Wednesday, 5 April 2017
(10.30 am)
Submissions by MR ZACAROLI (continued)
LADY JUSTICE GLOSTER: Yes, Mr Zacaroli.
MR ZACAROLI: My Lords, my Lady, I was turning now to the second of my broad topics, which was the rule in Bower v Marris and what it means and what it's meant over the years.
Can I ask my Lords then to turn up bundle 1, tab 6, which is the case itself. I'm well aware the courts have seen this before and no doubt at some length, but there are a number of points I want to draw out of it because we say that the precise reading of this decision is actually very important to understanding the principle.
Looking at the headnote first of all, just to make good the point that actually this case was in fact about the rights of the creditor against the co-obligor, and it's common ground that whatever the position may be between the creditor and the bankrupt, whatever may have happened there, nothing affects the contractual rights as against the co-obligor, just to park that point. That's what the case was about. So when the case was concerning rights for the bankrupt and the creditor, it was actually all obiter, although obviously fully

reasoned.
The second point just to remember is that this is not a case in which section 132 of the 1825 Act in fact applied.
Turning then to judgment of the Lord Chancellor, picking it up at the bottom of 354.
LADY JUSTICE GLOSTER: Yes.
MR ZACAROLI: The claim was:
"... a claim for payment of what he has not received from the estate of the bankrupt, and insists that the amount is to be calculated by applying the amount of dividends from time to time received and discharge of interest then due and the surplus, if any ...(Reading to the words)... calculation and is the general course of dealing in cases of mortgages, bonds and other securities."
What the Lord Chancellor is referring to there is the ordinary law of appropriation, that is the right of that creditor to appropriate towards interest before principal. So the starting point is that's the ordinary mode of calculation under the general rule. Nothing to do with the states, just to do with the general law of appropriation between two parties.
He then, in the next sentence, identifies the point of presumption which we say is important in determining

what the interest of the parties are:
"No creditor would apply any payment of the discharge of part of the principal whilst any interest remained due."
Ie the common-sense position is that is what creditors would do.
The argument that was advanced appears in the next paragraph, at the end of the second line after the colon:
"The proposition rests upon this: that the payments consisted of dividends of so many schillings in the pound, and that the sum upon which such dividends were made being the debt proved consisted, except for the small part ...(Reading to the words)... consisted of was upon each payment discharged."
So that's the argument, that the payments that had been made had already discharged principal.
The response to that is in the next paragraph:
"In the first place, as this mode of payment is regulated by acts of Parliament, the doctrine of appropriation, which is founded upon the ...(Reading to the words)... debtor or creditor cannot have any place in the consideration of the present question."
Now, the present question is the one he's just identified: were the payments that were made in

discharge of dividends actually --
LADY JUSTICE GLOSTER: To appropriate as against the co-obligor.
MR ZACAROLI: In other words, did it effect an appropriation by the debtor? And the answer is no, because at that stage appropriation has nothing to do with it.
He goes on in the next few lines to show that what he is then considering is very much the principle of appropriation thereafter, because he says:
"The estate of obligor under administration is liable to pay all that ...(Reading to the words)... before he would be bound to apply any part of it towards the discharge of principal."
He is referring there to entitlement of the creditor to exercise a right of appropriation. Very clear from the reference to "entitled".
That that is clear is also confirmed by the fact that later in judgment the Lord Chancellor refers to the position being exactly the same as with a solvent debtor. That is, for example, on page 357. At the top he says:
"The bankrupt continues indebted for the principal and interest since the commission ...(Reading to the words)... why should such payments have a different effect than they would if paid by a solvent obligor?"

In the case of solvent obligor, one is only concerned with the ordinary principles of appropriation.
LADY JUSTICE GLOSTER: It's interesting because I did a bit of research, or got my judicial assistant to do a bit research yesterday evening, and Bower v Marris has appeared in all the editions of Rowlatt on surety, which is interesting because it's there that one sees it.
MR ZACAROLI: Yes. We accept this is a principle, in terms of appropriation, that arises throughout the law, and I'll come to some other cases --
LADY JUSTICE GLOSTER: Whether it is or isn't appropriation, Bower v Marris, if there is a principle, appears in that context, which is your submission.
MR ZACAROLI: Yes. It applies --
LADY JUSTICE GLOSTER: I don't think it's referred to as a principle -- well (inaudible) been able to check. I don't think it's referred to as a principle even in Rowlatt.
MR ZACAROLI: Indeed.
LADY JUSTICE GLOSTER: It is just a citation. So that's your point basically on --
MR ZACAROLI: Yes. The other point to note on this is that it's essential to the reasoning that the court was dealing with an interest-bearing debt. It's not just a passing reference. There are six points, six

references, to the fact that interest continues accruing due under the debt, and that's the important part. In a sense, that had to be the case because if you are dealing with a co-obligor, a statutory right to interest that may exist against the bankrupt has no possible relevance to the claim against the co-obligor. But the point that interest continues accruing due occurs in six places. First of all, page 356, the sixth line:
"It is important that the creditor is entitled to apply all such payments on account to the interest due."
Then at the bottom of that page, about eight lines up:
"The interest stops at the date of permission, and though subsequent interest becomes due, it is not provable under the commission."
And it talks about this being an arrangement of convenience for the debtors/creditors. The bankrupt continues indebted for the principal and interest. That's the third reference.
Then 357, five lines down, a point I've mentioned:
"Why should such payments have a different effect than they would if made by a solvent obligor?"
Ie, with a solvent obligor there must be a right to interest before you can have any question of appropriation.

The point is repeated a few lines further on:
"Suppose the bankrupt does not obtain a certificate but afterwards ...(Reading to the words)... if there had not been any bankruptcy."
And the last four lines of that same page, 357:
"The creditor in that case would not have received interest upon his debt to the same extent as he would as if there had been no bankruptcy."
LADY JUSTICE GLOSTER: Might it not be said against you that the concept of discharge of the principal debt is not being recognised here as against the co-surety? I mean, it could be said on behalf of the co-obligor: well, actually, the principal debt's been discharged here by reason of the bankruptcy, and what Bower v Marris is saying is, no, it isn't, and isn't that an argument that could be put against you in his context?
MR ZACAROLI: I don't think so, because whatever happens between the bankrupt and the creditor has no effect -- it doesn't discharge any rights against the co-obligor. Payments under a bankruptcy or liquidation do not discharge a third party. The creditor's rights remains extant against the third party, irrespective of the bankruptcy. There may be questions -- it depends on the nature of the contract. There might be obligations where payment by one discharges the payment by the

other, or discharge by one --
LORD JUSTICE BRIGGS: But the argument that was rejected in Bower v Marris must have proceeded on the assumption that if the bankrupt was to have been taken as having discharged the principal out of the estate in the hands of his commissioner, it pro tanto as to principal also discharged the co-obligor, because the principal is simply gone and no longer was a principal debt.
LADY JUSTICE GLOSTER: That's the point I was making.
LORD JUSTICE BRIGGS: That's the underlying premise for the argument which the court then wrestled with and rejected. I'm not sure it rejected the underlying premise, it just said the argument based on it doesn't work.
MR ZACAROLI: Perhaps there was a shorter answer in the case, which is whatever you get from the bankrupt doesn't operate -- if there a discharge against the bankrupt, it in any event isn't a discharge against the co-obligor, which I think is what they are saying anyway, in fact.
LORD JUSTICE BRIGGS: They are saying there isn't even a discharge against a surplus in the bankrupt's estate.
MR ZACAROLI: No, no, indeed. I accept fully that insofar as the case is considering the position as against the bankrupt, that is the conclusion, that there's no

appropriation because it's been paid in process of law as against the bankrupt as well. I'm not denying that's what the court says. The context was one where there was a much easier solution in a way against the co-obligor, an obvious solution against the co-obligor, but I accept that, as against the bankrupt, that is the point being made; it is being said that the payment in process of law does not operate as an appropriation to discharge the principal.

I have to deal with the paragraph at the bottom of page 357 which refers to the 1825 Act. The assumption that the Lord Chancellor is making here, or his interpretation of the Act, appears from two sentences. The second sentence in the paragraph:

"This provision [132] obviously intended to make good to the creditors that interest which, by the course of administration in the bankruptcy, was lost."

And the last sentence:

"The creditor in that case will not have received interest upon his debt to the same extent as he would have if there had been no bankruptcy, and yet the Act must have intended to place him in as favourable a situation."

So the Lord Chancellor is interpreting section 132 as intending to give the creditor those rights that it

would have had but for the bankruptcy.

Now, that can only be a reference to the first half of section 132. You will recall that section 132 -- there are two parts to it. Part of it -- and it is the priority part, so first you pay creditors the rate they would be entitled to absent -- their rate of law under their contracts, and then any surplus after that will be used to pay interest at 4 per cent to everybody. Nothing the Lord Chancellor says in that paragraph can possibly have been addressing that latter part of it, because such creditors don't have any, didn't have any right, outside the bankruptcy to interest at all.

Then when the Lord Chancellor looks for authority, over the page, to his conclusion that he has reached as matter of principle, he lands on essentially Lord Hardwicke in Bromley v Goodere, which we've seen. That is a case which is premised upon whatever contractual rights the creditors had before the bankruptcy being respected out of the surplus, which shows that even though he was referring to a section of the Act, which did contain a right to 4 per cent for creditors who didn't have interest-bearing debts, nothing in this judgment has any relevance to that part of the section.

It was said a number of times by my learned friend

yesterday or over the last two days that it is common ground that Bower v Marris applied in bankruptcy prior to 1883. That phrase needs a little bit of unpacking. It is absolutely not common ground that Bower v Marris applied to section 132 insofar as it gave a right to 4 per cent to creditors. That is absolutely not accepted, and there's no case which ever decided that it did.

So far as the first part of section 132 is concerned, the only case to have considered it is this passage in the judgment of Lord Cottenham in Bower v Marris. The judgment proceeds on the basis that what the section is doing there is giving the creditors their contractual rights. It's not clear to what extent any argument was advanced to the court about that in this case. It wasn't particularly relevant. It wasn't applicable.

LORD JUSTICE BRIGGS: It wasn't relevant provided that the contractual rate of interest was higher than 4 per cent.

MR ZACAROLI: I'm saying the Act wasn't relevant to the decision.

LORD JUSTICE BRIGGS: Okay, the Act wasn't relevant, but none of this looked to the Act. I see, you say there would be no argument on the Act because it didn't apply.

MR ZACAROLI: Yes.

LORD JUSTICE BRIGGS: I don't know. What was the contractual rate of interest in this case?

MR ZACAROLI: In this case? I'm not sure we're told.

LORD JUSTICE BRIGGS: Did section 132 say, "Your contractual rate but 4 per cent if you" -- did it say, "The greater of your contractual rate and 4 per cent" or did it just say, "Your contractual rate if you have one and otherwise 4 per cent"?

MR ZACAROLI: I think the latter. I'll just turn it up.

LORD JUSTICE BRIGGS: I can't remember now and I can't remember what the reference is in the authorities bundle.

MR ZACAROLI: It is bundle 4, tab 118. I think it's the latter; it's just whatever rate was applicable by law prior to the bankruptcy. It's definitely not a provision like 2.88(9)), which applies a contractual rate only if it's higher. It's a priority section that gives you whatever contractual rates you have and thereafter --

LORD JUSTICE BRIGGS: It's a waterfall provision, isn't it?

MR ZACAROLI: Yes. I can't see anywhere in the judgment or the report of Bower v Marris what the rate of interest was. It might be possible that someone could work it out from the amount that is claimed and the time at which it is payable, but I'm not able to do that here.

LORD JUSTICE BRIGGS: The way the section is phrased, it may be if you were a 2 per cent contractual creditor, you did rather badly. You got 2 per cent but then you didn't share at all in the 4 per cent because you were not another creditor.
MR ZACAROLI: That's right. That's the plain reading of it.
LORD JUSTICE BRIGGS: Yes.
MR ZACAROLI: Going back to the common ground, what we accept is that Bower v Marris has been referred to in other cases, and in company cases. For example, in Humber Ironworks it is referred to as being applicable. But it's always referred to as applicable in the context where there's a remission to contractual rights for interest, and that is indeed the way it's understood in Bower v Marris itself, as I have just pointed out, and no other case said anything different, apart from the two cases I'll come to more recently, which are foreign cases we say are wrong.
I mentioned Bromley v Goodere. Could we turn that up quickly, two references in it, tab 1 of bundle 1. The point I made was when Lord Cottenham was applying this decision, what he was applying was a decision which effectively says if a creditor had rights against the bankrupt before bankruptcy to interest, then they should be respected afterwards. That is at page 51, second

paragraph. You have seen it so you need not read it again, but just to point out where that is.
To pick up a point on the previous page, page 50, in passing, it's a paragraph that's set out in the judgment below, the paragraph beginning:
"All bankrupts are considered in some degree as offenders ..."
It is about four paragraphs from the end of page 50. I just note that for present purposes. I will come back to it when considering questions of principle and policy, but it is worth noting at that stage, that was the attitude towards bankrupts.
LORD JUSTICE BRIGGS: Indeed. There is a famous saying of Lord Cooke right back in 1582, I think, to that effect, about the then bankrupt.
MR ZACAROLI: Yes. It is a point I made in passing to the judge below, at the time of Bower v Marris, the debtors prison where Dickens's father had been imprisoned had only just closed -- either opened or just closed, but that was the attitude towards bankruptcy at the time we are looking at.
So far as textbook references are concerned, I have already made the point, as the judge recorded at paragraph 141 of his judgment, that it's remarkable that there's no reference at all to Bower v Marris in any

edition of Williams over its 120-year history. There are two textbook references which have been relied upon by my learned friends and are referred to the judgment at paragraph 142.
LORD JUSTICE PATTEN: Sorry, I didn't catch what you --
MR ZACAROLI: I'm sorry, 142, the judgment of the judge below.
LORD JUSTICE PATTEN: Yes.
MR ZACAROLI: It might be best if my Lords just simply read paragraph 142. (Pause)
LORD JUSTICE PATTEN: Had Mr Justice David Richards himself ever heard of Bower v Marris? I can't quite work out from his judgment whether ...
LADY JUSTICE GLOSTER: Teatime conversation at Erskine Chambers.
MR ZACAROLI: None of us are in Erskine Chambers, so we can't answer that. The impression we got was he hadn't. At the first directions hearing, the only question on this long list of questions which were posed -- and I think there were 37 questions in Waterfall II, it was split into three parts at that stage -- the only question he raised an issue about, "Therefore what's the problem?" was the one which didn't refer to Bower v Marris, but the one which said interest under 2.88(7) should be applied towards interest before

