes.  
 19 MR DICKER: I've said I have already, essentially, made my  
 20 submissions in relation to these. They're both  
 21 concerned with non-provable claims. Though if one  
 22 starts with issue 30 --  
 23 LADY JUSTICE GLOSTER: You've already made your  
 24 submissions -- if I can fine my note ...  
 25 MR DICKER: Everything I said in relation to non-provable

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

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<p>1 LADY JUSTICE GLOSTER: Yes.</p> <p>2 MR DICKER: The judge dealt with it by dealing with what one</p> <p>3 might call the hypothetical judgment, which is</p> <p>4 subparagraph (b) of the declaration. He dealt with that</p> <p>5 first. He then dealt with a situation in which one had</p> <p>6 actually obtained a judgment post-administration order.</p> <p>7 He dealt with that second.</p> <p>8 173 deals with the hypothetical judgment. 178 deals</p> <p>9 with the actual.</p> <p>10 Now, for the purposes of my submissions, I was going</p> <p>11 to deal with it in the order in which I dealt with it</p> <p>12 below, which is the reverse order, and deal first with</p> <p>13 the situation in which you actually obtain a judgment</p> <p>14 post-administration. The analysis in relation to the</p> <p>15 two declarations is in fact very different.</p> <p>16 LADY JUSTICE GLOSTER: Is different?</p> <p>17 MR DICKER: Is different.</p> <p>18 So there's no difficulty, obviously, if you have</p> <p>19 obtained a judgment prior to date of administration</p> <p>20 order, that is provable like any other claim. The next</p> <p>21 question therefore is: what happens if you obtain</p> <p>22 a judgment, a foreign judgment, entitling you to the</p> <p>23 judgment interest rate under the foreign legislation but</p> <p>24 only do so after the date of administration?</p> <p>25 As between the creditor and the company, the</p> <p style="text-align: center;">Page 85</p>	<p>1 apply to such a judgment. So why, then, does the judge</p> <p>2 hold it's nevertheless not covered?</p> <p>3 He gave five reasons for doing so, which you'll see</p> <p>4 in paragraph 180. Recording my learned friend's</p> <p>5 submissions for Wentworth, first, he says:</p> <p>6 "It is as necessary for the operation of rule 2.88</p> <p>7 as it is for the ascertainment of provable debts, there</p> <p>8 should is a single cut-off date."</p> <p>9 Secondly:</p> <p>10 "His submission is consistent with the requirement</p> <p>11 of 2.88(9) that the default rate, his judgment rate as</p> <p>12 at the date of the administration, further suggests a</p> <p>13 comparison with a rate to which the creditor may</p> <p>14 otherwise be entitled under rights existing as at that</p> <p>15 date."</p> <p>16 Third:</p> <p>17 "If it is consistent with the extension of the</p> <p>18 provision for statutory interest beyond the</p> <p>19 recommendation of the Cork Committee of a single rate</p> <p>20 applicable to all debts at judgment rate as at the date</p> <p>21 liquidation."</p> <p>22 Then, ten lines down:</p> <p>23 "Fourthly, submissions made by Mr Dicker in relation</p> <p>24 to the inefficiency is unfairness of permitting</p> <p>25 creditors to obtain judgments after the commencement of</p> <p style="text-align: center;">Page 87</p>
<p>1 creditor has a right to interest at the foreign judgment</p> <p>2 rate from the date of judgment. That's leaving aside</p> <p>3 the effect of the insolvency. He has a new right which</p> <p>4 he has obtained, post the administration order,</p> <p>5 entitling him to payment of interest at the relevant</p> <p>6 rate. The question is whether or not he's entitled to</p> <p>7 be paid such interest from the date of his judgment</p> <p>8 before any distribution is made to subordinated</p> <p>9 creditors or shareholders. There are two ways in which</p> <p>10 he might be entitled to receive such payment. The first</p> <p>11 is under rule 2.88(7) and (9). The second is as</p> <p>12 a non-provable claim.</p> <p>13 So far as 2.88(9) is concerned, the answer obviously</p> <p>14 depends on the construction of the rule. The point is</p> <p>15 a short one. In our submission, the words "the rate</p> <p>16 applicable to the debt apart from the administration"</p> <p>17 are wide enough to cover a rate pursuant to a judgment</p> <p>18 which has actually been obtained after the date of</p> <p>19 administration. The judge accepted, in paragraph 181,</p> <p>20 as a matter of language, those words are capable of</p> <p>21 including:</p> <p>22 "A rate applicable at or at any time after the</p> <p>23 commencement of the administration."</p> <p>24 So the judge's view, as expressed in 181, is that</p> <p>25 the wording of 2.88(9) is capable of being read so as to</p> <p style="text-align: center;">Page 86</p>	<p>1 the administration to payment of interest at the rate</p> <p>2 applicable to such a judgment support the proposition</p> <p>3 the rights to interest are to be determined as at the</p> <p>4 commencement."</p> <p>5 Fifthly:</p> <p>6 "As a matter of construction of sub-rule 7 and 9 of</p> <p>7 rule 2.88, the words 'rate applicable to the debt apart</p> <p>8 from the administration' refer back to the debts proved</p> <p>9 in sub-rule 7. If the creditor does not have a judgment</p> <p>10 at the date of administration, the debt proved by the</p> <p>11 creditor is not a judgment subsequently obtained but</p> <p>12 the debt as at the date of administration ...(Reading to</p> <p>13 the words)... unascertained claim the later judgment</p> <p>14 quantifies the claim that was not the judgment debt</p> <p>15 which is the subject of proof."</p> <p>16 So post-administration judgment is capable of being</p> <p>17 in the wording, within the wording. It's not, however,</p> <p>18 caught by 2.88(9) for the five reasons identified by the</p> <p>19 judge.</p> <p>20 Now, the main point is, it seems to us, his first</p> <p>21 point, that there needs to be a single cut-off date in</p> <p>22 case there is a shortfall in interest. The judge</p> <p>23 appears to have assumed that that that cut-off date must</p> <p>24 necessarily be the date of the administration order.</p> <p>25 Otherwise, there's no issue.</p> <p style="text-align: center;">Page 88</p>

<p>1 We say there's no justification for this. It can                  2 equally be the date when all proved debts have been paid                  3 in full and the surplus comes to be distributed.                  4 Indeed, it would be more natural to take that date                  5 because, obviously, the premise of the rule is that                  6 there's been a delay between the date of the                  7 administration order and the date when the surplus is to                  8 be distributed, and you are being compensated for that                  9 delay. When the administrator in practice comes to work                  10 out how much is owing, he will obviously do it as at                  11 that date, looking back to work out what happened.                  12 LADY JUSTICE GLOSTER: Yes.                  13 MR DICKER: So we say if one reads 2.88(7) and (9) as                  14 effectively requiring a cut-off date, in the sense that                  15 if there a shortfall, obviously, claims to interest need                  16 to abate rateably, there's absolutely no reason why you                  17 can't have that same cut-off date when the administrator                  18 performs what 2.88(7) says he is to perform. Namely,                  19 use the surplus to make payment of interest, abate                  20 claims ratably at that point, but include claims to                  21 interest which exist by the time he comes to do that.                  22 So that's the short submission in relation to 2.88.                  23 The alternative approach is, of course, that again,                  24 such a creditor would have a non-provable claim. He                  25 would have a non-provable claim because his rights would</p> <p style="text-align: center;">Page 89</p>	<p>1 MR DICKER: Yes. The Australians have this concept, the                  2 sort of second round of proofs.                  3 LORD JUSTICE BRIGGS: Yes.                  4 MR DICKER: The authorities have never really dealt with                  5 a shortfall in respect of non-provable liabilities to                  6 work out -- I think your Lordship said this in the                  7 Waterfall 1 judgment.                  8 LORD JUSTICE BRIGGS: I touched on it.                  9 MR DICKER: Touched on it.                  10 LORD JUSTICE BRIGGS: Yes.                  11 MR DICKER: It may be worth just looking at the way                  12 Mr Justice David Richards dealt with this in Re T&amp;N,                  13 which you will see in volume 2, tab 74. The facts don't                  14 matter, but it concerns personal injury as a result of                  15 asbestos.                  16 There was an issue about whether or not they were                  17 contingent claims for the purposes of a scheme                  18 arrangement or provable claims in a liquidation.                  19 Mr Justice David Richards held they weren't. The rules                  20 were changed, subsequently, to accommodate them. But                  21 the relevant part of the judgment, for present purposes,                  22 is 106 and 107. One of the submissions that was made to                  23 him was they ought to be provable under the rules                  24 because, otherwise, if they're not provable, then                  25 essentially the assets would be distributed to the</p> <p style="text-align: center;">Page 91</p>
<p>1 not have been satisfied in full by the process of                  2 collective execution, distribution in effect of proved                  3 debts, payment of interest under rule 2.88. He would be                  4 entitled to have his unpaid claim paid before any                  5 distributions were made to shareholders.                  6 Again, there's a similar point in relation to the                  7 cut-off date on this variant. There is a cut-off date                  8 for the ascertainment of proved debts. There is not --                  9 or rather the same cut-off date does not apply to                  10 ascertainment for non-provable liabilities.                  11 I mentioned this yesterday, but there are a number                  12 of examples of this in the authorities. I referred to                  13 tort claims, for example, which only come into existence                  14 after the administration date. They don't arise --                  15 assume it doesn't arise under any obligation incurred                  16 before, they are therefore not provable. They are                  17 nevertheless payable as non-provable liabilities before                  18 any surplus is distributed.                  19 LORD JUSTICE BRIGGS: Presumably, it has a surplus that                  20 could go all the way to shareholders? You don't need                  21 a cut-off date at all at this stage in the process. You                  22 just pay everything that's due to everybody else before                  23 you pay the shareholders, but if there's a shortfall for                  24 any class of creditor lying ahead of the shareholders,                  25 then you need to make another one.</p> <p style="text-align: center;">Page 90</p>	<p>1 shareholders without reference to these claims. The way                  2 Mr Justice David Richards dealt with this you can see in                  3 so 106 and 107. He says, 106:                  4 "Pressed with a fifth consequence, submitted that if                  5 all provable debts and liquidation expenses were paid in                  6 full, the balance of assets would be distributed among                  7 shareholders. No payment or provision would be made for                  8 non-provable claims, such as claims in tort accruing                  9 after the liquidation date. Submitted this resulted                  10 from, first, the liquidator's statutory duty to                  11 distribute the assets in accordance with section 107 ...                  12 "                  13 Secondly:                  14 "The changes made by the Insolvency Act 1986 and the                  15 Insolvency Rules 1986, which meant there was no longer                  16 any mechanism for proving such tort claims even in a                  17 solvent liquidation."                  18 107:                  19 "It would indeed be extraordinary if a company's                  20 assets could be and were required --"                  21 LADY JUSTICE GLOSTER: We can read this. Can we read this                  22 to ourselves?                  23 MR DICKER: Yes, I'm sorry. So 107.                  24 LADY JUSTICE GLOSTER: All the paragraphs would you like ...                  25 (Pause)</p> <p style="text-align: center;">Page 92</p>