principal. He thought, why was that there? It seemed obviously wrong. That was his reaction at the first directions hearing, but we didn't ask him the question.
LORD JUSTICE PATTEN: I just wondered whether it had cropped -- I mean, he deals with how familiar it was. I just wondered whether he'd ever given any clue in argument whether he -- it doesn't matter.
MR ZACAROLI: All you have is --
LADY JUSTICE GLOSTER: Was it referred to in any of the old versions of the companies textbooks, like Palmer or Buckley, or is it just there under whatever the company case is.
MR ZACAROLI: There was a reference to it in a Gore-Browne edition since 1986. It was referred to below, but it's not been relied on since. In fact, we pointed out that it was clearly referring to the same point, it wasn't referring to post-liquidation interest at all at that stage. So apart from that, I cannot recall -- we did look at all those textbooks, but of course, if it had been mentioned, it would have been mentioned in the context of an application in an area we accept it applies in, which is where there is no statutory regime for interest.
LORD JUSTICE BRIGGS: And there is no dispute that it applied to corporate insolvency up until 1986, right

through since corporate insolvency was invented.
MR ZACAROLI: Yes, because there was no statutory right to interest in corporate insolvency until 1986, but I can't recall now -- if my Lady wants to know the answer, we can go and --
LADY JUSTICE GLOSTER: I'm just interested, that's all. It's up to you whether you go and look or send some minion to go and look for it.
MR ZACAROLI: Going back to paragraph 142 of judgment, merely two references: one a footnote, which is diminished in importance by the obvious error in it, as the judge points out, and also apparently referring to old law, and the second one is this book from 1904 by Mr Henry Wace, which is put in very tentative terms, "It is conceived that". We will come back to that because, as the judge noted in the last sentence, this is the passage repeated in the report of the Irish bankruptcy law committee, which is what was relied upon in the Irish case, and all that was relied on in Irish case, but we will come back to that.
There are, we accept, a number of references and applications of the principle in Bower v Marris in cases from other jurisdictions. My learned friend mentioned them but didn't take you to them. I don't propose to take you to them either. They are summarised, we say

accurately, in the judgment. So for example, cases from Australia are cited at paragraphs 80 to 83. The important point from those cases is that, in each instance, the relevant statutory regime essentially mirrored pre-1986 regime for companies in England, so they don't take the debate any further forward.
LORD JUSTICE BRIGGS: Yes.
MR ZACAROLI: We agree with judge's analysis of all those cases from foreign jurisdictions that he refers to. My learned friend didn't take you to them. I don't see the need to, unless you particularly want to. I'm going to pass over that and say the judgment stands as it is and is an accurate record of those cases. None of it takes the debate any further forward because in each case, other than the ones I'm going to come to in Ireland and Canada, the relevant regime reflected the pre-1986 corporate regime.
The one case that is relied upon very heavily by the SCG is the case dealing with a deceased's estate. That is Whittingstall v Grover. The judge dealt with this at length at paragraphs 108 to 114 of his judgment. At paragraph 112, the judge noted that Mr Justice Chitty in that case proceeds -- the middle of paragraph 112 -- on the basis that the decree for the administration of an estate operates as a judgment in equity, and that the

orders of 1841 were made in order to bring a judgment in equity into line with the Judgment Act law on which interest was payable. Interest on a judgment debt accrues due whilst it's outstanding just as much as interest under a contract.
At 114, the last three lines:
"In the light of the analysis of an administration decree as a judgment in equity in favour of all creditors analogous to a judgment at law, the decision does not, as it seems to me, support the submissions of the SCG and York."
We submit the judge was right in his conclusion for the reasons contained in those paragraphs.
Turning to the case itself, which is in bundle 1 at tab 24, my Lords will have picked up by now, I think, that the case was actually dealing principally with a question of priority between the joint and the separate estates of the partners. The first thing that happened in terms of chronology was that the first partner, Mr Whittingstall, died, and you will see on page 214, right-hand column, halfway down:
"By the decree made in the first of such actions, the usual accounts and inquiries were directed to be taken and made in January 1857."
So there was an order for the accounts and inquiries

in 1857. That is critical step in the analysis, as Mr Justice Chitty found at page 217, because such judgment operated as a judgment in favour of creditors, which itself gave right to interest. And the passage is 217, left-hand column, two-thirds of the way down:
"The orders of 1841 relating to interest were in substance repeated in consolidated orders of 1861 and are now embodied in the subsisting Rules of Court."
My learned friend Mr Smith took you to the Rules of Court, but we say he missed out an important sentence in those Rules of Court, so can we turn them up. They are at ...
LORD JUSTICE BRIGGS: Are we coming back to 217, I assume we are, when we looked at the orders?
MR ZACAROLI: We are indeed.
It's 151 of bundle 4.
LORD JUSTICE BRIGGS: 151 or 151A?
MR ZACAROLI: 151.
LADY JUSTICE GLOSTER: Which rule do you want us to look at, Mr Zacaroli?
MR ZACAROLI: It's rule 62, and this is the one --
LORD JUSTICE BRIGGS: This is the 1883 Rules of the Supreme Court.
MR ZACAROLI: That's right.
LADY JUSTICE GLOSTER: We looked at this yesterday.

MR ZACAROLI: We did, that's right, and my learned friend Mr Smith cited rule 62 and referred to the first four lines of it. The point he made was that 62 relates only to creditors with a contractual right to interest, but in fact it doesn't. As you will see, it goes on. The first part relates to creditors with a right to interest. Then it goes on, on the fourth line at the end:

"... and as to all others are for the rate of 4 per cent per annum from date of the judgment or order."

So rule 62 is the rule which provides that there is interest accruing both for creditors with a right to interest and also creditors without interest bearing --

LORD JUSTICE BRIGGS: That's almost the same, isn't it, as section 132 of the 1825 Bankruptcy Act?

MR ZACAROLI: Well, it then goes on in 63 to refer to -- where a creditor whose debt does not carry interest, it comes out of the surplus, which is the point that my learned friend Mr Smith made. But this works in two parts. The right to interest is conferred by 62, then where it comes from is dealt with in 63.

My Lord, Lord Justice Briggs is right in the sense that it operates in a way which gives priority to creditors with interest bearing debts. That point, that

the rule works in two ways, is made perhaps most clearly by the modern equivalent of the rule, which is at the same bundle, tab 192A. It's Practice Direction 40, paragraph 14 in the CPR.

LADY JUSTICE GLOSTER: 192C, thank you.

LORD JUSTICE BRIGGS: Where are we?

MR ZACAROLI: What I'm trying to look at is Practice Direction 40A.

LORD JUSTICE BRIGGS: 192C is Practice Direction --

MR ZACAROLI: It's 192A in my bundle. I'm told it's somewhere else. 192A --

LADY JUSTICE GLOSTER: 192A, okay.

LORD JUSTICE BRIGGS: PD40A.

MR ZACAROLI: Yes. On page 6 --

LORD JUSTICE BRIGGS: It's 40APD.

MR ZACAROLI: That's right the relevant paragraph is 40APD.14, it is on page 6. It appears in two sub-rules, sub-rule 1:

"Where an account of the debts of a deceased person is directed by any judgment ...(Reading to the words)... and on any other debt from date of the judgment of the rate payable on judgment debts at that rate."

LADY JUSTICE GLOSTER: At that date, not rate.

MR ZACAROLI: Yes. The judgment rate at that date, yes.

LORD JUSTICE BRIGGS: And then sub-rule 2 replicates the old

rule 63.

MR ZACAROLI: Correct, yes. But it expressly refers back to 1B, ie where interest is calculated on 1B, it's paid out of the surplus. So there's a priority rule here.

What really matters, in our submission, is Mr Justice Chitty's interpretation of all this, because Whittingstall v Grover is the only case where the principle in Bower v Marris has been applied to the rule in question. And he interprets it very clearly on the left-hand column of page 217 back in Whittingstall v Grover --

LADY JUSTICE GLOSTER: Yes.

MR ZACAROLI: -- as giving rise to a judgment in equity. You see that from the bottom five lines:

"Interest (inaudible) at 4 per cent form the date of the decree because the decree is a judgment ...(Reading to the words)... a judgment of law which would give them interest. The right of the creditor whose debt does not carry interest by law is therefore based on the provisions of the statute 1 and 2 Victoria(?), chapter 110."

That's the Judgments Act, which gives interest on judgments for the first time. It's based on that and the orders of 1841. So the 1841 orders apply in equity to the Judgments Act.

"The existing Rules of Court merely give effect to such right."

Is what he says.

LADY JUSTICE GLOSTER: So the point you are making is?

MR ZACAROLI: Interest accrues throughout the period because you have a judgment at the beginning on which interest accrues.

LADY JUSTICE GLOSTER: Right.

MR ZACAROLI: It is pointed out to me I have missed a sentence on the left-hand paragraph which makes the point clearer. It's unhelpfully just by second hole punch, so that's about two-thirds of the way down. You will see a reference to order 15, rules 62 and 63. The sentence immediately afterwards:

"The rules of 1841 were founded on the 17th section of the statute."

That is the section giving a right to interest on judgments. The 1838 Act, that is.

So when at the end of his judgment Mr Justice Chitty comes to apply Bower v Marris, it's on the basis that there has been a judgment effectively in equity in favour of the creditors, giving them a right to interest, as at the date of the decree, the decree for administration, and therefore he is able to say in the last five lines -- this is very brief passage:

"You apply Bower v Marris in the Warrant Finance Companies(?) case by treating the dividends as ordinary payments on account and applying each dividend in first place to the payment of interest it calculates to the day of such dividend, that is interest that's due and accruing during that period to the date of the dividend."

You'll have seen on the left-hand column again that Mr Justice Chitty relies on a decision of Lord Romilly in the Herefordshire Banking Company case. There are two cases I want to take you to, both referred to by Mr Dicker yesterday, on this point, which make good the point that -- in fact three cases -- the position in relation to the deceased's estate was always treated fundamentally differently from winding up.

The first is called Hadfield Patent, and that is at tab 12 of this bundle.

LADY JUSTICE GLOSTER: What bundle, 1?

MR ZACAROLI: Bundle 1, yes. The case involved an attempt by a creditor, who had a simple contract debt that didn't give rise to a claim for interest, to require a call to be made by the liquidator on shareholders of an unlimited company to pay up enough to pay that interest and claim -- the interest he claimed due to him. He didn't have an interest-bearing debt. The

decision, a very short decision of the Lord Chancellor over the page:

"An administration decree made by the Court of Chancery, to which reference has been made ...(Reading to the words)... date of the decree as if they had been judgment debts."

And he goes on to say that in the winding up context, there was no ability to allow interest on simple contract debts after the date at all. He makes reference in the penultimate paragraph:

"Reference has been made to the 26th rule of the order of 11 November 1862."

That was rule I referred to in passing yesterday, which purported to give a right to interest after the date of liquidation to creditors, and he notes there:

"It must be questioned whether it was not ultra vires unauthorised."

We come to see later it is undoubtedly held to be ultra vires.

The next case is in the next tab, tab 13, the Herefordshire Banking Company case. A judgment of Lord Romilly, and at page 252 the judgment begins. He says, referring to the distinction that's been point out to him yesterday between administration of estate and winding up:

"Though in the administration of assets the court does allow, by its own authority, interest of 4 per cent from the date of decree, that is because the decree is a judgment in equity in favour all the creditors and prevents them from getting a judgment at law which would give them interest. But though a winding up order is a decree in equity, and therefore a judgment, it is a judgment and decree of a different character ...(Reading to the words)... or entitle them to any interest in respect of it."

He then goes on to note that therefore, though he was a party to that order, it's undoubtedly an ultra vires.

And the third reference is in Humber Ironworks itself, bundle 1, tab 16. Lord Justice Gifford at page 67 explains why deceaseds' estates have always been treated differently in the first paragraph. About six lines in, he says:

"For some reason or other dead men's estates have been assumed to be solvent and they have been wound up on that footing, but so unjust has that been found that it has been necessary to give a positive enactment to give interest from the date of the decree to simple contract creditors whose debts did not bear interest."

So he ultimately finds that dead men's estate

principles are of no use when looking at the different contexts of winding up.

LORD JUSTICE BRIGGS: I'm so sorry, I was writing a note, are we still in Hereford?

MR ZACAROLI: No, we have moved to Humber Ironworks. Tab 16, page 647, Lord Justice Gifford, explaining why dead men's estates are always treated differently because they are always assumed to be solvent.

Essentially, you need a special rule for non-interest-bearing debts because it was otherwise unfair because the estate was deemed to be solvent and interest ran from the date of the decree, unlike in a winding up context, where no interest runs beyond the date of the winding up.

So we say that in Whittingstall v Grover, the right analysis is the decree in equity is a judgment which does in fact give a right to interest from the date of the decree and, more importantly, that was how it was treat by Mr Justice Chitty and why he therefore felt able to apply the law in Bower v Marris. In fact, there is very little analysis as to why the rule in Bower v Marris might apply in those circumstances, the only case that has applied it at all. But insofar as it's applicable, it's because interest was accruing.

The SCG place heavy reliance, as I said, on

Whittingstall v Grover. They contend that because in administration, liquidation and bankruptcy creditors are precluded from taking proceedings against the company, then you should treat creditors as if they had a judgment. At one point, he said that rule 2.88 affords to creditors the rights they would have had if they had a judgment. That is not what rule 2.88 says. The most that can be said about it is that the rate of interest which is to be applicable to the debts post-administration, liquidation or bankruptcy is the rate that applies to judgments. As the learned judge below said, one can understand that on the basis that you are precluded from getting a judgment, therefore that is the rate that should apply, but the rule does no more. It does not treat you as judgment creditors. It doesn't give you any of the other advantages as if you had a judgment. It simply applies the rate.

There's no basis, we say, for saying that the statutory right to interest which only applies in the future if and when a surplus arises is an equivalent to a right to interest which is accruing due during the period after the date of administration until such surplus arises. There is simply nothing due unless and until a surplus arises, then the new statutory right cuts in and gives you that new right to interest as at

that point. There's no basis, we say, for saying that that right is accruing in any sense before that.

I have already explained why the administration of deceaseds' estate cases are different. It was said, oh, well, if Bower v Marris were to apply there and not here, there would be anomalies. Well, other than Whittingstall v Grover, that's the only case which says that Bower v Marris does apply in that context. Assuming that it does, but that may be up for argument on another day, the fact is there are in any event substantial --

LADY JUSTICE GLOSTER: Sorry, are you saying it's wrong or not?

MR ZACAROLI: I'm accepting it's right as decided --

LORD JUSTICE BRIGGS: Otherwise we would have to go through a trawl of all the books on administration of estates.

MR ZACAROLI: The point I'm making is there are actually differences between the two regimes anyway. They are fundamentally different regimes. If they have different effects, different consequences, so be it; that is because they are different regimes dealing with different circumstances.

As I pointed out when I took you to rule at tab 192A, the current version of the administration of estates rules, it is fundamentally different from the

interest rule in bankruptcy or liquidation or administration because it is a waterfall; it provides for a rate of interest at the contractual rate, in any event, and it's only the 4 per cent of the Judgments Act rate which is postponed to the surplus.

So there is, in the administration of estates, a very different approach in any event. So to say that if Bower v Marris applies there that means it would be different takes us nowhere, because it's already different.

To the extent that it might be said, well, a judgment in insolvency should be treated in the same way as a judgment decree in equity, Lord Romilly, in the Herefordshire Bank case shows why that is not true, but in any event, insolvency proceedings are very often commenced without any court involvement at all. An administrator can be appointed out of court. CVLs, NVLs, involve no court input to the commencement. So there's no question of a judgment in insolvency in very many cases, and these rules apply across the board.

So those are my submissions on the principle of Bower v Marris, and what it actually is. As I say, essentially a rule of appropriation.

The third topic was then partially linked to that, because we say that if it does apply at all in the

insolvency context, it in fact could only ever applied to creditors with interest-bearing debts, because those are the only ones, if we lose everything so far, which might be said to have an accruing right to interest because the statute recognises they get the rate under their contract. So if it were to apply at all, it's only to that group of creditors.

Now, for reasons I've hinted at at the beginning, we say if that is the court's conclusion, the right answer is not to disturb the simplicity of rule 2.88, but actually to say if you have contractual rights based upon Bower v Marris which aren't respected by the scheme, then you come back in at a later stage with your non-provable claim to the shortfall. But I am focusing here on the question of the interpretation of rule 2.88 itself.

There we say the rule of appropriation undoubtedly requires two current debts, and I say this is linked because this relies on my previous submission that the right to interest under the statute is simply not accruing until such time as the surplus arises and the statute says that the right itself arises. So there is no possibility of an accruing right to interest for a non-interest-bearing debt upon which the principle in Bower v Marris could have any application.

And then to pick up a point I've already made, the rationale for the application of the principle in Bower v Marris in Humber Ironworks, in Re Lines Brothers is all about ensuring that creditors with a right to interest get the same treatment they ultimately would have done had there been no bankruptcy. That does not apply to someone without an interest-bearing debt.

LORD JUSTICE PATTEN: On that alternative approach, namely Bower v Marris only applies to people with a pre-existing right to interest, whether, I suppose, that's under a judgment or a contractual right, what impact does that have -- I'm not asking you to give me a figure, but, I mean, are there a significant number of creditors that would fall out?

MR ZACAROLI: Yes, I think it's common ground that's true in this case.

LADY JUSTICE GLOSTER: What type was contracts? I mean --

MR ZACAROLI: Prime brokerage.

LORD JUSTICE PATTEN: So they are primarily the people who would be affected.

MR ZACAROLI: Yes. I'm being told -- I think it's right -- it's in the billions, as everything is in this case.

LORD JUSTICE BRIGGS: That's people represented by York?

MR ZACAROLI: Yes.

LORD JUSTICE PATTEN: So it affects Mr Smith's clients more

than Mr Dicker's.

MR ZACAROLI: I think it affect his clients as well.

LORD JUSTICE PATTEN: Right. Okay. So it's a real point.

MR ZACAROLI: It's a real point, yes.

We suggest, however, that such differential treatment ought not to be allowed within rule 2.88, which is why we say, if anything, this goes to a non-provable claim. And itself, if it could only apply to creditors with interest-bearing debts, we say it is a conclusion why it shouldn't apply at all. It would first of all create differential treatment between creditors within rule 2.88 who otherwise are supposed to be treated pari passu. It would result in different periods of interest outstanding as between them. It would mean that the available pot in any case other than where there's enough to pay everybody would be eroded by those with a Bower v Marris right at the expense of those without. It would also create complications that would be inconsistent with we say the Cork Committee's plea for simplicity and certainty.

And there are two points here. One is that to allow Bower v Marris at all within 2.88 imports such complications, but to import it for only some creditors doubles those complications. The most obvious is that every time a slug of surplus arose to pay some interest,

there would need to be a recalculation of the proportionate claims of all the creditors to interest. The simplicity of the solution that the rule, we say, dictates is when interest stops running at the date of final dividend, thereafter the administrator, liquidator or trustee knows exactly how much interest is due to every creditor and it doesn't change over time, so that when a 10 per cent dividend is paid on outstanding interest, it's very easy to work out what that is for everybody. It's very easy to reserve, because you know what everybody is claiming.

Complications undoubtedly arise if you introduce Bower v Marris, which means that interest continues running, particularly if only for some but actually if for all, because the proportionate share of each creditor changes over time.

LADY JUSTICE GLOSTER: It's not an insuperable problem with the computer, is it?

MR ZACAROLI: It's not an insuperable problem.

LADY JUSTICE GLOSTER: If we are talking in general terms, why should that -- it's easier to calculate it this way -- trump the broad merits point on which the appellants rely? I mean, I understand your arguments of law, but okay, it is complicated to have to recalculate all the time, but --

MR ZACAROLI: We say it's contrary to the intention behind the rule, which is one of creating a simple and certain regime. There is a reference in one of the Australian cases which is worth looking at, which explains why it is that interest was cut-off at the date of bankruptcy or liquidation. And partially it was for this very reason: because of the complications it causes if you allow interest to keep accruing during the bankruptcy or administration liquidation period. The case is Mackenzie v Rees. It's bundle 1 of the authorities tab 38. The case was concerned with whether a creditor without a contractual right to interest was entitled to interest under the relevant statutory regime, and the relevant passage is in the judgment of Mr Justice Dixon. It's at page 8 to 9 of the report.

Page 8, the last paragraph towards the bottom of the page, he refers to:

"The principle of English bankruptcy law since the time, at all events, of Lord King that no ...(Reading to the words)... could not obtain a surplus until interest accruing had been met."

Referring to Bromley v Goodere:

"The rule and the qualification had their origin ...(Reading to the words)... for the purpose of proof."

Dropping down to the next paragraph:

"The principle rule, namely ...(Reading to the words)... among creditors where there was a deficiency."

He quotes Lord Justice Lindley in Ex parte Ador:

"The rule which prevents ...(Reading to the words)... the administration of the estate would be seriously complicated."

LORD JUSTICE BRIGGS: But I mean, on any view section 2.88(9) is going to have to cope with varying rates of interest, because some people would be in at the judgment rate; others would be in at fixed contractual rate; others, if it's the interest which will payable apart from the administration, will be in at whatever is the current floating rate in a floating interest rate contract.

MR ZACAROLI: Never during the period of distribution, because you don't distribute any interest until all dividends have been paid, by which point all those fluctuations have stopped because interest only accrues until the date of payment to the final dividend.

LORD JUSTICE BRIGGS: Oh, is this your point about it not running on past --

MR ZACAROLI: That's right. If it runs on past then, which is what Bower v Marris would require, then you run into this problem, but during the period you are actually distributing the surplus, on a pari passu basis,

been made pre-1986 in relation to the Act simply saying nothing about interest and therefore reverting creditors to their contractual rights, because it's in a sense a free-for-all there. There is no provision under statute which deals with it, and therefore it would be correct that interest would keep running on and that any claim to interest that a creditor made would vary over time and the proportionate share would vary over time on the same basis. I accept that.

The point I'm making here is it was the purpose and objective of the court committee to introduce a simple and certain code or provision for interest across the board across all insolvencies, and that that objective of simplicity is to some extent -- we say to quite a great extent -- affected if you don't stop the interest running at the date of the final dividend, in the way that the judge, Mr Justice Dixon, refers to on the previous page. That is a rationale for a cut-off. As to post-administration interest at all, we say the same rationale applies to there being another cut-off, which is the date of final dividend recommended by the court committee, we say implemented by the reference to debts outstanding in 2.88(7).

Introduction of Bower v Marris into the rule also has this effect, the date upon which the proved debts

although the Act doesn't say it -- oh, no, it does say it in terms, the rules said it. It's a pari passu distribution, both those points we say would apply. It would affect that pari passu distribution because the amounts would change over time and it makes it much more complicated in process of distributing, unless you wait until you have enough to pay everybody, in which case it's just one distribution.

The other point to note is that if Bower v Marris applies to the creditors who have contractual rights --

LADY JUSTICE GLOSTER: Are you leaving Mackenzie now?

MR ZACAROLI: Yes, I am.

LADY JUSTICE GLOSTER: Just explain to me the last few lines of that paragraph where it refers to the Humber case. The principle which stops interest upon debts for the purpose of proof upon assets, that allows it to run on as a claim upon a surplus. Just explain to me what he's saying there in the context of what he said previously.

I quite see all these considerations while the estate is insolvent.

MR ZACAROLI: Yes.

LADY JUSTICE GLOSTER: But what's he saying there, if he's not saying the position is different when you get to surplus?

MR ZACAROLI: It is true the point I'm making could have

cease to be outstanding, which is a question of construction of rule 2.88(7), would have a different meaning, depending on whether you were a creditor with right to interest and, therefore, right to appropriate on the basis of Bower v Marris, or you are not. Because if you're not, there's no difficulty; a right to simple interest ends at the date of final dividend that's outstanding until that date. You need to adjust the meaning of that word to cater for the concept of contractors brought in with contractual right.

LADY JUSTICE GLOSTER: Did the judge deal with Mackenzie? If so, which paragraph, please?

MR ZACAROLI: He didn't, I think. At least not in paragraphs dealing with the Australian cases.

LADY JUSTICE GLOSTER: He didn't deal with it at all?

MR ZACAROLI: Can I get somebody to run a check on that whilst I continue, my Lady?

LADY JUSTICE GLOSTER: Yes.

MR ZACAROLI: The point I'm making is about the construction of rule 2.88(7), the meaning of the word "outstanding". It requires it to be given a different meaning, but to be given a different meaning because of something being brought into the rule by 2.88(9), because it's only through 2.88(9) that creditors with an interest-bearing debt will be brought into the equation at all, otherwise

everyone would be restricted to the Judgment Acts rate. We say it would be very odd construction to require 2.88(7) to have a different meaning for the word "outstanding" depending on type of creditor because of a rule, the only purpose of which was to identify which was higher of two rates, the contract rate or the Judgment Act rate.

It's there for one purpose only, not to identify some different meaning of the word "outstanding" in rule 2.88(7).

LORD JUSTICE BRIGGS: Would there be any insuperable problem in taking a reasonably literal construction of 2.88(7) about when interest ceases to accrue, the one you are propounding, and yet nonetheless say you can operate Bower v Marris up until then?

MR ZACAROLI: Well, is my Lord thinking it's the date of final dividend?

LORD JUSTICE BRIGGS: Yes.

MR ZACAROLI: The problem with that is the reference to word "periods", not "period". It was common ground below that "periods" is there to cater for the fact there will be interim distributions, and so --

LORD JUSTICE BRIGGS: Interim distributions by way of principal.

MR ZACAROLI: Of principal.

LORD JUSTICE BRIGGS: By way of proof.

MR ZACAROLI: Exactly. Very simple case, after a couple of years you have to pay £50, another couple --you get the other 52 years later. The point is that interest accrues on the £50 portion for the period that's outstanding, and for the remainder for the period that's outstanding. So --

LORD JUSTICE BRIGGS: I'm not sure that really addresses my question. I think you are saying it's an inevitable consequence of applying Bower v Marris that you had to go on accruing interest right up until the date effectively of payment of interest and there's no basis upon which you could apply any more restrictive interpretation of "periods" in 2.88(7). I'm just asking: is that an inevitable outcome? Do you have to bin Bower v Marris altogether if you are right about what "periods" means in 2.88(7)?

MR ZACAROLI: We would say yes.

LORD JUSTICE BRIGGS: Well, why?

MR ZACAROLI: Again, perhaps I'm misunderstanding my Lord's question. Are you refer referring to the possibly of them applying in the period?

LORD JUSTICE BRIGGS: Yes.

MR ZACAROLI: Because the only point -- I'm not sure it makes any difference if you do that because the only

point of it is to extend the period which interest is payable. I think that's right. Because if it stops running at the date of any dividend on that portion, the only point of Bower v Marris is to say up to that point we've been actually addressing -- appropriating this as interest rather than principal, so we are treating the rump of principal remaining outstanding thereafter.

LORD JUSTICE BRIGGS: You say it is inconsistent with the primary effect of Bower v Marris, which is to postpone the date of payment of principal?

MR ZACAROLI: That's right. I don't think Bower v Marris gives you a higher rate during any particular period, it just keeps it running longer.

LORD JUSTICE PATTEN: If the judge was right and the proper construction of sub-rule 7 is that you pay principal first through the dividends, you can't operate Bower v Marris.

MR ZACAROLI: Correct, yes.

LORD JUSTICE BRIGGS: There can't be a halfway house. You just can't operate it because you are inevitably then going all the time paying off capital which gives rise to an immediate calculation of what interest is payable up to those dates.

MR ZACAROLI: Yes.

LORD JUSTICE PATTEN: And because principal is paid first,

there can't be any elongation of the period.

MR ZACAROLI: Yes. We undoubtedly agree with that, my Lord.

LORD JUSTICE PATTEN: But I think that's -- yes.

MR ZACAROLI: At the moment I'm addressing the possibility as it applies to some only, which is we say is a reason why it shouldn't apply at all.

LORD JUSTICE PATTEN: Yes. It's a straight choice between the two methods I think.

MR ZACAROLI: My Lords, the next point I'm moving on to is question of whether rate in 2.88(9) encompasses Bower v Marris. If that's a convenient moment, I can stop there.

LADY JUSTICE GLOSTER: Yes, we will take five minutes.

(11.45 am)

(A short break)

(11.50 am)

LADY JUSTICE GLOSTER: Yes, Mr Zacaroli.