<p>1 Yes.</p> <p>2 MR DICKER: So he, essentially, said this is another</p> <p>3 mechanism. Lord Justice Briggs in Waterfall I said,</p> <p>4 well, actually, the answer is, if one goes back to cases</p> <p>5 like Bromley v Goodere, it's always the liquidator's</p> <p>6 responsibility to deal with non-provable liabilities.</p> <p>7 In our submission, that's absolutely right.</p> <p>8 Mr Justice David Richards, in fairness to him, being</p> <p>9 addressed on this point rather more briefly in Re T&amp;N</p> <p>10 says the same result would occur but by a slightly</p> <p>11 different route, which is if the company is insolvent,</p> <p>12 why on earth wouldn't you allow creditors to execute and</p> <p>13 recover?</p> <p>14 LADY JUSTICE GLOSTER: Yes.</p> <p>15 MR DICKER: We say that's how it works in relation to any</p> <p>16 other non-provable liability which arises post the</p> <p>17 administration date, what on earth is the difference</p> <p>18 between those and the right under a foreign judgment</p> <p>19 obtained post administration order?</p> <p>20 It is a right the creditor has against the company.</p> <p>21 It does require to be paid before any surplus is</p> <p>22 distributed to shareholders, like any other non-provable</p> <p>23 liability.</p> <p>24 I think, just again so your Lordships have the</p> <p>25 reference, I think the reference to Lord Justice Briggs'</p> <p style="text-align: center;">Page 93</p>	<p>1 this stage, aren't we, not non-provable claims?</p> <p>2 MR DICKER: We are talking about proved debts, correct --</p> <p>3 LADY JUSTICE GLOSTER: Proved debt.</p> <p>4 MR DICKER: -- because this is a right under 2.88(9).</p> <p>5 LADY JUSTICE GLOSTER: If they were foreign judgments, prior</p> <p>6 to administration or post-administration, they would</p> <p>7 have all been converted into sterling?</p> <p>8 MR DICKER: Correct.</p> <p>9 LADY JUSTICE GLOSTER: So what you are seeking to do is to</p> <p>10 apply a non-sterling rate of interest which could be</p> <p>11 said to be a bit weird.</p> <p>12 MR DICKER: All I'm going to say about this is: I think the</p> <p>13 judge correctly recorded our submissions in the course</p> <p>14 of his judgment.</p> <p>15 LADY JUSTICE GLOSTER: Yes.</p> <p>16 MR DICKER: There's not really much more I can add, at this</p> <p>17 stage.</p> <p>18 LADY JUSTICE GLOSTER: Okay.</p> <p>19 MR DICKER: This is plainly a step beyond, but we do submit</p> <p>20 there is a big analytical distinction to be drawn</p> <p>21 between a judgment which has actually been obtained.</p> <p>22 There is no reason why, we say, there can't be</p> <p>23 a non-provable liability, on the one hand, and a</p> <p>24 purely hypothetical judgment, on the other.</p> <p>25 LADY JUSTICE GLOSTER: Are there any better ways you could</p> <p style="text-align: center;">Page 95</p>
<p>1 comment about the possible need for a second cut-off</p> <p>2 date is paragraph 165 of the Waterfall I judgment. So</p> <p>3 that's paragraph A of the declaration.</p> <p>4 Paragraph B concerns what I've referred to as</p> <p>5 a hypothetical judgment. In other words, a judgment</p> <p>6 which a creditor could have obtained after the</p> <p>7 commencement date but has not obtained.</p> <p>8 This is the argument which the judge rejected, at</p> <p>9 174 to 177. It raises a further question of</p> <p>10 construction in relation to rule 2.88(9) which is,</p> <p>11 essentially, when you see the words:</p> <p>12 "The rate applicable to the debt apart from the</p> <p>13 administration."</p> <p>14 Does that entitle one, essentially, to say: well,</p> <p>15 what would have happened had there not been</p> <p>16 an administration?</p> <p>17 In other words, had there not been a moratorium. If</p> <p>18 the answer to that question is: well, the creditor would</p> <p>19 have obtained a judgment and would have obtained</p> <p>20 a foreign judgment, then he ought to be entitled to</p> <p>21 interest at that rate.</p> <p>22 Now, the judge, I think --</p> <p>23 LADY JUSTICE GLOSTER: Even though it's a rate in</p> <p>24 a different currency, despite the fact that the proved</p> <p>25 debts -- because we are talking about proved debt at</p> <p style="text-align: center;">Page 94</p>	<p>1 submit a (Inaudible) claim, couldn't you?</p> <p>2 MR DICKER: If you had obtained a foreign judgment.</p> <p>3 LADY JUSTICE GLOSTER: Yes.</p> <p>4 MR DICKER: In our submission, yes, it would be</p> <p>5 a non-provable liability. If you didn't, because you</p> <p>6 were concerned about the effect of the moratorium, and</p> <p>7 the moratorium in practice prevented you from obtaining</p> <p>8 a foreign judgment -- I will come back to that in one</p> <p>9 moment -- then that option essentially wasn't open to</p> <p>10 you.</p> <p>11 Now, it might be said in answer: the moratorium is</p> <p>12 territorial in scope, so it couldn't necessarily have</p> <p>13 prevented a foreign judgment creditor from actually</p> <p>14 obtaining a judgment.</p> <p>15 That's not necessarily the end of it because the</p> <p>16 foreign creditor has a presence within the jurisdiction.</p> <p>17 It's possible to injunct him from taking proceedings</p> <p>18 which might interfere with the administration. But, as</p> <p>19 I say, I don't think I can really add much on that.</p> <p>20 The final thing I wanted to do was hand up to your</p> <p>21 Lordships two documents which set out some illustrations</p> <p>22 in relation to both Bower v Marris and compound</p> <p>23 interest. Can I stress we have not, I'm afraid, time --</p> <p>24 LADY JUSTICE GLOSTER: Let's hand them up anyway. If there</p> <p>25 are any complaints about them, Mr Zacaroli or anyone</p> <p style="text-align: center;">Page 96</p>



<p>1 else can raise them.</p> <p>2 MR DICKER: If we do have one for each.</p> <p>3 (Handed)</p> <p>4 LADY JUSTICE GLOSTER: Are you going to walk us through or</p> <p>5 are they self-explanatory?</p> <p>6 MR DICKER: Just in case, perhaps for my own benefit. The</p> <p>7 two documents, the first provides two illustrations in</p> <p>8 relation to Bower v Marris, so you'll see the</p> <p>9 assumptions, at the top:</p> <p>10 "Proved claim, hundred pounds, rate of interest</p> <p>11 10 per cent, and the interest methodology is simple."</p> <p>12 Then, the first example shows simple interest</p> <p>13 computed according to the rule in Bower v Marris,</p> <p>14 essentially, and you get to the stage of notionally</p> <p>15 reallocating the dividends and being applied first to</p> <p>16 interest. Secondly, to principal.</p> <p>17 The second shows simple interest computed according</p> <p>18 to the judge's judgment. You can see the difference in</p> <p>19 outcome for each.</p> <p>20 Then, the second sheet provides four scenarios in</p> <p>21 relation to compound interest, so this is in context of</p> <p>22 issue 3.</p> <p>23 The first shows how compound interest works as</p> <p>24 a matter of right.</p> <p>25 The second I should just explain. Compound interest</p> <p style="text-align: center;">Page 97</p>	<p>1 £135.91 and 143.45, which is how it would work. So,</p> <p>2 essentially, by reserving just £1, on the judge's</p> <p>3 approach, you can in fact achieve pretty much what you</p> <p>4 would achieve but only if you hold back the pound. If</p> <p>5 you pay the final pound, the whole thing freezes.</p> <p>6 LADY JUSTICE GLOSTER: Yes.</p> <p>7 MR DICKER: For some reason you are £8 worse off. All for</p> <p>8 the sake of a pound. We say it just illustrates the</p> <p>9 illogicality, in my respectful submission, in the</p> <p>10 conclusion the judge reached.</p> <p>11 LADY JUSTICE GLOSTER: That's very helpful. To actually see</p> <p>12 it worked out like that.</p> <p>13 MR DICKER: Unless you have any further questions for me,</p> <p>14 that is all I was going to say, at this stage.</p> <p>15 LADY JUSTICE GLOSTER: Thank you very much, Mr Dicker.</p> <p>16 Submissions by MR SMITH</p> <p>17 MR SMITH: Thank you. My Lady, my Lords, by way of</p> <p>18 introduction, like --</p> <p>19 LADY JUSTICE GLOSTER: Don't refer to me separately. It</p> <p>20 will add almost a quarter of an hour to everything.</p> <p>21 MR SMITH: I am grateful.</p> <p>22 By way of introduction, like Mr Dicker's clients, my</p> <p>23 clients are also unsecured creditors of LBIE. We are in</p> <p>24 a slightly different position to Mr Dicker's clients in</p> <p>25 that our claim arises under a prime brokerage agreement</p> <p style="text-align: center;">Page 99</p>
<p>1 shown with interest paid down first according to the</p> <p>2 rule in Bower v Marris. That produces the same figure.</p> <p>3 It essentially produces the same figure because if</p> <p>4 you're dealing with compound interest, because interest</p> <p>5 is capitalised, treated as part of the principal, it</p> <p>6 doesn't actually matter whether you notionally allocate</p> <p>7 payments to principal or interest. Interest will</p> <p>8 continue to run on whatever is left.</p> <p>9 So illustration 2 is simple simply to illustrate if</p> <p>10 you are in the world of compound interest.</p> <p>11 Bower v Marris doesn't add anything.</p> <p>12 Third, compound interest computed with the cut-off</p> <p>13 for the judge's judgment, so that's essentially compound</p> <p>14 interest continues to run until proved debts have been</p> <p>15 paid in full, at which point whatever sum of interest is</p> <p>16 still unpaid, no longer accrues interest.</p> <p>17 That's item 3.</p> <p>18 Item 4 is a worked example of the example I gave you</p> <p>19 where, instead of paying principal in full, when it</p> <p>20 comes to the final dividend, the liquidator holds back</p> <p>21 £1, at which point interest continues to accrue on all</p> <p>22 the unpaid interest plus, obviously, the outstanding £1.</p> <p>23 You can see from the bottom right, that someone ends up</p> <p>24 in that situation simply by withholding £1, is £143.66</p> <p>25 which compares to the judge's approach of cut-off</p> <p style="text-align: center;">Page 98</p>	<p>1 which does not carry with it any right to contractual</p> <p>2 interest, and that's the position in relation to all the</p> <p>3 claims against LBIE under prime brokerage agreements, as</p> <p>4 far as we are aware.</p> <p>5 On the other hand, Mr Dicker's clients have</p> <p>6 substantial claims under the ISDA master agreement,</p> <p>7 where there is contractual right to interest. So there</p> <p>8 is that difference between us, although it's fair to</p> <p>9 say: in relation to most of the issues our interests are</p> <p>10 aligned.</p> <p>11 In relation to the issues which Mr Dicker has been</p> <p>12 addressing where we are also an appellant alongside</p> <p>13 Mr Dicker's clients, we simply adopt Mr Dicker's</p> <p>14 submissions.</p> <p>15 There's just three points I'd like to add, if I may,</p> <p>16 very briefly by way of supplement, to what Mr Dicker</p> <p>17 said. The first relates to the authority of</p> <p>18 Whittingstall v Grover, which you will recall Mr Dicker</p> <p>19 addressed you on in the context of issue 2, dealing with</p> <p>20 Bower v Marris.</p> <p>21 Perhaps if I could just trouble you to turn that up</p> <p>22 again. It's in tab 24 of authorities bundle 1. You</p> <p>23 recall this was the judgment of Mr Justice Chitty. It</p> <p>24 concerned the testamentary estate of Mr Whittingstall</p> <p>25 who had carried on a banking business in partnership.</p> <p style="text-align: center;">Page 100</p>