MR ZACAROLI: It's a short point on question whether 2.88(9), the word "rate", incorporates Bower v Marris the short point is this: rate is a fundamentally different concept to applying Bower v Marris calculation, both in economic effect and in how it works. It is very different, for example, to applying a compound rate. A compound rate of interest is still a rate of interest, but to the contrary, Bower v Marris

is about identifying the order in which payments are to have been made or treated as being made. To know what amount of interest is outstanding, to make the choice between whether you appropriate towards interest or principal in what amount, you have to know the rate to start with, ie the rate is a pre-existing requirement for the operation of --

LORD JUSTICE PATTEN: But you are talking about the incorporation of a rate greater than the judgment debt -- than the --

MR ZACAROLI: Yes.

LORD JUSTICE PATTEN: But we know what the source of that is; it's the White Paper, isn't it?

MR ZACAROLI: Yes, it is.

LORD JUSTICE PATTEN: That -- doesn't have a reference in that to Bower v Marris.

MR ZACAROLI: No, in fact it's just a contractual rate it refers to. I said it was a short point; perhaps shorter than I thought.

LORD JUSTICE PATTEN: Well, I don't know.

MR ZACAROLI: I adopt that entirely, that's all it's doing. But the other point is you need to identify a rate before you can ever apply Bower v Marris. It's a different thing. Fundamentally different concept.

I want to just move on to -- it's a sidestep

slightly and it's something which I omitted in turning the page earlier, but it's a slightly self-contained topic, which is concept of appropriation and the importance of that as it lies behind both Bower v Marris and all the cases thereafter.

The judge at paragraphs 40 to 42 of the judgment set us out the core principles of appropriation, which I am sure are well-known to the court. In particular, he makes the point -- a point I made in opening -- that Bower v Marris operates on the basis of a presumption as to the interest or intentions of the creditor. It says that payments from the debtor's estate don't constitute an appropriation as made in process of law, therefore the creditor's entitlement remains, but we presume the creditor would want to be paid interest first because that's what's in his interests.

There is a case the judge cites at 42, which is the Smith v Law Guarantee & Trust Society case, which is an example of the opposite conclusion being reached by the court, namely that in that case the creditors couldn't possibly want anything other than the payments being appropriated towards principal first rather than interest and, therefore, the court would do that without bothering to ask them because you would know what the answer was.

If I can take my Lords to that. It's tab 29 of bundle 1. It's a case involving a debenture trustee, as you will see from first page of the headnote:

"The deed provides that the trustee should appropriate the proceeds of the realisation of the securities in the first place towards payment of all arrears of interest ...(Reading to the words)... action was brought on behalf of the debenture holders to enforce their security."

There were some prior orders in this case and, in particular, you will see about two-thirds of the way through the first paragraph of the headnote:

"Subsequent orders for payment to the debenture holders directed that ...(Reading to the words)... attributable to principal, they would be insufficient to discharge the full amount."

The case involved the question of tax, and it was in the interest of the debenture holders for it to be appropriated toward principal:

"The court held that when making the earlier orders ...(Reading to the words)... how the appropriation should be made and consequently income tax ought not to be deducted."

Turning to the judgment, first of all the first instance judgment, just to note a point at page 571 of

the report, bottom paragraph of 571:

"Mr Justice Byrne held that the provision of the trust deed for payment of interest in the first place was inserted for the benefit of the debenture holders and could be waived by them in the absence of ...(Reading to the words)... whether in their hands it would thereafter be treated differently."

Turning to Court of Appeal judgment, first of all Lord Justice Vaughan Williams at page 575, dealing with the question of the order in which payment should be appropriated. He says in the first paragraph:

"I think the view accords with what Mr Justice Byrne said. Nothing to say except to refer to what Mr Justice Byrne said in dealing with question of what ...(Reading to the words)... that the payment should now be attributed to capital."

And to like effect, Lord Justice Romer, bottom of page 578. The necessity he is referring to is the necessity to decide which orders the payments are to be appropriated in. He says:

"The debenture holders are entitled now to say ...(Reading to the words)... it is clearly to their interest that the order should be made in this form."

A final reference on the same point is back to Bower v Marris itself at tab 6, the penultimate

paragraph of Bower v Marris, showing that Lord Cottenham was absolutely well aware of the principles of appropriation and their derivation:

"It has been suggested that the case of ...(Reading to the words)... and are derived from the civil law."

The key point I'm making here is it's a matter of presumption, or it's a matter of entitlement, in the first instance, for the creditor, and then the reason the court has assumed that payments are to interest first in an insolvency case normally is because that's what would be in the creditor's interests, not because they have actually chosen but because you presume they would.

And it will always be subject to contrary agreement between the creditor and the debtor. So it would be entirely possible for a creditor to have agreed with the administrators that it wished to appropriate payments a different way. So, for example, if there was a particular tax issue which related or arose in respect of one particular creditor, it could always say, "I am choosing to elect these payments in different way" under the Bower v Marris principle, if it applied.

The senior creditor group in paragraph 9 of their skeleton for this appeal, which is in core bundle A at tab 12, they state four ways in which they say the judge

erred in reaching his conclusion on Bower v Marris.

The first is that he gave improper consideration to the pre-1986 law, or rather he didn't given proper consideration to it. We have been through that. Our submission is that he gave absolutely correct consideration to the pre-1986 law, identified precisely what the principle was, how it applied and how the rule in 2.88 was fundamentally different.

Secondly, they criticise the judge in holding that the language of 2.88 was inconsistent with the Bower v Marris. I have dealt with that and will come back to it at the end in a very short worked example.

They say the judge was wrong in relying on the pre-legislative materials for his conclusion. They say the Cork Report indicated a (inaudible) bankruptcy approach, which for over a hundred years had not recognised any remission to contractual rights. He was wrong in that respect.

Fourthly, and most importantly for present purposes, they say he was wrong as a matter of principle and policy. Lady Justice Gloster pointed out there was a sort of broad merits point put against us, which is why should people be deprived of what they would be entitled --

LADY JUSTICE GLOSTER: Yes, and that is this one, yes.

MR ZACAROLI: That's this one really.

The first point to make is that the question is put as: why would it have been Parliament's intention to abolish Bower v Marris which had existed for so long? Well, I hope I've dealt thoroughly enough with that one; there was no such principle in Bower v Marris that applied generally throughout insolvent states. It was merely an aspect of contractual rights if you remitted to them.

The second point is that the 1986 Act operates or the rules operate by providing creditors with a new bundle of rights. I've already been through the ways in which that bundle of rights affects the pre-existing rights of creditors, both in beneficial ways and sometimes non-beneficial ways. But essentially it's a new bundle of rights.

The broad merits answer is this was a new provision entitled to provide certainty and simplicity and most importantly uniformly among creditors, with the one nuance, only the one nuance, that if you had an existing contractual rate which was higher, you could still have that. But that's the only concession made to otherwise a pari passu and uniform solution for all creditors, recognising that that operates to the benefit of creditors generally, and to the detriment of the company

generally, in the sense that where it's paid more interest, others who have a claim on the assets of the company will have less to claim against.

In any case where the company is still insolvent, those who will be prejudiced by giving some creditors greater rights would be the other creditors who are still claiming. Even if the company is solvent enough to pay all statutory interest, there are others down the waterfall who are being prejudiced to the extent that more interest is being paid to some creditors under 2.88 than others. So the idea of this being a creditors versus members debate is one we fundamentally disagree with.

Dealing with that --

LORD JUSTICE PATTEN: I mean, are the points you are making now about the merits of it, if you like, as a scheme, are the submissions you just made to some extent parasitic upon accepting the judge's other conclusion, which is that it's an exhaustive regime? Because it seems to me you can't really consider the merits of it except in the context of both points. If the creditors like York never had a look-in under Bower v Marris because, if you are right, you have to have a pre-liquidation right to interest to qualify for that treatment, they're out, so the merits argument doesn't

go anywhere in relation to them. I mean, they can't say they're worse off because they never had a Bower v Marris.
MR ZACAROLI: Yes.
LORD JUSTICE PATTEN: But in relation to creditors who either had a judgment or a contractual right to interest, in relation to proved debts it doesn't matter if they have a right to revert to their contractual rights at the end of the process. I mean, it might be slightly more inconvenient to do it that way, but in money terms it shouldn't make any difference. So the question of whether the merits of excluding Bower v Marris, I think, are a bit difficult to assess until you decide whether or not you are also dealing with an exhaustive regime.
MR ZACAROLI: We have to deal with both possibilities --
LORD JUSTICE PATTEN: Well, of course. But, I mean, I think the two are very closely linked in relation -- because I mean, at the end of the day what you are asking yourself is, well, you know, what sort of regime did Parliament introduce through the insolvency rules?
MR ZACAROLI: My answer to that is in short that we say -- assuming there was a complete code in first instance, and these arguments obviously have, as it were, global force about -- respond to the merits point, but if we

are wrong about the complete code, the proper response is not to adjust or to interfere with the simplicity of rule 2.88 and the very clear calculation required by it, but that if my arguments and response to merits don't find traction, to say there's a non-provable claim at the end of it. That's the way I think I opened it. I stick with that. That is the correct answer to this. If we are wrong in saying that the code was a complete code and it has merit, the merit essentially being one-size-fits-all for all creditors, which operates to the detriment of the company and benefit of the creditors, or vice versa, on a global collective basis, and that's all you get -- you come in, you get the benefits but also take burden of statutory scheme, and the broad merit of that is -- well, there's a number of points, but essentially it's a common misfortune point. Once the company enters into an insolvency process, all creditors thereafter are treated equally so far as the delay in payment of their debts is concerned. 2.88(8) says pari passu payment of interest, even if you didn't have pari passu rights in respect of your debts.

And the reason for that is that -- and this falls into my next point, which was the broad point that it's creditors first, members last, we say is a vast simplification of the reality and really doesn't take

you anywhere in terms of where the merits lie. There are, as I've shown the court, statements to that effect in the old bankruptcy cases, certainly, at a time when debtors were regarded as offenders and where it really was a competition between the debtor and its creditors.

The modern world, we say, certainly in the corporate context, looks very different. What you have is a priority waterfall, and there are a number of levels below proving creditors and those entitled to statutory interest as proving creditors. You have the possibility of subordinated debt. You have the possibility of whatever non-provable claims exist. The Insolvency Act itself identifies as a possibility categories of non-provable claim and categories of postponed claim. My learned friend Mr Dicker referred to it in passing yesterday it's rule 12.3. Now, they are relatively limited, but they exist nonetheless.

So matters which are not provable are contained in sub-rule 2. In bankrupts, they include any fine imposed for an offence, et cetera, in administration, winding up or bankruptcy, obligations arising under those criminal statutes.

And then sub-rule 2(a) -- insert a new 2(a) -- has certain claims which are not provable except for the time when all other claims and creditors in insolvency

proceedings have been paid in full. So postponed claims, including claims arising under section 382(1)(a) of the Financial Services and Markets Act.

And then 3, nothing in the rule prejudices any enactment or rule of law under which a particular kind of debt is not provable, whether on grounds of public policy or otherwise. So there is undoubtedly a class of claim which are either statutory recognised as not provable or recognised by the common law as not provable, for example currency conversion claims, at least pending the Supreme Court decision.

And then beyond that, you have various levels of equity, preferred equity and finally ordinary equity. Now, none of those, we would say, including the very bottom of the waterfall, none of them are to be equated with the debtor for the purposes of the 18th and 19th century cases saying it is really about the debtor versus its creditors. We are really talking about a whole range of investors in a corporation that have chosen to invest at different of a priority waterfall, and the delay in the administration of an estate effects all of those investors in the same way, because those entitled to distribution as shareholders at the end of the day themselves are affected by delay in the administration of the estate. They, of course, don't

get a right to interest at all, but the delay affects everyone above them equally.

It's wrong to assume, therefore, we say, that the delay in payment of dividends to creditors is really down to the fault of the debtor, as there isn't a debtor anymore. What you have is an insolvency estate, administered by an administrator or liquidator, for the benefit of creditors. The delay over payment of dividends or interest could be down to a number of factors.

For example, disputes between the creditors as to their respective rights, which is indeed the reason we are here some years after the dividends have been paid in full, still waiting for interest to be distributed. Blaming no one, there are 37, 49 whatever it is, questions the court has been asked to resolve, because one group of creditors or another takes the view that they can maximise their recovery if they can succeed in argument A, B or C. This a debate between creditors as to the rights of priority out of the estate. In no way can it be said that this is the debtor's fault that this delay is continuing.

That all reinforces the broad merits point. One is looking at equality here amongst all creditors in relation to the period between the start of the

insolvency and when they actually get paid, in terms of interest. They're all being suffering the same misfortune insofar as they have claims against the estate and therefore should be ordered in the same way for the delay -- compensated for the delay.

Now, certainly in relation to the complete code world, the right question is not, oh, this is creditors versus debtor and that's the sole answer to this. The right answer is that there is a waterfall with different levels, and at each level the only question is: as a matter of construction of the Act and the rules, what is payable at this level? The answer to that question will impact on others within that level if there's an insolvency within that waterfall, and will impact on how much is left for the next level in the waterfall below it, which could be another level of creditors. For example, what we are talking about here is rights to interest, statutory interest. Any increase in the amounts payable by way of statutory interest will impact on the next level in the waterfall being non-provable claims, in whatever order those are to be paid, which is so far unclear.

So it's far too simplistic to say a construction of rule 2.88(7), which diminishes the rights of creditors otherwise than what they would have achieved outside of

administration, is merely improving the lot of the debtor. It's not.

I don't think we need turn it up, but my Lord --

LORD JUSTICE BRIGGS: How far does that go? On any view, and I think you accept there are different ways of looking at 2.88, will swell or reduce the size of any surplus after payment of all statutory interest, if there is any. It may mean that there's a shortage of statutory interest or it may mean that the surplus after payment for the next people down the waterfall is greater or lesser.

Now, Mr Dicker said, well, at the bottom you have the wicked shareholders, but in terms of -- we are not really talking about wickedness, but if a particular group are lower down the waterfall for some good reason than creditors with the right to interest, there is a point that if one particular interpretation gives creditors the right to interest less than their, quotes, theoretical full entitlement, it's the people down the waterfall who benefit. Whether those people are deferred creditors or non-provable claimants or shareholders in their various own internal waterfall positions, does that really make such difference to the argument?

MR ZACAROLI: It makes a difference to argument put against

us that this is really all about creditors first, members last. It is put in that broad way many times. I'm really responding to that broad merits point. And it does make a complete difference to that because one isn't talking about creditors first, members last, because we are not just talking about members being impacted by any decision at any level of the waterfall.

LORD JUSTICE PATTEN: It is where it comes into the order of priority that matters. If it comes in after statutory interest as an non-provable claim, it only impacts on the members.

MR ZACAROLI: Oh, I see, the extra-contractual rights which may not be -- yes.

LORD JUSTICE PATTEN: The problem about it adversely affecting other creditors proved in the liquidation -- I mean, of course it always ultimately depends on how much money there is, but assuming that there's quite a lot of money but perhaps not quite enough money to pay everybody, it may be quite important on what -- I mean, it would obviously preserve the rights of people in your clients' position more if -- for the excepts, if I can call it that, the (inaudible), they come in after statutory interest because that then impacts on the members, but it wouldn't impact on the other creditors, would it?

MR ZACAROLI: Well, it would. Obviously it always depends on how much there is.
LORD JUSTICE PATTEN: Of course.
MR ZACAROLI: If there is enough to pay everybody, by that I mean all non-provable claims as well, then the only person it impacts on will be then the subdebt or the shareholders, my clients. But my Lord's making an assumption that just because there's enough to pay all statutory interest it therefore falls into non-provable pot and, if it comes in there, it impacts only on the members. Well, no, it depends on what other non-provable claims there are and how much there is available to pay them. So, for example, you may end up with a competition between those claiming currency conversion claims and those claiming interest shortfall claims.
LORD JUSTICE PATTEN: Of course.
MR ZACAROLI: So it never is, except in the rare case where there is enough to pay absolutely any claim of any possible sort, both provable or non-provable, plus interest in full, that the members ever will see anything. It may be this is that case, but it's a very rare case. One can't adjudicate upon the construction of the rule by reference to the facts of this case, obviously, because this applies across the board,

including in relation to bankruptcy in liquidation.
On the broad fairness point, it is worth pointing out that it isn't just a question of people with no contractual rights claiming a right to Bower v Marris through the statutory process and therefore getting uplift to 8 per cent that they wouldn't otherwise have.
It is worth remembering -- this is straying from facts of this case a little but it's an example of something which may well occur more broadly -- interest rates have been historically low since 2008, 0.5 per cent, around there, since soon after that. But a creditor with a LIBOR-related rate of interest would have something like that but still way below the judgment. What they are contending for is a right to uplift their contractual rate to the 8 per cent, and apply Bower v Marris on that. They are trying to apply a contractual right which would have applied only to their lower rate of interest, the right of appropriation, to actually -- well, no, now we have 8 per cent, we want to apply the Bower v Marris principle to that, which gives us an astonishingly higher rate of interest, or higher sum by way of interest, than we would ever have got outside this insolvency process. And then you have foreign creditors, or creditors in a foreign currency, in

a similar place, where they have a low rate of contractual interest, but what they will be getting out of this result is an uplift to 8 per cent, calculated by applying all dividends towards interest at 8 per cent first, in circumstances where in no case would they ever have achieved that because, as a foreign currency creditor, even if they got a judgment, it would have been at a commercial rate of interest, not the Judgments Act rate.
We have authority for that if it's not a proposition that my Lords are well aware of, but I'm sure they are. But a foreign currency claim does not get Judgment Act rates as a right, they get a commercial rate relevant to currency in which your debt was owed.
So there are ways in which the result contended for by the SCG and York results in astonishingly great uplift in the amount of interest they would get, greater than they could ever have got outside of insolvency process. And you might say, well, every case of insolvency involves swings and roundabouts or benefits and burdens, some people do better, some people do worse, but it goes back to my fundamental point that Parliament has decided with rule 2.88 to implement a code for the purposes of compensating everyone kept out of their money after the date of the commencement of the

insolvency on a uniform pari passu basis.
Remembering, of course, that --
LORD JUSTICE BRIGGS: Just remind me, Mr Zacaroli, could a judgment creditor, a foreign currency claimant judgment creditor, nonetheless elect to take a sterling judgment and then the judgment rate?
MR ZACAROLI: Can I come back to you on that?
LORD JUSTICE BRIGGS: Yes.
MR ZACAROLI: Of course they would not have wanted to because, if they had done so, they would have scuppered their chances of a currency conversion.
LORD JUSTICE BRIGGS: They might want to take a bet.
MR ZACAROLI: I was just going to make the point that it's important to remember that, so far as bankruptcy is concerned, the one-size-fits-all approach had been implemented as long ago as 1883 without any nuance allowing creditors with a contractual rate to a higher rate if they had one.
And the final point on merits is this: leaving aside the foreign currency creditor who could never get a judgment with 8 per cent rate of interest, leaving aside those, it is an important part of the background that a creditor who would have been entitled to a County Court judgment would never have been entitled under the judgment to appropriate payments towards interest first.

My learned friend accepts this but dismisses it as, oh, it's a small corner and we needn't worry about it. These are rules intended to apply across all insolvency proceedings in a uniform way, the same way. In relation to the vast majority of bankruptcies, and I suspect many liquidations, which don't trouble this court very often, we are talking about relatively low sums of money and relatively low amount claims, where the claims would otherwise be County Court claims County Court judgments. In that whole arena, creditors would not, apart from the bankruptcy or insolvency, have been entitled to appropriate interest in a Bower v Marris way because by statute they are prevented from doing so, they can only appropriate towards principle first.

So broad statement, well, we should do this because if they have judgments, they could always apply the Bower v Marris principle, not so, and not so in relation to the vast proportion of claims that we would be concerned with across the whole range of insolvencies.

So coming back to the terms of the rule, 2.88(7), in summary, we say it's a direction to the officeholder to pay from surplus interest on defined sum at a defined rate for a defined period. It's a new rule imposed in 1986. It's the first time you see a rule in that form. It bears a strong resemblance to the bankruptcy rule

that applied before, with a nuance relating to a creditor's right of interest under a contract, if higher. It affects substantive changes to the creditor's rights and the companies' obligations collectively, and contains all the ingredients necessary to calculate how much interest is due to every creditor.

Picking up on my Lord, Lord Justice Patten's question of yesterday about, isn't this just really a question of construction and how do the terms of the rule not allow for the Bower v Marris way of calculating? Just to give a very simple example. Let's say you have a proved debt of £100 that's outstanding for five years. It would now be due interest of £40 at 8 per cent for five years. The proved debt is then paid in full. After a further two years there comes enough money to pay £20 towards the interest that's accrued due. On the SCG's case, that £100 would be treated as discharging the £40 of interest and only £60 of principal, leaving a further £40 of principal unpaid. So over the ensuing two years you have an 8 per cent right accruing on that. That's a further £6 of interest accruing after the date of final dividend. So the £20 that's now available goes as to £6.40 to pay interest accruing, and the rest of it goes to discharge the remaining principal still said to be outstanding.

Now, that, we say, contradicts the operations of the rule in two important ways. First of all, it involves the surplus being used to discharge an element of principal. Now, if it's said against us that's just a notional matter, it's a question calculation, the second point is far more substantive. It requires interest to be paid, it requires the surplus to be used to pay interest for a period long after the proved debt has ceased to be outstanding. That is completely contrary to the requirement in 2.88(7) that it's payable for the period the debts have been outstanding, periods the debts have been outstanding, since the date of administration, implementing the Cork Committee's recommendation, put in terms of interest should be payable for the period until declaration of the final dividend, mirrors that, we say accurately mirrors that.

As I think I said at the beginning, this begins and ends the short point of construction, and Bower v Marris is rather a red herring in all of this. But insofar as the question of Bower v Marris needs to be addressed, we say that the important point is this does not operate by remission to creditors of any rights they had outside the bankruptcy. No part of the operation of the rule to do that, which is an essential prerequisite of operation of that principle. And it's not an abrogation or repeal

or removal or getting rid of Bower v Marris. It is simply that Bower v Marris is an aspect of a creditor's rights outside of insolvency to appropriate payments when two debts are accruing to it, which has no function here because those essential prerequisites for its operation just don't apply anymore because they didn't in bankruptcy for the hundred years before anyway.

My Lords, my Lady, those are my submissions on the issue 2, Bower v Marris.

I was going to turn very briefly, although perhaps, given I have to deal with an example, slightly longer, with the question of compounding. We accept that compound interest as a rate is payable within the rule, but we say the judge was again right -- for my Lady's note, it's declaration 8, issue 3.

LADY JUSTICE GLOSTER: Thank you.

MR ZACAROLI: Yes, number 3 on the current list.

LORD JUSTICE BRIGGS: What issue number is it?

LADY JUSTICE GLOSTER: So it's issue 2A?

MR ZACAROLI: I'm sorry, it is issue 3, I got that wrong. It's number 2 on the current list.

LORD JUSTICE BRIGGS: Yes, genuine issue 3, item 2.

MR ZACAROLI: I will deal with this shortly because we say it is very much covered by my submissions to date on the construction of rule 2.88(7), in particular because the

effect of compounding after the date of the final dividend has been paid, or any dividend has been paid in relation to that part, would be to require interest to be paid for a period after the proved debts have ceased to be outstanding.
LORD JUSTICE PATTEN: It's the same point.
MR ZACAROLI: It's the same point, yes, that's why I deal with it shortly in that sense.
LORD JUSTICE PATTEN: Yes.
MR ZACAROLI: The points I made as to slightly broader merits about why it would contradict the simplicity that's meant to be incorporated by the new rules equally apply here because you have compound and continuing, you have readjustment of various creditors, proportionate share to interest during the period you are supposed to be distributing interest, which creates problems. They also apply here. Principal argument of construction is that it would be offend the rule because it would require interest to be in fact paid relative to a period which the rule does not allow interest to be paid for.
LADY JUSTICE GLOSTER: Could I ask you something, and it may be in the evidence, in which case I haven't picked up on it. Under sub-rule 8, all interest payable ranks equally, that's the position, is it, notwithstanding the terms of any contractual subordination agreement?

MR ZACAROLI: No, it's always possible to contract out of.
LADY JUSTICE GLOSTER: It is possible to contract out.
MR ZACAROLI: That's correct. That's probably dealing with preferential liabilities primarily. It may be dealing with subordinated liabilities that haven't covered this point, but it depends on the terms of the contract --
LADY JUSTICE GLOSTER: And the terms of the contract of the subordinated debt here has or has not contracted out?
MR ZACAROLI: That's a question the Supreme Court is considering.
LADY JUSTICE GLOSTER: Is it?
MR ZACAROLI: The extent of the subordination is being considered generally in the Supreme Court. I'm not involved in those proceedings. We can find out precisely what the question is there if my Lady is interested.
LADY JUSTICE GLOSTER: So I should go and read Waterfall I in relation to that?
MR ZACAROLI: I can provide my Lady with the answer after the short adjournment.
LADY JUSTICE GLOSTER: Okay.
MR ZACAROLI: The one point of detail I need to deal with is the worked examples that were handed up yesterday. And in particular, I need to deal with the contention that our case is absurd because all you need to defeat the

result we say should apply is leave a pound outstanding for as long as you want to keep interest compounding until the pound is paid.
LADY JUSTICE GLOSTER: If you are going to give us different arithmetic, I'd rather have it on paper.
MR ZACAROLI: I will have it -- in fact, let's hand up that now. (Handed)
My Lords had two hand-ups yesterday, hand-ups in two parts, the first dealing with issue 2. I'll be corrected from behind if I'm wrong --
LORD JUSTICE PATTEN: Is it the third sheet -- have I got this wrong? No, that's compound.
LADY JUSTICE GLOSTER: Yours goes to issue 3 on the --
MR ZACAROLI: It does, yes.
LORD JUSTICE PATTEN: The last page.
MR ZACAROLI: It is the last page, but I'll come to the point in a moment. We don't -- let me deal straight with it. We disagree with the reasoning that lies behind the third and fourth examples on the issue 3 pages. So let me deal with those head-on. Our example deals with the fourth example, so it corresponds to that.
The way we say it works, and this picks up importantly on the word "periods" plural in rule 2.88(7), is that interest is payable for the

periods a debt is outstanding, which means in respect of each part of that debt for the period it was outstanding until it was paid by an interim dividend. So looking at our example, the debt's £100, it's paid in three tranches, £50, £49 and the £1 is left outstanding, so that totals £100. As to that £50 was outstanding for two years, because it was paid by an interim dividend of £50 after two years. Compound interest on that sum over the two years equals £10.50, which is number on right-hand side of diagram. 10 per cent -- I should say these adopt the same rates of interest as in their example.
What you do after that is, well, interest ceases to compound on the part that's been paid when it's paid. So you park £10.50. That's interest that will be due on that sum if and when a surplus arises. The £49 is then paid after four years. The £49 is compounded at 10 per cent for the entire period of time it's outstanding -- that's four years -- at the end of which that results in the sum of £22.74. That's parked.
The £1 has been outstanding for the entire period of six years, and as to £1, interest is compounded at 10 per cent over the period, resulting in the £0.77. The total is £34.01.
Now, that differs from the way it's put in the

fourth example, in that in the fourth example what continues to compound after the end of year 2 is the entirety of the interest that has so far compounded on the £50 that's now been paid.
LADY JUSTICE GLOSTER: You are comparing yours with their fourth example.
MR ZACAROLI: Yes.
LADY JUSTICE GLOSTER: So you are saying they have their calculations wrong.
MR ZACAROLI: The numbers are correct on the way they have done it. We say that the flaw -- and the difference between us is this: we say paying interest for the periods those debts are outstanding requires you to look at each slug of the principal that is paid separately and work out what interest is due on that period from the time it was outstanding.
Now, just to contrast that with a perhaps absurd example of an attempt to gain the system. So after two years let's say -- if after two years the whole £100 had been paid, then you would have your --
LORD JUSTICE BRIGGS: You mean a single dividend at the end of two years of the whole year?
MR ZACAROLI: Single dividend is paid in one go, you have compound interest in this example of £21 for those two years on the £100. Let's assume that rather than

paying £100, £99 was paid and left £1 outstanding for the remainder of the period. If you were to bring into account the £21 that's continuing to compound after the date you paid £99, you would then be applying a rate of interest on the remaining £1 for the remaining period at an extortionately high amount.
The only economic difference between the first example and the second is £1. Otherwise the debt is no longer outstanding as to 99 per cent of it. And that's why we say the logic of this works, that in that example of £99 being paid, after two years, and £1 being left outstanding thereafter, interest will continue to accrue on a compounding basis in relation to the £1 that's outstanding, including the two years which is outstanding until the £99 was paid. So this way picks up perfectly the notion of interest compounding during the period for which interest is payable.
LADY JUSTICE GLOSTER: Yes.
MR ZACAROLI: So that's our response to the fourth example.
We haven't produced an example to contradict the third example, but exactly the same error, we say, exists in that example, although it's not done without the pound outstanding. So we don't agree with the -- if my Lords want us to produce an example that contradicts expressly the third, we can.