<p>1 One of the questions which arose was the issue of 2 interest which Mr Dicker showed you was dealt with by 3 the judge, on page 217. 4 Just to note, the question he was dealing with, one 5 sees about a third of the way down the page, was whether 6 between joint creditors of the testator, on the one 7 hand, and the separate creditors, on the other hand, 8 whose debts do not by law carry interest, who had 9 priority. So he was looking at the position as between 10 joint creditors and separate creditors as to who had 11 priority. In both cases, debts did not by law carry 12 interest. 13 It's interesting to note, in our submission, what he 14 describes by way of the legislative basis for the right 15 to interest, which he deals with slightly further on in 16 the same column. He says: 17 "Previously to the orders of 1841, the court of 18 Chancery did not give interest to a creditor coming in 19 under a decree for the administration of the estate of a 20 deceased person." 21 LORD JUSTICE BRIGGS: Where are you? 22 MR SMITH: I'm slightly further on. It's about halfway down 23 the page, the left-hand side column. 24 LORD JUSTICE BRIGGS: Which? 25 MR SMITH: 217. It's a passage about halfway down the page.</p> <p style="text-align: center;">Page 101</p>	<p>1 for our purposes is rule 63, which deals with the 2 position where there's a creditor whose debt does not 3 carry interest. What this provides, you will see, the 4 creditor whose debt does not carry interest who comes in 5 and establishes the same before the judge in chambers 6 under a judgment or order and so on: 7 "Shall be entitled to interest upon his debt at the 8 rate of 4 per cent per annum from the date of the 9 judgment or order out of any assets which may remain 10 after satisfying the costs of the cause or matter, the 11 debts established and the interest of such debts as by 12 law carry interest." 13 So the right to interest under rule 63 only arose 14 after the principal debts had first been discharged. 15 You see that from the wording after "satisfying the 16 debts established". 17 Now, that's not in the same language as 18 rule 2.88(7), but it obviously bears a similarity to the 19 central concept in rule 2.88(7), which is that the right 20 to statutory interest only arises after the debts proved 21 have been paid. 22 Now, just looking back at Whittingstall v Grover, 23 you can see that language and that provision wasn't any 24 bar to the application of the rule in Bower v Marris for 25 the purposes of calculating interest.</p> <p style="text-align: center;">Page 103</p>
<p>1 It begins: 2 "Previously to the orders of 1841 the Court of 3 Chancery did not give interest to a creditor coming in 4 under a decree for the administration of the estate of a 5 deceased person where the debts did not by law carry 6 interest." 7 Then, he refers to the orders of 1841, which 8 Mr Dicker showed you yesterday. He says: 9 "The orders of 1841 relating to interest were in 10 substance repeated in the consolidated orders of 1861 11 and are now embodied in the subsisting rules of court, 12 order 55, rule 62 and 63." 13 So the subsisting rules at the time were those in 14 order 55, rules 62 and 63. 15 In our submission, it's interesting to look at what 16 those rules actually provided because we do suggest they 17 have some similarity to rule 2.88. You will find those 18 in the fourth authorities bundle, behind tab 151. This 19 is taken from the rules of the Supreme Court in 1883, 20 but we have checked and they appear to have been made in 21 the same form throughout this period. 22 If you go over to the second page of the tab, you 23 will see the two rules. Under the heading "interest". 24 There's firstly rule 62, which deals with the position 25 where the debts do bear interest. Then, more relevantly</p> <p style="text-align: center;">Page 102</p>	<p>1 Now, we know that the testamentary estate in 2 Whittingstall v Grover included debts which did not by 3 law carry interest. Because that was the question 4 Mr Justice Chitty was concerned with, and which he set 5 out in the passage in the left-hand column, on page 217, 6 and which I referred to a moment ago. 7 So he was therefore dealing with, at least in part, 8 debts which did not by law carry interest and where, in 9 our submission, the right to interest must have arisen 10 under rule 63. 11 But what he nonetheless held was that the rule in 12 Bower v Marris applied for the purposes of calculating 13 that interest. You see that from the very final 14 paragraph, again, which Mr Dicker showed you yesterday, 15 on the right-hand column, at page 217, where he said 16 that the interest was to be calculated applying the rule 17 in Bower v Marris, in other words, by treating the 18 dividends as ordinary payment on account and applying 19 each dividend in the first place to the payment of 20 interest and only then in discharge of principal. 21 Now, in our submission, that's important. Then two 22 points arise from it which are relevant for present 23 purposes. The first point is that the language, in 24 order 55, rule 63, to the effect that the right to 25 interest only arose after satisfaction of the debts</p> <p style="text-align: center;">Page 104</p>

<p>1 established, ie the principal sums, was not regarded as                  2 precluding the application in Bower v Marris, in                  3 calculating entitlements to interest.                  4 So the fact that the right only arose after the                  5 principal had been paid was not considered to be                  6 a reason why, when it came to working out the interest                  7 entitlement, you couldn't apply Bower v Marris for those                  8 purposes and treat the payments in the way described by                  9 Mr Justice Chitty.                  10 In our submission, that language, which talks in                  11 terms of satisfaction of the debts established, is very                  12 similar indeed to the language you find in rule 2.88(7)                  13 which talks about payment of the debts proved. One asks                  14 oneself: well, if the rule in Bower v Marris was capable                  15 of being applied on the basis the language in rule 63,                  16 why isn't it capable of being applied, equally, in                  17 relation to rule 288?                  18 That's the first point.                  19 The second point is that, in our submission, this                  20 also shows that the operation and application of the                  21 principle in Bower v Marris is not dependent on the                  22 doctrine of appropriation. Because if you think, in                  23 relation to Whittingstall v Grover, of a creditor whose                  24 debt did not by law carry interest, at the time he                  25 received a payment --</p> <p style="text-align: center;">Page 105</p>	<p>1 been calculated in accordance with Bower v Marris.                  2 Now, in our submission, it would be very odd to end                  3 up in a position where Bower v Marris did not apply to                  4 the calculation of statutory interest under rule 2.88,                  5 where a creditor might have a non-provable claim of this                  6 nature. We submit that would be a very odd outcome.                  7 The reason for that is that it appears that such                  8 a non-provable claim would only be available to                  9 a creditor who had an existing contractual or other                  10 legal right to interest as at the commencement of the                  11 insolvency. The reason for that is that the                  12 non-provable claim is based on the idea that the                  13 creditor has remitted back to his underlying rights to                  14 extent they have not actually been discharged by                  15 payments made in course of insolvency. So in order to                  16 have that non-provable claim, you need a contractual                  17 right to interest or some similar legal right.                  18 Now, that, we submit, would lead to an odd position                  19 where creditors who did have an existing legal right to                  20 interest could potentially recover interest calculated                  21 on a Bower v Marris basis as a non-provable claim. But                  22 creditors who had no such existing rights at the                  23 commencement of the insolvency, could not. So,                  24 essentially, there'd be a difference in treatment                  25 between creditors depending on whether they had</p> <p style="text-align: center;">Page 107</p>
<p>1 LADY JUSTICE GLOSTER: He can't appropriate.                  2 MR SMITH: He discharged his principal. He had no right to                  3 interest because the right to interest only arose once;                  4 the principal had been paid in full. So what this                  5 demonstrates is that contrary to Wentworth's                  6 submissions, the principle in Bower v Marris is not                  7 dependent on the doctrine of appropriation and, clearly,                  8 Mr Justice Chitty didn't regard that as being in any way                  9 central to the operation of the principle.                  10 So that's what we wanted to add in relation to -- we                  11 thought it was quite helpful to look at the language in                  12 the rule. As I say, we do submit there is some                  13 similarity in relation to rule 2.88.                  14 The second point I just wanted to comment on, very                  15 briefly, is in relation to issue 2A and declaration 5.                  16 This, in particular, is the argument that if                  17 Bower v Marris cannot be applied to the calculation of                  18 statutory interest under rule 2.88, a creditor may                  19 nonetheless have a non-provable claim to the interest to                  20 which he would have been entitled on his underlying                  21 claim calculating in accordance with Bower v Marris.                  22 Basically, the idea is that if you can't get                  23 Bower v Marris under rule 2.88, a creditor may                  24 nonetheless have a non-provable claim to what he would                  25 have received if interest on his underlying claim had</p> <p style="text-align: center;">Page 106</p>	<p>1 an existing right to interest as at the commencement of                  2 the insolvency. That's notwithstanding the creditors                  3 without an existing right to interest are equally kept                  4 out of their money by the insolvency.                  5 Now, we suggest that that is also particularly odd,                  6 or would be a particularly odd result when you bear in                  7 mind that one of the main purposes of the changes made                  8 to statutory interest in 1986 was to place creditors                  9 with an existing right to interest on their debt, and                  10 those without such a right, on the essentially the same                  11 basis. That was one of the main changes made in 1986.                  12 You will recall that, prior to 1986, only creditors                  13 with an existing right to interest, such as                  14 a contractual right, could recover post-insolvency                  15 interest in a company liquidation. That was then                  16 remedied, in 1986, when rules were changed and it was                  17 basically said creditors who do have existing right to                  18 interest, and those who don't, are both entitled to                  19 recover statutory interest in the event of a surplus.                  20 That was in fact the principal change which was made in                  21 rule 2.88. One sees that from the Cork Report amongst                  22 others places.                  23 So, in circumstances where the legislature has                  24 specifically remedied and removed the difference in                  25 treatment between creditors with existing rights to</p> <p style="text-align: center;">Page 108</p>