LADY JUSTICE GLOSTER: No, you don't agree with the third for the similar reasons --
MR ZACAROLI: That's right. So that's our response to the contention --
LORD JUSTICE BRIGGS: Does the same criticism affect their second example?
MR ZACAROLI: I think their second example is on the assumption they are right, I think.
LORD JUSTICE BRIGGS: Yes.
MR ZACAROLI: So we disagree with it for the reasons fundamentally --
LADY JUSTICE GLOSTER: The arithmetic --
MR ZACAROLI: We don't take issue with the arithmetic.
LADY JUSTICE GLOSTER: Yes, and obviously on 1 as well.
MR ZACAROLI: Yes, we accept the arithmetic but we have a different approach.
LADY JUSTICE GLOSTER: You don't accept the principle.
MR ZACAROLI: That's right.
LADY JUSTICE GLOSTER: Thank you.
MR ZACAROLI: Turning then to the question of non-provable claim for interest.
LORD JUSTICE PATTEN: Where are we in terms of the -- is this -- this is another issue now?
MR ZACAROLI: Yes, this is now a combination of two issues actually. I'll actually pick up some more in a moment.

LADY JUSTICE GLOSTER: Can you give us the item number first of all?
MR ZACAROLI: Yes. So the item number first of all is number 4.
LADY JUSTICE GLOSTER: That's the left-hand column.
MR ZACAROLI: The left-hand column, item 4, which is essentially interest -- compensating for the late payment of interest.
LADY JUSTICE GLOSTER: Yes. This is declaration 4.
MR ZACAROLI: It is, yes. And then the second --
LADY JUSTICE GLOSTER: What was issue 2A?
MR ZACAROLI: These are all within issue 2A, it was a broad issue. And the second point I have to deal with is the non-provable claim to a shortfall, which is item number 3, declaration 5.
LADY JUSTICE GLOSTER: I'm going to ask you at the end of this hearing for your issues list to be updated with references in the transcripts, please, because that would be extremely helpful to me. So there would be another column.
MR ZACAROLI: I'm going to deal first with the question of interest because you've been paid interest late. So interest on interest. The judge dealt with this at paragraphs 165 to 167 of the judgment. The essential claim is identified at 165, fourth sentence:

"The SCG and York submit that creditors are entitled to compensation in respect of the loss caused by the time taken to distribute the surplus."

That's the surplus in respect to interest. And there are two fundamental obstacles to this. The judge identifies them in the next two paragraphs. Paragraph 166 he says:

"First obstacle is that whilst statutory interest ...(Reading to the words)... the rule does not stipulate the time at which such payment is to be made."

In other words, there's no foundation for a claim that the payment has been made late because there's no obligation to pay it by any particular time. In the absence of that obligation, it's impossible to identify a cause of action which would entitle you to claim for the loss you say you suffered by interest not being paid at any particular date. We say the judge is right for the reasons there given. It's hard to improve on that paragraph.

The second point, obstacle, in 167 is that the legislation makes no provision for the payment of interest on statutory interest. That is obviously true. Rule 2.88(7) is concerned solely with paying interest on proved debts. Had it been in the mind of the legislator to provide a third round of proofs in relation to late

payment of interest, it would have been the simplest thing to state in the Act. The absence of it in the Act, the absence of it in the Cork Report or the White Paper suggest it was clearly no part of the legislative intention to create a further claim for interest upon interest. Generally speaking, that would be an odd conclusion, particularly if one's comparing the rates under the Judgment Act because Judgment Act interest is simple only. That is regarded as being enough.

A very short reference, perhaps we needn't turn it up, but Novoship v Mikhaylyuk, paragraphs 140 to 141, is where Lord Justice Longmore refers to the concept of interest under the Judgment Act being regarded as enough is enough. You don't get any more than that. It's simple, not compound.

In their skeleton argument, the SCG place reliance on the case of Sempra Metals. We say that's irrelevant. I don't think this point was pursued orally; if it was, it was very shortly pursued. Essentially, whilst it's possible to claim interest as damages for the late payment under Sempra Metals as a head of loss, the essential prerequisite is a cause of action, the payment by a particular time, and without that fundamental prerequisite, you don't get such a claim off the ground. So it's just irrelevant to refer to Sempra Metals.

There is no cause of action because there is no date by which interest is to be paid. It would give rise to a whole host of questions and complications if there were, because it's payable out of a surplus. Does that mean only when it is surplus cash, or when there is surplus in asset which is yet to be realised? You obviously can't pay interest out of that until you have realised it. At what point does this date arise? There is no date, there is just an identification of a payment out of a surplus.

LORD JUSTICE PATTEN: The judge's treatment of this is all on the premise which he's dealt with already that it's a complete code. So he's shut out any question of remission to contractual rights because obviously if he hadn't then presumably delays in payment -- the clock would still be ticking, wouldn't it?

MR ZACAROLI: I think as my learned friend Mr Dicker accepted yesterday, in relation to -- if it's not a complete code, and so contractual rights remain, and you have a right under contract to apply money towards interest before principal, then there's no need for this claim because you are always compensated.

LORD JUSTICE PATTEN: No, if Bower v Marris applies, I think he accepts that this doesn't.

MR ZACAROLI: That's what I'm saying, yes.

LORD JUSTICE PATTEN: But if Bower v Marris doesn't apply but it's not a complete code, then you would be able to get the money on the basis that time was still running, wouldn't you.

MR ZACAROLI: There are two classes of creditor, one with a contractual right to which --

LORD JUSTICE PATTEN: I'm assuming now you have a contractual right to interest, or contractual or other right to interest.

MR ZACAROLI: Yes.

LORD JUSTICE PATTEN: I'm just trying to make sure I've understood the context in which this point is a possibility.

MR ZACAROLI: I think there are two particular circumstances in which it remains a possibility. First of all, there is a complete code, in which case this argument would be necessary.

LORD JUSTICE PATTEN: Well then you would to, as you were about to say to us, you would have to identify a separate cause of action.

MR ZACAROLI: Yes, correct.

LORD JUSTICE PATTEN: Yes.

MR ZACAROLI: It arises then.

LORD JUSTICE PATTEN: Yes.

MR ZACAROLI: It also arises if it's not a complete code,

I think I'm right in saying this, in relation to a creditor who has no interest bearing debt. Because their only right is to -- on any view is to payment of statute.
LORD JUSTICE PATTEN: But then because they don't have a contractual or other pre-existing right they also have to identify a cause of action, haven't they?
MR ZACAROLI: Yes, indeed. That's why this point arises in both contexts. They have to identify cause of action in both contexts.
LORD JUSTICE PATTEN: Yes.
LORD JUSTICE BRIGGS: But the two declarations -- we are really looking at a grey area between declarations 4 and 5, aren't we? Declaration 4 is all about whether you have a specific claim for delay in payment of statutory interest.
MR ZACAROLI: Yes.
LORD JUSTICE BRIGGS: Declaration 5 is all about whether if you get less statutory interest than you would if you've been reverted to your contractual rights you have a non-provable claim for the difference.
MR ZACAROLI: Yes. But I think we are therefore dealing with only the first of those for the moment.
LORD JUSTICE BRIGGS: Yes.
MR ZACAROLI: We say the judge was right for the reasons he

gave, I have amplified a little, but we say actually there's not much to add. But his reasoning is perfectly cogent and is the right answer.
LADY JUSTICE GLOSTER: Yes.
MR ZACAROLI: Turning then to the slightly larger topic of declaration 5, that is where there is a non-provable claim to interest. There are two other declarations which go hand-in-hand with this. Because on the judge's reading the complete code argument prevented both of these claims arising, and they are declarations 18 and 19 on the list, that's numbers -- I believe it's 9 and 10.
LADY JUSTICE GLOSTER: So it's items 9 and 10.
MR ZACAROLI: Items 9 and 10.
LADY JUSTICE GLOSTER: Sorry, declarations.
MR ZACAROLI: They are declarations 17 and 19.
LORD JUSTICE PATTEN: Why couldn't we have had the issues and the items lined up? I mean, all this supplementary issue 3 and so on.
LADY JUSTICE GLOSTER: Byzantine, isn't it?
MR ZACAROLI: It is.
LADY JUSTICE GLOSTER: You would have thought that between you you could have come up with some simplified formulation with appropriate references in the judgment, but there we go.

MR ZACAROLI: On behalf of all of us I think we apologise that we haven't.
LADY JUSTICE GLOSTER: Not sure I will accept it. Anyway, we are where we are.
LORD JUSTICE PATTEN: So we are now on items 9 and 10, issues 29 and 30.
MR ZACAROLI: Yes. I mentioned those because those are important to consider in this context. I don't think my learned friend dealt with those separately as such, and again if he did it was very swift. Those are the issues which say there isn't a currency conversion claim where the interest you get, once converted into sterling at the date of payment, is less than your contractual right to interest under your foreign currency denominated contract. That's issues 18 and 19, put in two different ways depending on whether it's statutory interest or contractual rates you're entitled to -- Judgments Act rate or contractual rate. The reason they go hand-in-hand with this is the judge's conclusion that there is a complete code ruled out in itself the possibly of there being a currency conversion claim in relation to interest accruing post-administration, because you don't have a contractual right to it against which it could be compared. Currency conversion claim is all about comparing your contractual right to

dollars -- with the dollars you get out of the scheme. And if there's a complete code, his reasoning was it means that there can't be a claim -- remaining contractual entitlement to interest in dollars or in sterling, or whatever, because it's gone as a result of the complete code. And therefore the possibility of a currency conversion claim in relation to your receipts in dollars by way of interest is simply cut off.
So if he's wrong about the complete code, we say it would follow that those conclusions also have to be reversed.
LORD JUSTICE PATTEN: I'm sorry, I'm being very slow. I mean, a currency conversion claim is an unprovable claim.
MR ZACAROLI: Yes.
LORD JUSTICE PATTEN: So why does the fact that rule 2.88 is a complete code, which is primarily directed to provable claims, it's interest on provable claims, cut out a claim for interest on an unprovable claim?
MR ZACAROLI: That goes to the heart of many of the issues about off-set --
LORD JUSTICE BRIGGS: That bring on board off-set.
MR ZACAROLI: Because it's the same debt. You only have one debt. I'm entitled to be paid $100. I will be coming to this and going to the detail later, but fundamentally

there's one debt on which it's converted and then you get interest.
LORD JUSTICE PATTEN: I understand that.
MR ZACAROLI: The judge says well if there is a complete code it rules out any right to interest beyond the date of administration. So you can't argue about the difference between the interest you would have received by contract and the issue you get out of the estate.
LORD JUSTICE PATTEN: But you can have a non-provable claim for the loss you suffered.
MR ZACAROLI: It's not loss. It's not a loss.
LORD JUSTICE PATTEN: No, you can have a currency conversion claim, which is a non-provable claim, for the loss you suffered by reason of the conversion of the --
LADY JUSTICE GLOSTER: Which is a damages claim, isn't it?
MR ZACAROLI: My Lady no, it's not.
LADY JUSTICE GLOSTER: It's a debt claim, is it?
MR ZACAROLI: It's a debt claim, that's the way it's been analysed by the Court of Appeal in Waterfall I. It is simply you are remitted to the right to come back for the rest of the debt in dollars that you didn't get through the statutory process.
LORD JUSTICE PATTEN: Because you are worse off than you would have been had there been no liquidation process. But that one gets through because that's not affected on

the judge's reasoning by anything that 2.88 is doing.
MR ZACAROLI: Yes. There's a great number of moving parts here.
LORD JUSTICE PATTEN: Yes, there are.
LADY JUSTICE GLOSTER: Particularly while we are waiting for the Supreme Court judgment.
MR ZACAROLI: Indeed. I'm afraid this is an area which is very much impacted by what the Supreme Court say about whether they exist, and if they do, how.
LORD JUSTICE PATTEN: How they work. I mean, it's worse than that, isn't it? Because you have to argue this appeal on the basis that Waterfall 1 in this court is rightly decided.
MR ZACAROLI: Yes. I accept that, yes.
LORD JUSTICE PATTEN: So we're not able to entertain arguments that proceed on any different premise.
MR ZACAROLI: I'm not doing that.
LORD JUSTICE PATTEN: I'm not saying you are. The trouble is that once one gets into this, I mean it's very tempting -- but you are going to tell me we have to resist it -- to actually look at the matter much more broadly. We have to wait to see what the Supreme Court says about it.
MR ZACAROLI: Well.
LORD JUSTICE PATTEN: Which could make all this a complete

waste of time.
MR ZACAROLI: It could. The moving parts I was referring to were moving parts within the appeal.
LORD JUSTICE BRIGGS: Speaking for-myself I think it would be certainly be easier for me to look, as it were, distinctly at declaration 5, which is where I thought we'd got to --
MR ZACAROLI: Yes.
LORD JUSTICE BRIGGS: -- without getting too distracted by declarations, whatever they are, 18 and 19.
MR ZACAROLI: Certainly I'm happy to do that.
LORD JUSTICE BRIGGS: Forget about foreign currency claims, assume it's a purely UK problem with a sterling contract debt which carried a rate of interest which, had there not been an insolvency process, would have got you more by the end of the day than you get under statutory interest under 2.88. That's a relatively, even for me, comprehensible question.
MR ZACAROLI: Indeed I was going to do that. It's important to note that this --
LORD JUSTICE BRIGGS: There's some nasties lurking behind the arrows but let's go and deal with them once we've got rid of vanilla one.
MR ZACAROLI: That's where I am going next. Would that be a convenient moment?

LADY JUSTICE GLOSTER: Yes, it would. Can you just give me an example of the sort of contractual provision that you have in mind in relation to declaration 5. Just a real life one rather than as is described here.
MR ZACAROLI: A contractual provision which entitles you to --
LADY JUSTICE GLOSTER: More than --
MR ZACAROLI: Yes, say a 10 per cent right --
LADY JUSTICE GLOSTER: It's as simple as that.
MR ZACAROLI: Yes. But in particular, it's the -- in fact what we are concerned with here is whatever wouldn't have been picked up by rule 2.88, 10 per cent would have been. So what we are really concerned with here is the right to appropriate payments to interest first rather than principal.
LORD JUSTICE BRIGGS: And to go on accruing interest after the final payment of principal by way of dividend.
MR ZACAROLI: Or, as I am being reminded, repeatedly compounding it.
LADY JUSTICE GLOSTER: Yes. Thank you very much, 2.00.
(1.00 pm)
(The short adjournment)
(2.00 pm)
LADY JUSTICE GLOSTER: Mr Zacaroli, before you go any further, the court would just like to be clear about the

waterfall and how it flows down. Is it agreed that as at present in the light of Waterfall I, the decision of this court in Waterfall I, that the priority flows down as follows after a fixed charge, prefs(?), expenses, et cetera, and floating charge creditors, unsecured provable debts, statutory interest, non-provable liabilities, subordinated debt, interest on subordinated debt shareholders, or in the light of the majority in Waterfall I are you saying it flows down differently? Should I repeat that?