<p>1 interest and those without, we suggest must be somewhat  2 odd for that same difference to persist in relation to  3 the entitlement of creditors to receive interest  4 calculated in accordance with Bower v Marris. What one  5 would basically be saying is that the difference remains  6 but the difference, instead of being at the level of  7 entitlement to interest, is at the level of entitlement  8 to have that interest calculated in accordance with  9 Bower v Marris. For those reasons, we do submit that  10 would be an odd outcome and it does support the  11 submission, we suggest, that rule 2.88 should be  12 construed as permitting statutory interest to be  13 calculated in a accordance with Bower v Marris and  14 thereby available to all creditors, whether or not they  15 have an existing right to interest at the commencement  16 of the insolvency.  17 So that's the second point.  18 The third point, very briefly, in relation to issue  19 7, which is the issue concerning interest on contingent  20 debts and the question of time from which that interest  21 begins to run.  22 I just wanted to remind you of an additional point  23 which the judge made in his judgment at paragraph 211.  24 It's page 52 of bundle A1, tab 2. This was the point he  25 made which, in our submission, is a good point in</p> <p style="text-align: center;">Page 109</p>	<p>1 for example, there's no suggestion of any intention to  2 make a change in the position. In our submission, the  3 point which the judge makes in paragraph 211 is a good  4 one, in that, all things being equal, one construes the  5 new language used in the 1986 Act and the 1986 rules in  6 essentially the same way and leading to the same result.  7 Those are the only points I wish to add by way of  8 supplement to Mr Dicker.  9 LADY JUSTICE GLOSTER: Thank you very much. Yes,  10 Mr Zacaroli, you next.  11 Submissions by MR ZACAROLI  12 MR ZACAROLI: My Lords, I propose to deal with the issue in  13 a slightly different order than those taken by  14 Mr Dicker. Only slightly.  15 I propose to start with the question of  16 Bower v Marris and his application to rule 2.88.  17 Picking up after that the issue of whether compound  18 interest continues after the payment of the final  19 dividend.  20 Secondly, I was going to move to non-provable claims  21 to interest. In particular, whether rule 2.88  22 represents a complete or exclusive code.  23 Then, departing from the order of Mr Dicker, I was  24 going take my Lords to the question of off-set of  25 statutory interest against the currency conversion</p> <p style="text-align: center;">Page 111</p>
<p>1 relation to the position under the old law, pre-1986.  2 The position there was that in the case of  3 bankruptcy, section 33(8) made explicitly clear that  4 interest was paid on all debts proved in the bankruptcy  5 from the date of the receiving order. So it was made  6 explicitly clear that you received interest from the  7 date of the receiving order, on all the proved debts.  8 It was also the position that in bankruptcy, under the  9 1914 Act, a contingent debt was capable of being proved,  10 section 30(3), which we have in the bundle,  11 authorities 4, tab 151A.  12 So tying those provisions together, it was quite  13 clear, pre-1986, that a creditor in a bankruptcy could  14 prove for a contingent debt and that in the event of  15 a surplus interest was to be paid on all proved debts,  16 including a contingent debts, from the date of the  17 receiving order. Although one can't find an authority  18 which specifically makes that good in relation to the  19 1914 Act, in our submission that was the clear effect of  20 that Act on its proper construction.  21 Now, the judge is obviously right to say, "One needs  22 to treat that with a little bit of caution because  23 that's one legislation, things can change".  24 But there's not a hint of any evidence that there  25 was an intention to make a change. In the Cork Report,</p> <p style="text-align: center;">Page 110</p>	<p>1 claims.  2 The reason for doing that is that issue is far more  3 complex than has been so far presented to the court. In  4 particular, there's a number of moving parts in relation  5 to that issue.  6 LADY JUSTICE GLOSTER: Could you just identify on the issue  7 sheet. You are dealing with declaration 3, issue 2, and  8 declaration 8, issue 3, first.  9 MR ZACAROLI: Yes. Then I'll be dealing with the third  10 issue, that is declaration 5, issue 2A. Also  11 declaration 4, issue 2A. Then, I'm going to move to  12 question of the off-set of statutory interest against  13 currency conversion claims. Those are a number issues.  14 Let me just make sure I get them all.  15 LADY JUSTICE GLOSTER: I'm working from the issue sheets --  16 MR ZACAROLI: I understand.  17 LADY JUSTICE GLOSTER: It's important I'm on the right one.  18 MR ZACAROLI: So it's the sixth issue, that's issue 10.  19 LADY JUSTICE GLOSTER: Yes, number 6, issue 10 is your third  20 point.  21 MR ZACAROLI: Also, picking up with that -- because there's  22 various other points that go with that ...  23 LADY JUSTICE GLOSTER: Don't forget you have been living  24 with these issue for a long time.  25 MR ZACAROLI: I know, but not in this order.</p> <p style="text-align: center;">Page 112</p>

<p>1 LORD JUSTICE BRIGGS: That's supplemental 3, isn't it?                  2 MR ZACAROLI: Yes, that's correct. Yes.                  3 LADY JUSTICE GLOSTER: Which one are you looking at now?                  4 MR ZACAROLI: That's supplemental issue 3, which is                  5 declaration 4 of the --                  6 LADY JUSTICE GLOSTER: Supplemental issue 3.                  7 MR ZACAROLI: It's number 8 on the table my Lady is working                  8 from. I think it's those two that I'm picking up in                  9 relation to off-set.                  10 LORD JUSTICE BRIGGS: Yes.                  11 MR ZACAROLI: Then I'm going to turn to the question of                  12 whether the rate of interest, under 288(9), includes                  13 a rate applicable to a post administration foreign                  14 judgment either actual or hypothetical. That is                  15 declaration 10. It's issue 11 on the list,                  16 declaration 10, issue 4.                  17 LADY JUSTICE GLOSTER: Yes.                  18 MR ZACAROLI: Then, this leaves, I think, only the question                  19 of contingent debts and the date from which interest                  20 runs on contingent debts. That's issue 7, which is                  21 issue number 5 on the list, declaration 14.                  22 LADY JUSTICE GLOSTER: Yes.                  23 MR ZACAROLI: I was just explaining the reason for that                  24 order change is because we say there's a close                  25 connection between the question of whether there's</p> <p style="text-align: center;">Page 113</p>	<p>1 That is the Judgments Act rate for a contractual rate of                  2 hire. On a defined sum, that is the proved debts for                  3 a defined period. That is the period those proved debts                  4 were outstanding since the date of administration.                  5 Those three elements are both the essential and the                  6 sufficient elements in order to calculate an amount of                  7 interest due from the surplus. No more is needed.                  8 Those words neither require, nor permit, that the                  9 interest is to be calculated upon, firstly, the basis                  10 that the surplus is used to discharge any part of the                  11 proved debt, or that it is to be assumed that the                  12 dividends already paid were made in respect of interest,                  13 or that the surplus is to be used in paying interest                  14 accruing long after the date when the proved debts are                  15 paid in full. Each of which is an integral part                  16 and consequence of applying the so-called rule in                  17 Bower v Marris to rule 2.88(7). That's our first broad                  18 point.                  19 It's a relatively straightforward question of                  20 statutory construction. When I deal with that point,                  21 I will take my Lords through the position as it existed                  22 prior to 1986 and why we say that's the right reading of                  23 the words in 1986.                  24 The second broad point is to properly characterise                  25 the so-called principle in Bower v Marris. Now, the</p> <p style="text-align: center;">Page 115</p>
<p>1 a non-provable claim to interest, on the basis 288 is                  2 not a complete code, and the question of whether there                  3 should be an off-set between currency conversion claims                  4 and statutory interest. The answer would be different,                  5 or the arguments are very different, we say, if there is                  6 or isn't a complete code.                  7 LADY JUSTICE GLOSTER: Right. I would be grateful, when you                  8 move to another section, if you could identify, for                  9 purposes of the transcript, which on this page you are                  10 dealing with, so there's no doubt about it.                  11 MR ZACAROLI: Yes.                  12 So starting with issue 2 -- and I propose to deal                  13 with this through three broad points, which I'll then                  14 develop at more length.                  15 The first broad point is that it's common ground we                  16 are here dealing with a question of statutory                  17 construction. We say, really, the beginning and the end                  18 of this is a relatively straightforward question of                  19 statutory construction. The judge was correct for the                  20 reasons he gave, at paragraphs 134 to 137 of the                  21 judgment.                  22 Rule 2.88(7) is clear and unambiguous. It's                  23 a direction to the administrator to pay from a surplus                  24 in a particular manner. Most importantly, it identifies                  25 and requires interest to be paid at a defined rate.</p> <p style="text-align: center;">Page 114</p>	<p>1 SCG, my learned friend, Mr Dicker's clients, would like                  2 you to think that there was some general equitable                  3 principle applicable to payments from a fund that any                  4 distributions from it are applied, first, towards                  5 interest and secondly towards principal. They would                  6 also like you to think this was a principle that was                  7 applied in winding up in liquidations for 200 years                  8 before the 1986 legislation came along. Such that it                  9 cannot have been the intention of Parliament, in 1986,                  10 to overturn two centuries of learning.                  11 Now, that was a picture undoubtedly attractively                  12 painted but, we say, ultimately flawed because it                  13 misunderstands the principle to be derived from the case                  14 of Bower v Marris, and the subsequent cases in which                  15 that same principle has been applied.                  16 In very brief summary, there are only two                  17 propositions for which Bower v Marris, the case, can                  18 stand. The first is a negative proposition relating to                  19 the common law of appropriation and that negative                  20 proposition is that distribution from an insolvency                  21 estate being made under process of law do not constitute                  22 appropriations made by the debtor. So that if the                  23 creditor otherwise has a right of appropriation between                  24 two different debts, at the time a payment is made to                  25 it, its entitlement to appropriate remains in place.</p> <p style="text-align: center;">Page 116</p>

<p>1 The second principle, which one gets at least 2 partially from <i>Bower v Marris</i> but also from other cases 3 on the same subject matter, is that where a creditor has 4 a concurrent right to principal and interest at the time 5 of a distribution to it, it is a matter of assumption or 6 presumption in the absence of a contrary indication, 7 that it would appropriate first towards interest and 8 second towards principal, because that is generally what 9 is in its economic interest. But it's a matter of the 10 court assuming what would be in the interest of the 11 creditor and applying that rule.</p> <p>12 So three reasons leading to the conclusion that the 13 rule does not apply under 2.88(7). The first is those 14 propositions that one derives from the case are capable 15 of application only where the conditions for the 16 exercise of a right of appropriation otherwise exist. 17 That is where at the time of any payment to the creditor 18 that creditor has two accrued rights to principal and to 19 interest.</p> <p>20 Second, and it follows from that, that it's 21 a prerequisite to the operation of the principle in the 22 insolvency context that the relevant statutory scheme 23 which governs that insolvency deals with the creditor's 24 right to post-liquidation interest, or post 25 administration interest, by remitting that creditor to</p> <p style="text-align: center;">Page 117</p>	<p>1 in England and Australia -- and we say all cases apart 2 from two which are outliers, which I will come to -- 3 apart from those two outlier cases, it was indeed the 4 basis on which the statutory scheme operated, it was 5 a remission of contractual rights.</p> <p>6 The two cases are the case in Ireland, <i>Hibernian</i>, 7 which has been mentioned in passing, and the Canadian 8 case of the <i>Confederation Trust</i>, also mentioned in 9 passing. I will come to those later. We say those are 10 wrong. The point wasn't fully argued in either case. 11 They are simply wrong. Or distinguishable, but we say, 12 primarily, wrong.</p> <p>13 My third point here is that those conditions that 14 I've mentioned, those two conditions, do not exist under 15 the 1986 statutory code. Rule 2.88(7) operates not by 16 remission to contractual rights in any sense, but by 17 creating a new and universal right for all creditors to 18 be paid statutory interest.</p> <p>19 Now, I've used the phrase "so-called principle in 20 <i>Bower v Marris</i>" deliberately, because we have to be 21 careful, I submit, with using a label like "the 22 principle in <i>Bower v Marris</i>" as if it was a well-known 23 principle of application generally in bankruptcy and 24 winding up prior to 1986. It's a principle that 25 obviously we've lived with greatly and, therefore, it's</p> <p style="text-align: center;">Page 119</p>
<p>1 whatever rights it would have had but for the 2 insolvency, ie remission to its contractual rights.</p> <p>3 When I use the phrase "contractual rights" it's 4 a shorthand, I have to stress, for whatever rights to 5 interest it had prior to the insolvency. It might be 6 pursuant to a judgment or a statute but I'm using the 7 phrase "contractual rights" in --</p> <p>8 LORD JUSTICE BRIGGS: You say it only works if the process 9 remitted to is contractual rights?</p> <p>10 MR ZACAROLI: Yes, in that broad sense of the word.</p> <p>11 LADY JUSTICE GLOSTER: When you say, "Prior to the 12 bankruptcy", you are not accepting that they subsist 13 alongside the bankruptcy? You use the words "prior to 14 bankruptcy", are you using that meaning?</p> <p>15 MR ZACAROLI: No, I'm using it in the sense that at the date 16 of the bankruptcy, it had an existing contractual right 17 to interest.</p> <p>18 LADY JUSTICE GLOSTER: Right.</p> <p>19 MR ZACAROLI: The timing point I will come back to later, 20 but I'm not trying to make a subtle point there.</p> <p>21 LADY JUSTICE GLOSTER: Fine.</p> <p>22 MR ZACAROLI: Just by way of aside, that point, that the 23 statutory scheme can only incorporate <i>Bower v Marris</i> if 24 it operates by way of a remission to contractual 25 rights -- it is in fact the case that if all the cases</p> <p style="text-align: center;">Page 118</p>	<p>1 a shorthand we use.</p> <p>2 However, so far as England is concerned, the truth 3 is as follows: there is no reported case in bankruptcy 4 that has applied the so-called principle in 5 <i>Bower v Marris</i> since a statutory right to interest was 6 first introduced, in 1824.</p> <p>7 LORD JUSTICE BRIGGS: Is this your third main point?</p> <p>8 MR ZACAROLI: No, this is still my second point.</p> <p>9 LORD JUSTICE BRIGGS: Okay.</p> <p>10 MR ZACAROLI: These are, in a sense, warning points about 11 how one should be careful with using or assuming there 12 is this principle which is applied in bankruptcy and 13 insolvency for so long.</p> <p>14 LORD JUSTICE BRIGGS: No English case.</p> <p>15 MR ZACAROLI: Yes, has purported to apply the principle in 16 the bankruptcy context since the statutory code for 17 interest was first introduced, in 1824. The only case, 18 in fact, is <i>Bower v Marris</i>, which, as my Lords know, was 19 not actually concerned -- it mentions the Act but it 20 wasn't concerned with the Act. The Act did not apply to 21 bankruptcy in <i>Bower v Marris</i>, and was in any event 22 a case actually concerned with the rights of 23 a co-obligor, so everything to do with the bankrupt is 24 obiter.</p> <p>25 My learned friend referred, I think referred, to</p> <p style="text-align: center;">Page 120</p>

<p>1 some supposed many other cases in England which had 2 applied Bower v Marris in bankruptcy. He didn't cite 3 them to the court, none were cited to the judge below, 4 that is judgment paragraph 65. The judge records that 5 fact, nobody had managed to cite a case to him in 6 bankruptcy on Bower v Marris since 1841 which is the 7 date of the case.</p> <p>8 The leading bankruptcy textbook throughout the 9 entire period, from the end of the 19th century onwards, 10 was Williams, later Williams v Neil Hunter(?), that has 11 never made any reference in any edition to the principle 12 of Bower v Marris. Judgment paragraph 141 is where that 13 is --</p> <p>14 LADY JUSTICE GLOSTER: Was it cited at all in Williams v 15 Neil Hunter(?).</p> <p>16 MR ZACAROLI: No.</p> <p>17 In the context of winding up, there are two 18 occasions on which the rule has been applied.</p> <p>19 The first was in the Humber Ironworks cases. There 20 was a series of four decisions but they all relate to 21 the same liquidation, around the end of 1860s/beginning 22 of the 1870s. Then, nothing further until it was 23 a matter of common ground between counsel in 24 Lines Brothers case number 2, that the court has seen. 25 The fact that there's no reference between those dates</p> <p style="text-align: center;">Page 121</p>	<p>1 creditors who actually had a right to interest from the 2 background, so contractual rights at the beginning of 3 the administration.</p> <p>4 For reasons we'll come on to, we say it doesn't but 5 if it can apply at all, it's only in that context.</p> <p>6 That is because it's rationale is to ensure that 7 creditors' contractual rights are satisfied from the 8 surplus before anything goes back to creditors and for 9 that you must have an accrued contractual right, by 10 definition.</p> <p>11 Now, that was a refrain that recurred in my learned 12 friend's submissions, that creditors must have their 13 contractual rights respected through the statutory 14 process before we turn to members(?) Although we 15 suggest that that was a submission made rather 16 conflating the question whether one was looking at a 17 matter of construction at rule 2.88 or a separate 18 question: well, if doesn't come within rule 2.88, is 19 there some fall-back, non-provable claim?</p> <p>20 We say, if the court is persuaded by those arguments 21 that it would be unfair or contrary to some principle 22 and policy that creditors are not getting the full 23 contractual benefits they would have outside of 24 an administration, if that's concerning the court, then 25 the answer to that comes in at the latter stage of</p> <p style="text-align: center;">Page 123</p>
<p>1 is referred to at paragraph 75 of the judgment.</p> <p>2 LORD JUSTICE PATTEN: What's this; Mr Pott's researches?</p> <p>3 LADY JUSTICE GLOSTER: Or Mr Stubbs.</p> <p>4 LORD JUSTICE PATTEN: Or Mr Stubbs.</p> <p>5 LADY JUSTICE GLOSTER: So it's an ask in chambers.</p> <p>6 LORD JUSTICE PATTEN: Sleeping beauty awoke.</p> <p>7 MR ZACAROLI: We don't say they were wrong, indeed we accept 8 that in relation to the companies that was the right 9 approach because there was a remission to contractual 10 rights. But what --</p> <p>11 LORD JUSTICE BRIGGS: Shades of Cherry v Boulton.</p> <p>12 MR ZACAROLI: Well, another example of appropriation. But 13 what I'm saying here is that to assume this principle 14 was so well known to draftsman in the 1986 legislation 15 that he can't have intended to overrule, firstly, to 16 construe the principle in way I have described it and, 17 secondly, makes an assumption this was a principle so 18 well-known it was something the draftsman would have 19 been aware of.</p> <p>20 Now, that's my second broad point.</p> <p>21 The third broad point is this: where the 22 Bower v Marris calculation applies, we say it can only 23 ever logically apply to creditors with an interest 24 bearing debt. So, in the modern sphere, if it applies 25 at all between 2.88(7) it can only apply to those</p> <p style="text-align: center;">Page 122</p>	<p>1 a non-provable claim for the shortfall, similar to the 2 currency conversion claims.</p> <p>3 We have arguments in relation to that as to why it 4 doesn't come in there as well, but if these arguments 5 have traction, it is not because they require 6 a different construction of rule 2.88 separate to its 7 natural one but because creditors' contractual rights, 8 if not fully satisfied by the statutory scheme, remain 9 extant and come in as a non-provable claim at the end.</p> <p>10 LADY JUSTICE GLOSTER: Your primary argument is they don't 11 come in, even at that stage.</p> <p>12 MR ZACAROLI: That's correct, yes.</p> <p>13 So those are the three broad points in overview. 14 I'm going turn to the first one, which is the question 15 of professional construction. The first thing to do is 16 to put the 1986 legislation in context, partly to meet 17 the appellant's point that the judge gave insufficient 18 weight to that context. We say he gave exactly the 19 right weight for the pre-1986 law.</p> <p>20 What the legislator was faced with, in 1986, were 21 two different regimes, one for corporates, one for 22 bankruptcy. So far as winding up was concerned, there 23 was no statutory right to post-insolvency interest at 24 all. Just a remission to contractual right as a matter 25 of judge-made law. So far as bankruptcy was concerned,</p> <p style="text-align: center;">Page 124</p>

<p>1 for over a hundred years there had been a statutory                  2 rights to interest at a fixed percentage for all                  3 creditors, and nothing more from the statutory scheme,                  4 no remission to contractual rights.                  5 It's an aside, but it may be worth noting that there                  6 was a rule relating to post-insolvency interest in the                  7 liquidation as early as 1862 in the winding up rules.                  8 But the judges decided in a series of cases, in                  9 particular a case called Re Herefordshire Banking                  10 Company that that rule was ultra vires. So there had                  11 been an attempt to introduce a rule in relation to                  12 post-liquidation interest, in 1862, held to be                  13 ultra vires.                  14 I then take my Lords to the cases -- it's all dealt                  15 with summarily but clearly in paragraphs 69 and 70 of                  16 the judgment below.                  17 So, in winding up, it was a matter of judge-made                  18 law. The first case to look at is Humber Ironworks                  19 case, for which there are two passages I need to show                  20 the court. That's bundle 1, tab 16.                  21 The passages, first of all, in the judgment of                  22 Lord Justice Selwyn, the last paragraph on the second                  23 half of the page. About five lines down, towards the                  24 end of line, says:                  25 "I apprehend that. In whatever manner the payments</p> <p style="text-align: center;">Page 125</p>	<p>1 have had under your contract. Would that be                  2 a convenient moment to give the shorthand writers                  3 a break?                  4 LADY JUSTICE GLOSTER: Certainly, we will rise for five                  5 minutes.                  6 (3.16 pm)                  7 (A short break)                  8 (3.22 pm)                  9 LADY JUSTICE GLOSTER: Yes, Mr Zacaroli.                  10 MR ZACAROLI: My Lord, the second case then was                  11 Re Lines Brothers Number 2, which is in bundle 1,                  12 tab 48. The court has seen this, so I'm just going to                  13 turn to page 457 which is the supplemental judgment --                  14 no, sorry. It's the argument during the supplemental                  15 hearing, the second hearing. The argument of Mr Potts,                  16 between letters B and D, paragraph beginning, "As to                  17 whether ..."                  18 My Lords could remind themselves of that paragraph.                  19 (Pause)                  20 The two points to note in it are the submission                  21 being made which was accepted and all agreed, just by                  22 letter C:                  23 "The principle in Bower v Marris aims to bring about                  24 payment to the creditor ...(Reading to the words)...                  25 Would have received had no liquidation taken place."</p> <p style="text-align: center;">Page 127</p>
<p>1 may have been made, whether originally they may have                  2 been made in respect of capital or in respect of                  3 interest, still inasmuch as they have been paid in                  4 process of law and without any contract or agreement                  5 between the parties [I just highlight that] the rule is                  6 always subject to a contrary intention, the rule of                  7 appropriation is always a matter of intention."                  8 Then, following it down, the rule is part of the                  9 reference to Bower v Marris:                  10 "By treating the dividends as ordinary payments on                  11 account and applying each debt, in the first place, to                  12 the payment of interest due at the date of such                  13 dividends."                  14 So it's an essential part of the test, as he puts                  15 it, that interest must be due at the date of the                  16 dividend.                  17 At page 647, in the judgment of                  18 Lord Justice Gifford, the bottom paragraph, on page 647,                  19 beginning, "For these reasons ...", three lines from the                  20 end, he says:                  21 "Operates by the creditor whose debt carries                  22 interest is remitted to his rights under his contract.                  23 On the other hand, a creditor who is not ...(Reading to                  24 the words)... for interest does not get it."                  25 So it essentially works by giving you what you would</p> <p style="text-align: center;">Page 126</p>	<p>1 Then, the last sentence says:                  2 "You stop the calculation at the date of final                  3 payment. Then creditor does not get full payment, and                  4 is thus not remitted to his contract in the full sense."                  5 So the whole essence of the principle is remission                  6 to contractual rights as if there had been no                  7 insolvency.                  8 LORD JUSTICE PATTEN: Park this, if you want to, for when                  9 it's convenient to deal with it. But, I mean, when you                  10 apply Bower v Marris, it's only ultimately a tool of                  11 calculation, isn't it? In the sense that everybody                  12 seems to agree on, more or less, it's not question of                  13 appropriation as such.                  14 MR ZACAROLI: We disagree with that.                  15 LORD JUSTICE PATTEN: I know you do, but it's not in the                  16 purest way -- well, all right, you can tell me when you                  17 come to this point.                  18 When a dividend is paid it's likely to be paid by                  19 the administrator by reference to it in the satisfaction                  20 of the principal, the proved debt.                  21 I mean, it's not going to be paid by reference to                  22 some interest calculation that's running alongside the                  23 outstanding principal. So what's going through my mind                  24 is: is there a divergence, at any point, in terms of how                  25 2.88 operates between, if you like, the Bower v Marris</p> <p style="text-align: center;">Page 128</p>