MR ZACAROLI: I have it, my Lady.

LADY JUSTICE GLOSTER: We just want to be clear that we're all agreed or understood as to what both parties agree is the right --

MR ZACAROLI: I believe that is the right order.

LORD JUSTICE PATTEN: Because I think I put to you a point before the adjournment on what might be a false assumption. I have looked at part of the judgment. It's all a question of where you rank in relation to an non-provable liabilities. Because a point we're on makes no difference to you unless you are after them. You are sandwiched between them and members, isn't that right?

MR ZACAROLI: It depends on other issues.

LORD JUSTICE PATTEN: It may do.

MR ZACAROLI: I can't give a straight answer to that in terms of where our interest lies, but that rather complicates it, but --

LORD JUSTICE PATTEN: We are looking at in more simple terms at the moment.

MR ZACAROLI: Simple terms, yes.

LORD JUSTICE PATTEN: As to how much comes out at each stage.

LADY JUSTICE GLOSTER: And that's agreed. So subordinated debt, well, I have it here as 8, then interest on subordinated debt at 9, and members at 10.

MR ZACAROLI: Yes.

LADY JUSTICE GLOSTER: So there's no argument that, for example, subordinated debt, statutory interest, would be pari passu with 6, statutory interest.

MR ZACAROLI: Not as the current Court of Appeal decision stands.

LADY JUSTICE GLOSTER: Yes.

MR ZACAROLI: That is an issue dealt with -- it's one of the questions my Lady asked me to look at -- at paragraphs 58 and 59 of the Court of Appeal judgment. That is an issue --

LADY JUSTICE GLOSTER: In Waterfall I.

MR ZACAROLI: Waterfall I. That is an issue which is live in front of the Supreme Court.

LORD JUSTICE PATTEN: I see, right.

MR ZACAROLI: But also, my Lord, in a sense, where the interest of my client might lie is one thing, but of course there might well be other cases where a subordinated claim is not subordinated to interest but just to provable debt.

LORD JUSTICE PATTEN: Well, it depends what the terms are, obviously.

MR ZACAROLI: It does indeed.

LORD JUSTICE BRIGGS: But a subordinated debt could be provable and carry statutory interest.

MR ZACAROLI: Yes.

LORD JUSTICE PATTEN: But I assume you'd come here because your clients had some material interest in the outcome.

MR ZACAROLI: Yes.

LORD JUSTICE PATTEN: Rather than just arguing points of general public interest.

MR ZACAROLI: Indeed, my Lord.

LADY JUSTICE GLOSTER: Yes. I mean, that makes the assumption that subordinated debt is subordinated to everything else, doesn't it?

MR ZACAROLI: Yes, the current Court of Appeal decision is that it's subordinated, I think, to everything.

LORD JUSTICE BRIGGS: It's a fact sensitive decision on the basis upon which that debt was incurred.

MR ZACAROLI: On that piece of debt, on that particular contract.

LADY JUSTICE GLOSTER: Yes. I suppose it might vary if there was no contractual provision subordinating it to non-provable liability.

MR ZACAROLI: Yes.

LADY JUSTICE GLOSTER: Or not subordinating it to, I don't know, statutory interest where there's apparently in the rules a pari passu provision.

MR ZACAROLI: Yes.

LADY JUSTICE GLOSTER: So it does depend on the Court of Appeal's decision and the terms of the particular contract.

MR ZACAROLI: Yes.

LADY JUSTICE GLOSTER: Right. But here, so long as it stands at any rate, your particular claim, Wentworth's claim, is governed by the Court of Appeal's decision.

MR ZACAROLI: That is correct.

LADY JUSTICE GLOSTER: Thank you.

MR ZACAROLI: My Lord, there is another question I was asked to check which was question of whether Mackenzie v Rees was referred to in the judgment. It is not referred to in the judgment by name. The judge refers to Australian cases to which he was referred. It was one of them and he was referred to it, but he doesn't make reference to

it in the judgment.
LADY JUSTICE GLOSTER: Thank you.
MR ZACAROLI: I have my Lord, Lord Justice Briggs's question in mind. I don't have a definite answer yet. Can I postpone that a little longer?
Turning then to the question of non-provable claims to interest. The judge dealt with this at paragraphs 156 to 164 of his judgment. The arguments made to him were essentially those made to this court by the SCG, which the judge rejected and we respectfully suggest the judge got the right answer for the reasons he there gave. In particular, paragraph 164 is the essence of it. On the fifth line, he says:
"Rule 2.88 is not a partial measure for dealing with post-insolvency interest. If it was only a partial measure, why provide that interest is payable at the rate applicable apart from the administration ...(Reading to the words)... Payment of further post-insolvency interest as a non-provable debt out of the surplus remaining."
We submit that that conclusion is supported by five propositions: first, the construction of the rule; second, the pre-legislative materials; thirdly, by reference to the regime which had been applicable in bankruptcy prior to 1986; fourth, that the substantial

changes to the rights of creditors as against the debtor introduced by those rules are inconsistent with a remission to contractual rights thereafter; and, fifthly, a reference again to points of principle and policy which I will deal with very shortly.
LORD JUSTICE BRIGGS: Sorry, what was your second one?
MR ZACAROLI: The second one was the pre-legislative materials.
LORD JUSTICE BRIGGS: Thank you.
MR ZACAROLI: So far as the first point is concerned, construction, rule 2.88(7) requires the surplus to be used or applied before being applied for any purpose towards paying interest on the debts. We say that in context, that means any other purpose, ie than paying interest on the debts. The rule is about compensating creditors for loss of the time value of money after administration. This is the way it's to be done, by paying interest, and therefore the purpose there mentioned must be any other purpose.
LADY JUSTICE GLOSTER: Is there any dispute about that? Or is there any difference between any purpose and any other purpose?
MR ZACAROLI: We say this a nuance because any other purpose, ie other than compensating creditors for the time value of money for the period after administration,

so if it is for any other purpose it supports the view that this is the only route to interest for this post-administration period.
LADY JUSTICE GLOSTER: Yes.
MR ZACAROLI: There is --
LADY JUSTICE GLOSTER: So the purpose is interest.
MR ZACAROLI: Yes, exactly.
LADY JUSTICE GLOSTER: And it can't be applied for any interest purpose.
MR ZACAROLI: That's right, because that's covered by the rule.
Textual support for that is provided by section 189 of the Act, which is the mirror image provision in relation to winding up. The oddity about this aspect is that some of these rules are in the Act, some procedures, some in the rules. The interest provision for winding up is in section 189, and it's materially the same, we suggest, as the Cork Committee proposed. There should be no difference between the different regimes, but there is an additional word in section 189(2). It says:
"Any surplus remaining after payment of proved debts in full before being applied for any other purpose ..."
We say the same word must be implied into rule 2.88.
LADY JUSTICE GLOSTER: Yes.

MR ZACAROLI: We say that's a construction which is supported by what one might impute to be the intentions of the draftsman here. The draftsman has tried to cater for the proposition that creditors are being kept out of their money, some compensation needs to be paid. We say it would be an odd intention to impute the draftsman to do that only partially through a rule which relates to that period, and that he didn't intend the creditors to come back for any more afterwards.
Secondly, the pre-legislative materials I mentioned, really this is the Cork Report. We have seen it before. The only point to make is there's nothing in the Cork Report that suggests that the new rule was supposed to be a partial solution to the issue. If it was intended for there to be a further round of proofs or interest claims, that would have been easy to state.
Third point is the pre-existing position in bankruptcy. Again, I have already dealt with the substance of this, that in the 1883 Act there is no room under the Act for any remission to contractual rights to interest between creditors being paid in interest under this Act provided, and it going back to the debtor.
Now, my Lord, Lord Justice Briggs, asked yesterday about the discharge provisions in the 1883 Act, whether there was any magic in them, relating to (inaudible).

There are two sections to look at. The first is section 30 of the 1883 Act.
LORD JUSTICE PATTEN: So this is in bundle --
MR ZACAROLI: Bundle 4, 145.
LADY JUSTICE GLOSTER: Section 30.
MR ZACAROLI: Section 30, yes. Tab 145. So there's a subsection 1 is a whole series of things that are not released by the discharge of the bankrupt. A variety of specific matters set out there. And then 2 is the important one:
"An order of discharge shall release the bankrupt from all other debts provable in the bankruptcy."
And then the definition of provable debts is to be found at section 37, 145B that is. So subsection 1 is an exclusion of unliquidated damages claim. There's a exclusion of debts that are contracted after the notice of an act of bankruptcy, and then subsection 3:
"Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order or to which he may become subject before his discharge by reason of an obligation incurred before that date, shall be deemed to be debts provable in the bankruptcy."
Now, it's a judge-made rule at this time that interest which accrues after the date of the

commencement of the bankruptcy is not provable but is deferred, and there is no section in the Act which says you can't get interest beyond the date of bankruptcy.
So we would say the short point is this: the Act does discharge the bankrupt himself, the person, the bankrupt, from a claim for further interest because it's covered by the definition of provable debts in the Act from which he is released on his discharge. So there is no room for a creditor to come against the bankrupt person after discharge. The creditor is limited to whatever rights he has against the estate, and those rights include a right to interest at 4 per cent out of any surplus, if there is one. But the bankrupt himself is discharged.
We say that makes absolute sense when you consider that, otherwise, a creditor who didn't get any interest from the estate because there never was a surplus would be able to pursue the bankrupt for interest accruing after the date of bankruptcy. If the bankrupt was not released, in his person, from any interest accruing after the date of bankruptcy, it would mean a creditor could go against the bankrupt for that interest, whether or not the estate remained insolvent, and that would be an absurd proposition.
Under the modern attitude towards bankruptcy,

utterly inconsistent with the rehabilitation approach. Maybe in 1883 that wasn't quite the same, there was a discharge but not for all things, but we say the logic remains the same.
LORD JUSTICE BRIGGS: There are all sorts of liabilities that didn't fall within 37(3) in those days.
MR ZACAROLI: Yes, for example --
LORD JUSTICE BRIGGS: -- from which he would not be discharged. Discharge from provable debts you say includes, by implication, and from any interest accruing on those debts.
MR ZACAROLI: Yes. Well, because it's a future liability arising out of an obligation (inaudible) bankruptcy within the definition of 37(3).
LORD JUSTICE BRIGGS: Although you said that it was a judge-made rule that interest wasn't provable.
MR ZACAROLI: Yes. As matter of convenience, as we saw in --
LORD JUSTICE BRIGGS: Do you mean before the Act or do you mean it was provable after the act?
MR ZACAROLI: No, no, no --
LORD JUSTICE BRIGGS: Not provable at all.
MR ZACAROLI: It's not provable as a matter of judge-made law, but that doesn't necessarily effect the definition within here of what the bankrupt is being discharged

from, when you look at 30 and 37(3) together. It would be very surprising conclusion that he is released from debt but interest accruing on that debt post-bankruptcy he is not released from. That doesn't make any sense. The first answer would be it's as a matter of construction the release extends to the interest of debt, and the second would be in 1883 it's a complete code, so the creditor's rights are altered by the provision allowing them interest for the post-bankruptcy period to the extent that takes away any other contractual right they might have had.
The fourth point is the linked one I just made about the substantial change in creditors' rights that are affected by rule 2.88 itself. First of all, sub-rule 1 precludes proof for interest, that means you can't claim against the company for interest beyond the date of bankruptcy, and in place there's a whole series of rights, some of which cut across your otherwise entitlement under contract, some of which give you much greater rights than you would have had under your contract.
Now, another point put to me yesterday by my Lady, Lady Justice Gloster, was the question about what happens in administration if, at the end of all distributions, there remains a surplus or a surplus

arises for some reason, and the creditor who had a provable claim comes out of the woodwork and says, "Well, I want to claim against this". I think the question you were asking me was, well --

LADY JUSTICE GLOSTER: But he doesn't prove, I think I put it on that hypothesis. I may not need to put it on that hypothesis, but I did.

MR ZACAROLI: Let's leave it as he comes in to make a claim against the company that is still in administration, this surplus having appeared. The answer to that is if he wants to claim at all, he must prove.

LADY JUSTICE GLOSTER: Even though all the debts had been paid and there's a surplus?

MR ZACAROLI: Yes, because there's a statutory provision, regime, that is meant to treat all creditors equally. It doesn't matter when you come in, what date you come into the scheme, provided that what you come in with is a debt that was provable, you must abide by the statutory scheme. So just take a very simple example. Let's assume we are right about Bower v Marris on rule 2.88 and this creditor had a contractual claim to interest which would, absent any insolvency, have entitled him to calculate interest on a Bower v Marris basis. So there's a slug of interest he's not getting out the regime. We would say he is treated like anybody

else who is a provable creditor, at whatever date they come in.

We say, again, it would be slightly absurd if you had any different answer, because it would just mean creditors, if they thought there was going to be a surplus --

LADY JUSTICE GLOSTER: Would hang on until the end.

MR ZACAROLI: Would sit back and wait. If you want to make a claim against the company in an insolvency process, you must -- what you are doing is proving. You can't avoid the necessary characterisation of that as a proof.

LADY JUSTICE GLOSTER: What happens at the end of an administration where the administrators have distributed? Is it always the case that the company will go into liquidation or not necessarily?

MR ZACAROLI: I need to correct something I said yesterday.

LADY JUSTICE GLOSTER: Yes, I thought you told me it always went into liquidation if it was a distributing administrator.

MR ZACAROLI: I don't know a case where that hasn't happened. It would be most unusual for the court to start construing the rules on the basis of that real outlying possibility.

LADY JUSTICE GLOSTER: But it is possible.

MR ZACAROLI: It is possible because you can just discharge

an administration order with nothing more happening.

LORD JUSTICE BRIGGS: At any stage in theory, I suppose.

MR ZACAROLI: At any stage, and there is no distinction here made between a distributing administration and a non-distributing administration. As a concept, it can be terminated through a series of statutory --

LADY JUSTICE GLOSTER: So theoretically it could go back to the company under its previous Board of Directors.

MR ZACAROLI: It could. At that stage, I don't know what the answer is. It's never arisen. That couldn't occur in any other insolvency process. The liquidation can't be brought to an end in that way.