<p>1 calculation and, actually, what the rule requires in                  2 terms of how -- this really comes down to how statutory                  3 interest operates; I mean, do you follow what I'm trying                  4 to put to you?                  5 It seems to me, it's one thing to say, simply on                  6 a basis of a reversion to contractual rights, "Oh well,                  7 if you're free to apply Bower v Marris, then you have to                  8 do this calculation and monies coming out of the                  9 liquidation or the bankruptcy, or the administration,                  10 and it's a question of you working out by appropriating                  11 it or attributing it to the interest account, as opposed                  12 to the principal in the first instance, ultimately to be                  13 able to say when you have enough money to satisfy the                  14 totality of your contractual claim.                  15 But unless the Bower v Marris principle actually                  16 subverts the terms of rule 2.88, the question of what                  17 interest you're entitled to may arguably depend simply                  18 on that.                  19 I mean, that's where I think there's this conflict                  20 between the operation of the principle in terms of --                  21 looked at simply as a matter of statutory construction.                  22 MR ZACAROLI: If I think I've understood that correctly,                  23 first of all, we do submit -- and we'll develop this --                  24 that it is a rule of appropriation at its very heart.                  25 That's what the rule is about. It's not a rule of</p> <p style="text-align: center;">Page 129</p>	<p>1 Bower v Marris that's the words used by Lord Cottenham.                  2 In contrast, in bankruptcy, this is looking at the                  3 position as at 1986 and what existed in the prior                  4 regimes, in bankruptcy, as I intimated a moment ago, the                  5 headline point is that for a hundred years, that is                  6 since 1883, there had been a single and simple rule in                  7 relation to post-bankruptcy interest. That was all                  8 creditors are entitled to interest that fixed 4 per cent                  9 rate out of the surplus, whether or not they had                  10 interest-bearing debts.                  11 Just very briefly, the history of the -- I think                  12 my Lords have seen this enough, you know that                  13 section 132 of the 1825 Act first of all introduced                  14 a rule which allowed interest pursuant to a contractual                  15 or other legal rate and then only the surplus thereafter                  16 became available at 4 per cent for creditors.                  17 If we can turn up, however, the Bankruptcy Act 1883,                  18 this is in bundle 4. It's tabs 145A and tab 146.                  19 LORD JUSTICE BRIGGS: Which one do we go to first?                  20 MR ZACAROLI: 145A first, which is section 40(5). This is                  21 the provision for interest at 4 per cent on all debts                  22 proved in the bankruptcy.                  23 The next tab, 65, requires the surplus:                  24 "... after payment in full of creditors with                  25 interest as by this Act provided back to the bankrupt."</p> <p style="text-align: center;">Page 131</p>
<p>1 calculation. It's a rule of appropriation. It results                  2 in a different number, yes, that the creditor will                  3 receive, ultimately, but that's done pursuant to                  4 a method of appropriation. That is fundamental to its                  5 operation.                  6 So I disagree with the premise, with respect to                  7 my Lord, of my Lord's question, but we do say it's                  8 inconsistent with the operation of the rule. That's                  9 a question of statutory construction. I'll come on to                  10 that, if I may, when I deal with how the rule cuts                  11 across or how application of Bower v Marris would cut                  12 across the rule in specific ways. We say it does indeed                  13 do that. But perhaps I can park that point until I come                  14 to looking at the words of the rule we're concerned                  15 with. Yes. So the point I've made so far is: in                  16 liquidations, undoubtedly, prior to 1986, the operation                  17 of the principle was based upon there being a                  18 remittance(?) to contractual rights and the fact that                  19 there was a contractual entitlement to interest which                  20 had accrued due at the time the payment of dividend was                  21 made. Excepting, there's this nuance, that the right to                  22 be paid the interest is deferred. Nevertheless, it's                  23 very clear the rule works on the basis that the right to                  24 interest had accrued post liquidation. We see that from                  25 the words of Humber Ironworks but, also, when we look at</p> <p style="text-align: center;">Page 130</p>	<p>1 The judge dealt with this at paragraph 140. We say                  2 he was right again for the reasons he gave; that is,                  3 that this was the sole rights to interest provided by                  4 the statutory scheme in relation to bankruptcy at all                  5 times following 1883. And that is the clear reading of                  6 the surplus going back to the bankrupt after payment in                  7 full of his creditors "as by this Act provided".                  8 There is one other reference to pick up in this Act.                  9 That's at tab 149, which is in a schedule to the Act                  10 dealing with proof of debts. It's the second schedule,                  11 tab 149. The first eight paragraphs deal with proof in                  12 ordinary cases, and the beginning of the page, proof by                  13 secured creditors. And the particular rule is rule 17                  14 at the bottom of that page:                  15 "Subject to the provisions of rule 12 ..."                  16 You will see rule 12 is to do with valuation of                  17 security, and if dissatisfied it can be very valued or                  18 sold.                  19 "... a creditor in no case receive more than                  20 20 shillings in the pound and interest as provided by                  21 this Act."                  22 There's a further point to make on this which -- I'm                  23 afraid I wasn't expected to get to this quite so                  24 quickly, but we have the 1883 Bill which is the                  25 precursor to the 1883 Act. I am afraid we haven't yet</p> <p style="text-align: center;">Page 132</p>

1 circulated it electronically, we have copies. If  
 2 I could hand those up now.  
 3 LADY JUSTICE GLOSTER: Will you make sure that someone  
 4 behind you gets to all our clerks the electronic  
 5 updates.  
 6 MR ZACAROLI: Yes.  
 7 LORD JUSTICE BRIGGS: (Inaudible) admissible we are here  
 8 construing the Insolvency Act 1986 and we are looking at  
 9 the bill for the Bankruptcy Act 1883.  
 10 MR ZACAROLI: The point this goes to is whether  
 11 section 40(5) of the 1883 Act was the sole entitlement  
 12 to interest out of the bankruptcy estate for creditors  
 13 or whether there could have been some other right to  
 14 interest before the surplus was (inaudible). So it's  
 15 that point of construction on the 1883 Act this goes to.  
 16 What this shows is a deliberate decision by the  
 17 legislator not to go down the route that had been in the  
 18 1825 Act in two respects. The first provision is  
 19 paragraph 36 --  
 20 LORD JUSTICE PATTEN: Can you just tell me where this is  
 21 supposed to go in the bundle? I have A there, but what  
 22 is it?  
 23 MR ZACAROLI: I'm being told 198A. There's a new index  
 24 apparently.  
 25 LORD JUSTICE PATTEN: Thank you.

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

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1 page of this tab:  
 2 "The bankrupt shall be entitled to any surplus  
 3 remaining after payment in full of his creditors and of  
 4 the costs charged and expense of proceedings on the  
 5 bankruptcy petition."  
 6 What's missing but then comes in in the section  
 7 itself, which is section 65, is the words "payment in  
 8 full with interest as by this Act provided."  
 9 So those words are a deliberate insertion into  
 10 paragraph 65.  
 11 LADY JUSTICE GLOSTER: What do we get from that?  
 12 MR ZACAROLI: You get reinforcement of the point, which  
 13 I say you get anyway from the clear words in the  
 14 section; that the only entitlement to interest  
 15 contemplated by the Bankruptcy Act 1883 was the right to  
 16 4 per cent for all creditors. There is no question of  
 17 remission to contractual rights at all.  
 18 LORD JUSTICE BRIGGS: Remind me, does the discharge of the  
 19 bankrupt relieve him from his contractual rights or not,  
 20 when you have the estate back?  
 21 MR ZACAROLI: Of course we don't have all of the 1883 Acts  
 22 and I haven't looked to see precisely what the discharge  
 23 provisions did. Perhaps if my Lord's interested in  
 24 knowing the answer to that we will look at it.  
 25 LORD JUSTICE BRIGGS: If you like, the other side of the

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

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<p>1 statute. So assuming that the estate remains insolvent 2 there's no grounds for any surplus being payable under 3 the bankruptcy estate because it never goes into 4 surplus. 5 The same would apply. The bankrupt is discharged 6 except for any debt which wasn't provable which would 7 include interest accruing from the date of the 8 bankruptcy order, and therefore remains liable. That 9 would be simply absurd. It cannot have been any 10 statutory intention whether then or under the current 11 Act. We say discharge of the debt must carry with it 12 discharge of any interest accruing on that debt. 13 Just so you are aware of it, the position remained 14 the same in 1914, the 1914 Bankruptcy Act. The relevant 15 sections are section 33(8), which is tab 153 of 16 bundle 4; and then section 69, which is the same as 17 section 65 of the 1883 Act and that's at tab 156 of 18 bundle 4, including the words "payment in full with 19 interest as by this Act provided." 20 But there is a further point to make on the 1914 Act 21 because by this time a provision had come into force -- 22 it's at tab 155 -- this dealt with excess interest where 23 a creditor had a debt which carried interest at a rate 24 exceeding 5 per cent. 25 LADY JUSTICE GLOSTER: What section are we looking at?</p> <p style="text-align: center;">Page 137</p>	<p>1 irrespective of any contractual right -- 2 LADY JUSTICE GLOSTER: Express provision. 3 MR ZACAROLI: Yes. Bower v Marris had no application. And 4 there is, as I have made clear, no case which has sought 5 to apply, or to be fair, considered Bower v Marris in 6 relation to that Act or any Act since. 7 LORD JUSTICE BRIGGS: You say this cuts down proof that 8 pre-bankruptcy interest to that rate unless there's 9 a surplus. 10 MR ZACAROLI: That's right. Then you get that surplus. 11 I think in fact before anything goes to -- in relation 12 to post-bankruptcy interest it's only related to the 13 proved portion of your interest claim. 14 That point, that it's relating to only proved 15 portion of the debt, is made clear in the Cork Report 16 which is the next place to go which is the 17 pre-legislative material (inaudible) 1986. You can go 18 to the Cork Report and look at this point first. It's 19 bundle 5, tab 211 and the internal page numbering is 20 page 310, under the heading "Chapter 31, Interest on 21 Debts". Paragraph 1364 deals with section 66(1) of the 22 1914 Act. My Lords read that paragraph, and the last 23 sentence makes clear that it's relating to proof only. 24 (Pause) 25 LORD JUSTICE BRIGGS: That applies in corporate insolvency</p> <p style="text-align: center;">Page 139</p>
<p>1 MR ZACAROLI: Section 66(1), tab 155: 2 "Where a debt has been proved and the debt includes 3 interest for any pecuniary consideration in lieu of 4 interest, such interest or consideration shall, for the 5 purposes of dividend, be calculated as a rate not 6 exceeding 5 per cent per annum without prejudice to the 7 right of a creditor to receive out of the estate any 8 higher rate of interest to which he may be entitled 9 after all debts proved in the estate have been paid in 10 full." 11 Now this relates solely to proof. So under the 12 words "interest accruing after the date of the 13 bankruptcy order" that's all (inaudible). 14 We say, however, the fact the statute has dealt 15 expressly with interest that is above the rate otherwise 16 allowed in this context demonstrates that it did not 17 intend to provide for any interest above the rate 18 allowed of 4 per cent in relation to post-bankruptcy 19 interest. So it's another statutory or contextual 20 reinforcement of that conclusion. 21 LADY JUSTICE GLOSTER: So you say this makes it clear that 22 Bower v Marris wasn't applying at this stage? 23 MR ZACAROLI: It's a slightly different point, but yes, we 24 say that because by this stage the Act provided 25 a self-contained provision of interest at 4 per cent</p> <p style="text-align: center;">Page 138</p>	<p>1 as well. 2 MR ZACAROLI: No, this is just bankruptcy. 3 LORD JUSTICE BRIGGS: That's not what he says at the 4 beginning of 1364. 5 MR ZACAROLI: Yes, there's a provision in liquidation for 6 a while -- post-liquidation interest was dealt with by 7 reference across the Bankruptcy Act I'm pretty sure. 8 LADY JUSTICE GLOSTER: And this is about pre-liquidation. 9 MR ZACAROLI: Yes, only in the case of insolvency. So in 10 the case of insolvency, one read across to the 11 Bankruptcy Act for the purposes of the interest 12 provisions. My Lords may remember reference -- I think 13 it's in the judgment somewhere -- to the fact that the 14 reason for the bankruptcy provision into post-bankruptcy 15 interest did not get brought across into the winding up 16 regime was because of a decision someone will remind me 17 the name of -- Fine Industries Commodities(?), I am very 18 grateful -- where the judge concluded that it only 19 applied in the case of insolvent winding up and if the 20 company turned out to be solvent then you didn't then 21 read across the bankruptcy rules. 22 But yes, this applies obviously in the case of 23 insolvency without leaving a surplus, hence it applied 24 in corporate law as well. 25 LORD JUSTICE PATTEN: I suppose the point that</p> <p style="text-align: center;">Page 140</p>

<p>1 Lord Justice Briggs asked you, although it says it apply 2 in -- it goes on a few paragraphs later to say it was 3 believed it didn't in fact apply. I'm looking at 4 paragraph 1368. 5 MR ZACAROLI: Perhaps I can come back to that. I'll think 6 about that. It's irrelevant anyway for the purposes of 7 the submissions I'm making. The point is only that in 8 bankruptcy it didn't in any sense shift -- it reinforces 9 the conclusion that in bankruptcy interest was not 10 payable otherwise than pursuant to the Act. 11 The point then made at paragraph 1383 of the Cork 12 Report, turn on two pages, which recites section 33(8) 13 of the 1914 Act in terms which make it clear that once 14 you've paid statutory interest at 4 per cent per annum, 15 any balance then belongs to the bankrupt. 16 Looking at the Cork Report more generally, in 17 particular between 1383 to the end of this section, 18 that's to 1395, there are a number of points which come 19 out of it. First of all, there's criticism made of the 20 inequality of the position in winding up at 1384, noting 21 that creditors with a right to interest get it but those 22 who don't, don't get it. Noting the point made in 1385 23 that the whole purpose of interest beyond the date of 24 the winding up was to compensate all the creditors for 25 being kept out of their money whilst the administration</p> <p style="text-align: center;">Page 141</p>	<p>1 We say that's very important wording when one comes 2 to the Act although when one sees the word 3 "outstanding". Clearly under this wording, interest is 4 due for a period, the period ending when the final 5 dividend is declared. 6 And the recommendation is that: 7 "The rate should be that which applies to judgment 8 debts at the commencement of the insolvency." 9 And the concept of it being the judgment rate at the 10 commencement of the insolvency is carried through but 11 we'll see in a moment the modification to that brought 12 in by the White Paper. 13 The White Paper is at tab 212, the next tab. And at 14 paragraph 88 we see the recommendation for a variation 15 to the Cork Committee's proposal. That is that there 16 should be interest at a minimum rate equivalent to the 17 Judgments Act rate at the date of the relevant order: 18 "If, however, a higher contractual rate applies to 19 the debt, post-insolvency interest will be chargeable at 20 that rate." 21 So that brings us up to date, as it were, to 1986, 22 to the legislation. Stepping back a moment, what was 23 the position when the 1986 Act and rules came to be 24 enacted? At its highest, we say that where the statute 25 previously was silent as to post-liquidation interest</p> <p style="text-align: center;">Page 143</p>
<p>1 of the estate occurred. Then also, attention is drawn 2 at 1386 to the anomaly between the two different sets of 3 proceedings. 4 Under the heading "Our Proposals" on page 315 you 5 see the matters they have taken into account in 6 formulating the proposals: 7 "We consider there should be only one set of rules 8 relating to the interest on debts in all forms of 9 insolvency proceedings. In preparing the rules 10 simplicity and certainty are essential." 11 And they go on to deal with the exorbitant rates of 12 interest dealt with under section 66 are no longer 13 a serious problem so we don't need that anymore. 14 And they note another criticism there: 15 "Moreover, the rules by which the rates are applied 16 resulted in unequal treatment of different classes of 17 creditors." 18 So their recommendation is at 1359, to repeal 19 section 66. And then (c): 20 "During the insolvency, in the event of there being 21 a surplus after payment of all admitted debts and 22 liabilities, including interest prior to commencement of 23 an insolvency, where applicable, interest should run on 24 all such debts and liabilities until a final dividend is 25 declared."</p> <p style="text-align: center;">Page 142</p>	<p>1 there was a judge-made rule that creditors were remitted 2 to their full contractual entitlement when the surplus 3 emerged, on the basis they should get interest as if 4 there had been no winding up. And in that context 5 dividends were to be treated as on account of the 6 principal and interest which had accrued at the date of 7 each dividend. In that case the creditors' entitlement 8 to appropriate remained. That's why it's still a rule 9 of appropriation. We will come to Bower v Marris in 10 a moment. But that's what it was. 11 That is, we say, very far indeed from the concept of 12 some general equitable principle about how to calculate 13 interest from an insolvent estate. And certainly no 14 support in the law of bankruptcy for at least 15 a hundred years, and we will say longer, for any such 16 principle. 17 Can I then turn to rule 2.88(7) itself, or rather 18 I should say rule 2.88 because it's important to see the 19 whole of the rule in construing sub-rule (7). The first 20 point to note about it is that it does indeed implement 21 the Cork Committee's proposal with the single 22 modification proposed by the White Paper to allow 23 a higher contractual rate if applicable. 24 The second point to note is it clearly does not 25 operate by reference to the old companies' position, ie</p> <p style="text-align: center;">Page 144</p>

1 remission to contractual rights, but adopts principally  
 2 the bankruptcy method, which is to apply a right of  
 3 interest to everybody, whether they had a right to  
 4 interest or not. So looking at the rule, sub-rule (1)  
 5 is important:  
 6 "Where a debt proved in the administration bears  
 7 interest that interest is provable as part of the debt  
 8 except insofar as it is payable in respect of any period  
 9 after the company entered administration."  
 10 The definition of "proof" is at rule 2.72(1) and  
 11 (2), tab 169 if you would rather look at it in the  
 12 bundles, or it's in the Red Book. Sub-rule (1) of 2.72:  
 13 "A person claiming to be a creditor of the company  
 14 and wishing to recover his debt in whole or in part must  
 15 submit his claim in writing to the administrator.  
 16 "(2) The creditor who claims [it is referred to as  
 17 proving] his debt the document at which he seeks to  
 18 establish his claim is his proof."  
 19 So "proving" is just another word for claiming the  
 20 amount you say is due to you.  
 21 So putting 2.72 and 2.88(1) together, the rules  
 22 preclude a creditor from making a claim for any interest  
 23 that accrues after the date of the administration. It's  
 24 common ground that precisely or materially the same  
 25 wording appears across the various insolvency

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1 proceedings. So both in liquidation, all forms of it,  
 2 and bankruptcy.  
 3 Having removed the creditors' right to prove claim  
 4 for interest beyond the date of administration, what the  
 5 rule then goes on to do is to provide the creditor with  
 6 new rights -- creditors generally with new rights. And  
 7 we do say these new rights are substantially different  
 8 to the rights which creditors generally had prior to the  
 9 administration. So for example --  
 10 LADY JUSTICE GLOSTER: There's no obligation on the creditor  
 11 to prove his claim if he has assets outside the  
 12 jurisdiction and he's not subject to the jurisdiction of  
 13 this court, he can enforce in that way. If he has  
 14 security he can enforce his security. So it's not  
 15 compulsory for the creditor to submit to the process.  
 16 MR ZACAROLI: No, it's not compulsory.  
 17 LADY JUSTICE GLOSTER: And if he doesn't his contractual  
 18 rights remain outstanding.  
 19 MR ZACAROLI: They may do so in relation to a right against  
 20 security, or if one is talking about --  
 21 LADY JUSTICE GLOSTER: Or foreign assets or something.  
 22 MR ZACAROLI: Provided the creditor is a foreign creditor.  
 23 If the creditor has a connection with this injunction he  
 24 could be enjoined from taking steps abroad in --  
 25 LADY JUSTICE GLOSTER: We all know that, yes.

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1 MR ZACAROLI: So that's right, that creditors who don't come  
 2 in at all don't make a claim at all, are not subject to  
 3 the scheme at all.  
 4 LORD JUSTICE BRIGGS: But then they cannot recover out of  
 5 the estate.  
 6 MR ZACAROLI: That's right.  
 7 LADY JUSTICE GLOSTER: But then are you saying they'd be  
 8 precluded from any surplus even if they did prove at  
 9 that stage?  
 10 MR ZACAROLI: Yes. They can't come into the estate at all.  
 11 If they have no connection with this jurisdiction they  
 12 may simply stand outside the whole process, whether it  
 13 be proved debts, non-provable debts, interest, whatever,  
 14 they simply stand outside it. If there are assets in  
 15 China that the Chinese creditor can get hold of so be  
 16 it. If he can get them before the liquidator he gets  
 17 recognition in China and takes the assets.  
 18 But if you stand wholly outside the scheme then you  
 19 are outside it for all purposes. And the secured  
 20 creditor, of course, is exercising a right against  
 21 secured assets, which is in a sense his own property,  
 22 it's a proprietary right he has.  
 23 So if you want to come into the statutory scheme the  
 24 only way to do so is by making a claim. If you make  
 25 a claim, then what you can't do is make a claim for any

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1 interest accruing after the date of administration and  
 2 in place of that the statutory scheme gives you what you  
 3 see in rule 2.88.  
 4 And the rights are different in a number of ways,  
 5 the most obvious difference being the creditor who has  
 6 no contractual or other rights to interest is paid  
 7 interest, notwithstanding that lack of any right.  
 8 A creditor with a low rate of interest gets an uplift to  
 9 the statutory rate. A creditor with a right to simple  
 10 interest where interest is accruing at the date of  
 11 administration gets a form of compounding because the  
 12 proved debt means anything outstanding by way of  
 13 principal or interest up to the date of administration.  
 14 A future creditor whose debt is not discounted at all,  
 15 nevertheless gets interest on that debt from the date of  
 16 administration when contractually it wouldn't be  
 17 entitled to it.  
 18 Depending on the court's answer to issue 7,  
 19 certainly on the basis of the judge's answer to issue 7,  
 20 a contingent creditor becomes entitled to a right to the  
 21 interest at the date of administration even though its  
 22 interest never actually falls in, ie it never becomes an  
 23 actual creditor. That couldn't possibly happen outside  
 24 administration or liquidation, whether by a judgment or  
 25 otherwise. He couldn't obtain judgment for his

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<p>1 contingent claim. He has to wait to see if it falls in.                  2 So the Act, if we are wrong on issue 7, gives an                  3 important different right to creditors that doesn't                  4 exist outside of administration.                  5 And the big picture point here, we say, is that the                  6 bundle of provisions in rule 2.88 substantially alter                  7 both sides of the equation.                  8 First of all, collectively, the rights of creditors                  9 are altered. They're given, collectively, a bundle of                  10 different rights than those which they would have                  11 outside of insolvency and, on the other side of the                  12 coin, the debtor is subject to very different                  13 obligations than it would have had outside of the                  14 administration, ie the estate, as a whole, is having to                  15 bear, for example, the obligation to pay everybody at                  16 the Judgment Acts rate, even though many of those                  17 creditors would have had no right to interest.                  18 The only concession to the rights that existed at                  19 the date of administration of the creditors is in                  20 sub-rule (9), where the draftsman has incorporated one                  21 aspect of the creditors' rights outside administration.                  22 Namely, the rate. The rate of interest applicable to                  23 its debt. If that rate is higher than the Judgments Act                  24 rate, then it's that rate of interest to which the                  25 creditor is entitled. That is, we say, as the judge</p> <p style="text-align: center;">Page 149</p>	<p>1 on what sum you are paying it, and the third is for what                  2 period. Those three things are all defined fully in                  3 2.88(7). It therefore is all you need to know in terms                  4 of a blueprint for how to calculate interest.                  5 The third point, that it's for a defined period,                  6 that is until the date the debts cease to be                  7 outstanding. That wording obviously comes directly from                  8 sub-rule (7). We say that means: until the dividends                  9 are received. The relevant surplus is that remaining                  10 after payment of the debts proved. What has to be                  11 outstanding is those proved debts.                  12 It was common ground before the judge, and he held                  13 in his judgment that the reference to periods, in the                  14 plural, is deliberately there to cater for the fact that                  15 there may well be interim dividends. So if I made                  16 a hundred pounds, and I get paid £50 after one year, and                  17 the remaining £50 at the end of two years, I am entitled                  18 to interest on a hundred pounds for one year. But,                  19 after that, I have already been paid after the interest                  20 ceases to run on the 50, continues to run on the                  21 remaining 50.                  22 That meaning of the word "outstanding", as I point                  23 out earlier, is wholly consistent with paragraph 1395(c)                  24 of the Cork Report, which referred in terms to the                  25 period of interest being payable until the final</p> <p style="text-align: center;">Page 151</p>
<p>1 said, held, a limited incorporation of a creditor's                  2 rights, contractual rights.                  3 It certainly doesn't indicate the rule was generally                  4 intended to operate by remission to contractual rights,                  5 indeed the opposite. The fact that some limited                  6 incorporation of the creditor's rights is identified and                  7 brought in the specific name of the rate. It suggests                  8 the opposite, the drafter did not intend to remit                  9 creditors generally to their contractual rights. This                  10 is a new statutory right, not a remission to contractual                  11 rights.                  12 I'll come back, if I may, to the question whether                  13 the word rate, in rule 2.88(9), incorporates the right                  14 of appropriation based on Bower v Marris. We say it                  15 doesn't. I will come back to that, if I may.                  16 As a matter of construction, rule 2.88(7) does not                  17 permit interest to be paid to creditors on the basis                  18 that prior dividends are treated as having discharged                  19 interest before principal. It's a direction as to what                  20 to do with the surplus if it arises. That obviously                  21 arises only when proved debts have been paid. I repeat                  22 the points I made in opening.                  23 There are three elements you need to know in order                  24 to calculate the amount of interest you need to pay out                  25 of the surplus. The first is the rate. The second is</p> <p style="text-align: center;">Page 150</p>	<p>1 dividend was declared.                  2 The way in which Bower v Marris would operate would                  3 be, first of all, to assume that what's been paid to                  4 date is statutory interest, not the proved debt.                  5 Remembering the only right here is one to statutory                  6 interest. It's not a contractual right but it is just                  7 the statutory interest pursuant to this rule. For                  8 Bower v Marris to operate, one would have to assume that                  9 some of the payments that have been made to date were                  10 made in respect of statutory interest where statutory                  11 interest is not payable until all proved debts have been                  12 paid in full.                  13 Secondly, the operation of Bower v Marris would                  14 require proved debt to be treated as not having to be                  15 paid in full.                  16 Thirdly, the surplus would be applied under the                  17 Bower v Marris principle, to interest accruing long                  18 after the date the final dividend had been paid.                  19 Finally, Bower v Marris principle would actually                  20 result in payments being made of something which is                  21 supposed to be statutory interest but in fact is                  22 repayment of parts of the proved debt. Not interest at                  23 all.                  24 LADY JUSTICE GLOSTER: Can I ask what may be a foolish                  25 question, Mr Zacaroli: let's assume a very simple</p> <p style="text-align: center;">Page 152</p>

1 liquidation where the liquidator, or the administrator  
 2 for that matter, has distributed all the proved debts,  
 3 and just before the administrators hand back the surplus  
 4 to the company and its directors, a foreign creditor has  
 5 not proved, comes in and says, "I haven't proved, but  
 6 now there's a surplus. Not proving, I'm just asking you  
 7 to pay out of the surplus -- which you are just about to  
 8 hand back -- my contractual rights"; what happens then?  
 9 He's not making a proof; is he obliged to make a proof  
 10 or does he injunct the administrators? What's the legal  
 11 position in that situation?  
 12 MR ZACAROLI: So a creditor --  
 13 LADY JUSTICE GLOSTER: Let's assume it's a foreign creditor.  
 14 Everything has been wound up. All the debts have been  
 15 paid. I appreciate we're not on point here, precisely,  
 16 but there's a surplus and the foreign creditor comes  
 17 along and says, "I have rights under a foreign contract  
 18 which gives me interest on my debt", whether it's  
 19 contingent or not may be another frill. "I want to be  
 20 paid and I want to be paid my full contractual interest  
 21 at my foreign rate, which I haven't been paid meantime".  
 22 MR ZACAROLI: So he has an option?  
 23 LADY JUSTICE GLOSTER: He didn't prove, but now there's  
 24 a surplus. The administrators are about to hand back;  
 25 what's the position as a matter of law there?

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1 The foreign creditor with his claim says, "Well,  
 2 don't hand back, pay it to me"; what happens in that  
 3 very simple situation?  
 4 MR ZACAROLI: Well, I think the answer is he can't make any  
 5 claim unless he proves. If it's a provable claim, he  
 6 has to prove for it.  
 7 LORD JUSTICE BRIGGS: Otherwise it's a non-provable claim  
 8 and we are back into Waterfall 1.  
 9 MR ZACAROLI: Yes, if it's a completely new claim, which  
 10 has --  
 11 LADY JUSTICE GLOSTER: Matured in the meantime.  
 12 MR ZACAROLI: If it has matured, that suggests it was  
 13 a pre-existing claim, which lays out an obligation prior  
 14 which is therefore proven. The definition of provable  
 15 claim is very wide.  
 16 LADY JUSTICE GLOSTER: It makes a difference, does it,  
 17 whether's it's a provable claim?  
 18 MR ZACAROLI: Yes.  
 19 LADY JUSTICE GLOSTER: If it is a provable claim and he  
 20 hasn't proved and everything else is being paid and the  
 21 surplus is going back to the company you say he should  
 22 have proved he is going and the administrators say,  
 23 "Well, do what you like as against the company, but you  
 24 can't adjunct us".  
 25 MR ZACAROLI: I need to think about that, if I may

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1 because --  
 2 LADY JUSTICE GLOSTER: It may be a stupid question. I am  
 3 just trying to understand how far your argument goes.  
 4 MR ZACAROLI: Anybody who wants to claim from the company  
 5 has to prove, that's the start. If they have a provable  
 6 debt, they can only get that debt --  
 7 LADY JUSTICE GLOSTER: Even once it goes into surplus, even  
 8 once it flips into surplus?  
 9 MR ZACAROLI: Yes, it is still a question of proving.  
 10 LADY JUSTICE GLOSTER: Until the administrator has been  
 11 formally discharged?  
 12 MR ZACAROLI: What I need to just check, and I may do  
 13 overnight, is check the extent to which a note of the  
 14 final dividend has been declared by the administrator  
 15 and properly advertised at the time et cetera, the  
 16 extent to which, having paid all dividends and paid  
 17 statutory interest on all those dividends -- I just need  
 18 to work out --  
 19 LADY JUSTICE GLOSTER: Yes, I am just trying to understand  
 20 what, at the end of the road, the position is.  
 21 MR ZACAROLI: I need to work out whether the creditor can  
 22 actually the come under stir -- you can never stir  
 23 final --  
 24 LADY JUSTICE GLOSTER: There's no possibility of that.  
 25 That's not in my --

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1 MR ZACAROLI: The question is whether the right remains for  
 2 that creditor to make a claim against the assets in the  
 3 liquidation which remain.  
 4 I suspect he probably can, but I need to check that.  
 5 But it has to be by way of proof. You just can't come  
 6 in and say, "I'm a --"  
 7 LADY JUSTICE GLOSTER: Until the administrator has actually  
 8 been discharged and paid over to the company.  
 9 Okay, the administrator is about to go into court  
 10 and get his discharge, or however you do it, foul or  
 11 something, and about to pay back the company. The  
 12 creditor comes along and says, "I want an injunction. I  
 13 can't pay it back to the company controlled by these  
 14 creditors".  
 15 MR ZACAROLI: If I can take that away with me.  
 16 LADY JUSTICE GLOSTER: Okay, you may say it's a silly  
 17 question but I'm just interested to know what ultimately  
 18 down the track the position is.  
 19 LORD JUSTICE BRIGGS: Begs the question whether money is in  
 20 fact at the end of administration paid to the company or  
 21 direct to its shareholders.  
 22 MR ZACAROLI: It depends what sort of administration --  
 23 well, actually, it must --  
 24 LORD JUSTICE BRIGGS: If it is a distributing  
 25 administration, which it by definition is, then does it

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1	in fact go back to company or does it go to	1	
2	shareholders?	2	
3	MR ZACAROLI: Goes to shareholders.		Submissions by MR DICKER (continued) .....1
4	LORD JUSTICE BRIGGS: I don't think it goes back to the	3	
5	company. We are in a bankruptcy situation. That's not		Submissions by MR SMITH .....99
6	insolvency.	4	
7	MR ZACAROLI: That's correct there's no concept of the		Submissions by MR ZACAROLI .....111
8	company for it to go back to, at this stage.	5	
9	LORD JUSTICE BRIGGS: No, the company dies, doesn't it?	6	
10	Once it's a distributing administration, it's like a	7	
11	winding-up.	8	
12	LADY JUSTICE GLOSTER: It's like a liquidation. Okay, so	9	
13	the example then is not back to the company, but back to	10	
14	the shareholders.	11	
15	LORD JUSTICE BRIGGS: Yes.	12	
16	MR ZACAROLI: Simply, may I take it away?	13	
17	LADY JUSTICE GLOSTER: Okay. Yes, please do. Is that	14	
18	a convenient moment?	15	
19	MR ZACAROLI: It is.	16	
20	LADY JUSTICE GLOSTER: You are well ahead.	17	
21	MR ZACAROLI: I think so, yes.	18	
22	LADY JUSTICE GLOSTER: Very well. Thank you very much.	19	
23	10.30 tomorrow.	20	
24	(4.15 pm)	21	
25	(The hearing was adjourned until	22	
		23	
		24	
		25	
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1	the following day at 10.30 am)		
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