Let's imagine a liquidation which is brought to end because the liquidator thinks he has distributed everything. He would then seek dissolution of the company. Let's say years later -- well, there would have to be limitation period, but sometime later, a creditor comes forward and says, "I think this company has an asset and I have a claim which I deliberately stayed out of the proof process for". What would happen then is the company is restored to the register, but it gets restored to the register in the form or under the proceedings that it was under at the time it was dissolved. It doesn't cease to be in liquidation. There would be no a liquidator. You would need to put

a new liquidator in place to gather in the asset and then that creditor is a proving creditor who can only get what the statutory scheme gives him.

LADY JUSTICE GLOSTER: What's the provision that says in relation to -- is it in the Companies Act or is it in the Insolvency Act, which says a member can't claim in his capacity as such before a creditor? Or is that just the general distribution provisions which you showed --

MR ZACAROLI: It's in 74(2)(f) of the Insolvency Act. I say that as if I know it off by heart -- I heard it whispered to my left. It's preventing the member competing with creditors for that claim.

LADY JUSTICE GLOSTER: And it's just that one -- any sum due.

MR ZACAROLI: Yes. It's not a right to a distribution for a member because clearly that cannot compete with creditors.

LADY JUSTICE GLOSTER: Thank you.

MR ZACAROLI: I have made my submissions on the nature of the changes to creditors' rights. I don't need to repeat those.

LADY JUSTICE GLOSTER: No.

MR ZACAROLI: And the last point I've really made before, which is the question of principle and policy, which as my Lord, Lord Justice Patten, pointed out, comes in at

two stages, and it comes in at this stage again on the question whether there is a complete code, and we say there should be, and that the reasons of principle and policy that we identified before support that conclusion.

Essentially the statute was intended to provide a simple route procedure for paying interest in relation to the post-insolvency period that treated all creditors equally because they suffered a common misfortune, and that members come last is not a good point because even at this stage the competition isn't necessarily between interest and members, it's interest and other non-provable claims or a subordinated creditor who doesn't have the provisions that we have as interpreted by the Court of Appeal.

There's an additional issue now which is best dealt with at this point and it's a point on which we are appealing, it's the first issue -- I think the first issue I've come across that we're actually appealing. That is item 7 on the list, declaration 6, whether there is a non-provable claim to interest on a currency conversion claim.

Now, remembering the judge held that there were no non-provable claims to interest, post-insolvency interest generally, but he did find at paragraphs 168 to

170 of the judgment that there was a non-provable claim on a currency conversion claim. The essence of his reason is at paragraph 169, and that is that rule 2.88 is a complete code only in relation to provable or proved debts.

LORD JUSTICE BRIGGS: That, if you like, must be read into 164, where he talks about complete code. He means in relation to provable debts.

MR ZACAROLI: Yes. We say in fact his conclusion at 164 is inconsistent with this and he can't read it in that way, but that's our argument here.

First of all he said it's a non-provable debt. We would accept that a truly non-provable debt, that is debt that has nothing to do with the proved debt itself -- so we say a currency conversion claim is merely part of the proved debt. We'll come on to that, but think of a completely different debt, a tort claim that arises subsequent to the administration. That stands completely outside the statutory scheme. That is a non-provable debt. There is no way we could argue that such a claim could not be subject to an interest claim, that stands outside the Act. It stands outside the Act wholly because it's nothing to do with the proof process.

But that is different, we say, from a currency

conversion claim. What is a currency conversion claim? Probably best summarised at paragraphs -- it's the Waterfall I Court of Appeal judgment, which we had open before. It's bundle 3, tab 101, paragraphs 136 to 137. Can I ask my Lords to read paragraphs 136 and 137.

LADY JUSTICE GLOSTER: This is in Lord Justice Briggs's judgment?

MR ZACAROLI: Yes, it is, yes.

LADY JUSTICE GLOSTER: Sorry, the second paragraph. (Pause)

MR ZACAROLI: What it is is the balance of the underlying proved debt expressed in the foreign currency. There's only one debt here. In order to prove your debt you need to convert it into sterling. But there is still only ever one debt. I'm owed $100 under my contract with the company. That is my claim. In order to make a claim in the insolvency estate, I have to submit to the conversion of that claim into sterling. But it remains one unitary claim.

We deal with this in our skeleton. It may be sensible to have that open. It is tab --

LADY JUSTICE GLOSTER: And his claim isn't -- I know I have raised this point before lunch -- for breach of contract, for failing to pay --

MR ZACAROLI: No, it's not.

LADY JUSTICE GLOSTER: Why not?

MR ZACAROLI: Because the short answer --

LADY JUSTICE GLOSTER: Apart from the fact that my Lords --

MR ZACAROLI: That's what the Court of Appeal said, yes.

LADY JUSTICE GLOSTER: Yes, I see. It's not a claim for damages for failing to pay in the right currency or to pay enough sterling the meet the --

MR ZACAROLI: We did --

LADY JUSTICE GLOSTER: You went into all that.

MR ZACAROLI: -- run an argument along those lines before the judge which failed, but we don't repeat that here.

LORD JUSTICE BRIGGS: It's a purer version to contract claim where the statutory process for pari passu distribution hasn't paid you in full.

MR ZACAROLI: Yes.

LORD JUSTICE BRIGGS: I hope I'm not redefining an earlier definition but it's shorter.

MR ZACAROLI: It's a remission to your provable -- I think I said proved then -- claim. The provable claim is the $100. To prove it, you must have it converted.

So we go to this at paragraph 8 of our skeleton. It is core bundle A, volume 1, tab 13, paragraph 8. It's really a very short point. There is one single obligation, a debt of $100. It is proved and converted thereby into sterling. Statutory interest is paid on the whole of that proved debt. Expressed in sterling,

but paid on the whole of it.

At paragraph 228 of the judgment, the judge held that:

"The only right of a creditor, whether its debt is expressed in sterling or a foreign currency, is to receive interest in accordance with rule 2.88."

Because for post-administration interest that's a complete code.

Now, we are here obviously working on the premise that he was right in respect of the complete code there. We say that in that circumstance there cannot be a claim to interest because it contradicts his conclusion that the only right to any interest accruing post-administration, irrespective of which currency your debt is denominated in, is under the statute under rule 2.88.

It's an argument from first principle. It's shortly stated. There are no cases to support it because this is an entirely new area of law, the whole concept of currency conversion claims is new, and that's it.

There are two subsidiary points that arise. The first is that if I'm wrong about this and the currency conversion claim does exist, then we say it should only run from the date of payment of the final dividend in respect of the proved debt. And the second point I'll

deal with very shortly. The declaration identifies all non-provable debts. It relates to all non-provable debts and says that if there's a claim for interest on them, it's a non-provable claim.

Now, as I said, we fully accept that that is right with respect to the sort of provable debts that we could conceive, like a tort claim, which stands outside the statutory process altogether.

The short point is this: we submitted to the judge it wasn't necessary to go that far in the declaration to encompass all non-provable claims. We don't know what other non-provable claims may subsequently be held to exist. There was no need to do it. There's no claims that have been identified in the administrations falling within this declaration other than a currency conversion claim, and therefore it was unnecessary to say that. It's a very short point. So it should be limited to currency conversion claims, which is all we are really talking about.

LORD JUSTICE BRIGGS: It is very hard to see how a post-cut-off date tort claim could, on a reversion to rights principle, attract any interest.

MR ZACAROLI: Oh, I see. Well, it depends --

LORD JUSTICE BRIGGS: Until you get a judgment.

MR ZACAROLI: Then there might be delay.

LORD JUSTICE BRIGGS: Yes. It's not like contract debt with an interest, with an interest coupon attached to it.

MR ZACAROLI: What I do need to deal with at slightly greater length is the question of the date interest runs from if there is a claim, a non-provable claim to interest on a currency conversion claim. This we deal with at paragraphs 13 to 17 of our skeleton, same tab, 13. The core point here is that until the date of a final dividend in respect of the proved debt, we say there isn't a currency conversion claim because the currency conversion claim is the shortfall, if any, between the underlying foreign currency entitlement and the foreign currency equivalent of the sum of all sterling dividends paid at the time each of them is paid.

Now, although there's no outward claim by the company against the creditor for a currency conversion claim where the creditor does better by reason of the FX rates -- that is established, there's no such right, it's a one-way bed, this -- we submit, I think no objection is taken to this, that in relation to each of the dividends that are paid during the period of paying those dividends, at the time of payment, some may give rise to excess of dollars, some may give rise to a shortfall. It's only the aggregate amount at the end

of the period that matters, because any shortfall could be made up by an excess of a later dividend.

So we say no currency conversion claim actually exists until the final dividend, because it's only once you have aggregated all the payments made that you know whether the creditor has received less by way of dollars than he is entitled to.

LADY JUSTICE GLOSTER: And at what date you ascertain once the final payment has been made in sterling.

MR ZACAROLI: Yes, the shortfall would only exist once the creditors received that sterling and converted it back into declaration.

LADY JUSTICE GLOSTER: Yes.

MR ZACAROLI: So to take a simple example, imagine that there's $100 debt at the date of administration which equals a £100. There are two dividends of £50 each. The first one gives the creditor, let's say, $60 -- £50 equals $60 at that stage. The later one equals only $30. The is a currency conversion claim, but there is no sense at all in which you can say that the creditor was out of the pocket in dollars until the date of the final dividend.

LORD JUSTICE BRIGGS: It sounds awfully like an argument that was floated by their Lordships but failed to persuade at the end of the day in (inaudible) credit

number 2, where it is suggested that you couldn't suffer a loss on a secured lending transaction until you realised the security property, because you wouldn't know whether it was going to be worth more or less than the debt. Therefore, interest couldn't run on your loss at any earlier date until you realised the security. But that, I'm afraid, didn't prevail.

MR ZACAROLI: This isn't so much that you don't know you suffered loss; it's that you hadn't suffered a loss. Because --

LORD JUSTICE BRIGGS: That's what was suggested, but I think you'll find that they repented of that view.

MR ZACAROLI: Perhaps I will have a look at that, but in the meantime we would say whatever the position may be in relation to secured transactions, in this novel world of currency conversion claims, the question is: have you suffered a shortfall? That's the only question, and you have not suffered any shortfall between your dollar entitlement and your sterling dividends at the date of the interim dividend in my example. So there's no sense in which you've been kept out of the your money at that point and therefore shouldn't be having interest. The judge's conclusion is that you get interest on your subsequently arising currency conversion claim at the date of final dividend from the date of administration.

So being compensated from the date of administration in circumstances where you have suffered no loss.

LORD JUSTICE BRIGGS: There might be a middle ground, might there not? Let's suppose that the currencies diverge in a straight line, so that on day 1 -- that's the date of the administration -- there is simply no divergence. So there's no immediate -- if you got paid on the date of the cut-off date, you wouldn't suffer any currency conversion loss because would be paid at the then prevailing conversion. And suppose that then they diverge in a straight line, and you are paid your final dividend in year 4, and you get a 50 per cent dividend in year 2. So you had been paid for half your claim in year 2, by which time sterling has fallen by, say, 20 per cent against the dollar, and then the other half, by which time it's fallen 40 per cent against the dollar. You could surely say at the interim stage, "Subject to sterling getting better again I've suffered a loss thus far".

MR ZACAROLI: I would say you potentially suffered a loss because you will not have suffered a loss until the currency conversion when you have aggregated all the different -- all the dividends. So take the reverse of my example, so that after the first dividend you are suffering a currency loss, which is wholly made good by

the date of the final dividend, although you don't have a currency conversion claim.

LORD JUSTICE BRIGGS: No, I can see that.

MR ZACAROLI: No one is suggesting you should have interest in the interim because you potentially have one at the date of the first dividend.

LADY JUSTICE GLOSTER: Anyway, you make the point, I think, in 14 and 15.

MR ZACAROLI: We have, and again, it's a short point. It doesn't bear repetition.

With that, I now turn to the question of offset. Not set-off, but offset.

LADY JUSTICE GLOSTER: Sorry, just before you do that, in relation to other non-provable claims, such as a tort claim, the date from which a tort claimant might be entitled to interest could vary depending on the particular facts of the case, couldn't it?

MR ZACAROLI: Yes. Yes, if a tort didn't arise until --

LADY JUSTICE GLOSTER: The date when it's -- in a professional negligence claim, the date on which the claimant might have recovered against the third party, for example.

MR ZACAROLI: Yes.

So turning to the question of offset. This is the part where there are, I'm afraid, some other moving

parts to consider. There are two issues which we need to consider here. The first is item 6, declaration 7, and that is whether in calculating a currency conversion claim, account should be taken of and offset should be made by statutory interest already received.

The second area is supplemental declaration 4, item number 8. That is whether there should be -- assuming that I'm wrong on the previous issue, and there is a claim to interest on a currency conversion claim, whether that claim should take account and be offset against statutory interest received.

Now, dealing with item number 6, that is the broader question, first, we are --

LADY JUSTICE GLOSTER: Item number 7 or ... You've just said you are dealing with declaration 6, item 7.

MR ZACAROLI: No, I may have got it wrong. Declaration 7.

LORD JUSTICE BRIGGS: You got the declaration number wrong. Declaration 17.

MR ZACAROLI: I'm sorry. That's right, it is, yes.

LADY JUSTICE GLOSTER: My note is -- which may well be wrong -- declaration 6, item 7.

MR ZACAROLI: What I meant to say was item 6 --

LORD JUSTICE BRIGGS: Declaration 17.

MR ZACAROLI: -- declaration 17.

LADY JUSTICE GLOSTER: So we're on item 6.

LORD JUSTICE PATTEN: Issue 10.
LADY JUSTICE GLOSTER: Okay. And we're still dealing with item 8, supplementary declaration 4, are we?
MR ZACAROLI: Yes, but I'm going to park that for a moment. I will deal first of all with the broader question of a currency conversion claim being offset against statutory interest.
LORD JUSTICE BRIGGS: Really they are terribly close, these two: one is do you offset against non-provable principal, and the other is against non-provable interest, aren't they?
MR ZACAROLI: They are.
LORD JUSTICE BRIGGS: They are not terribly far apart.
MR ZACAROLI: No. But the first one actually involves both issues as well, depending on the complete code. That's the point. In relation to the broader argument, the argument is different depending upon whether rule 2.88 is a complete code, or whether, on issue 2, rule 2.88 effectively allows all your contractual rights into the calculation of interest, in the sense -- either way we say there's a different approach to this, because the critical question is: does the statutory scheme permit you a claim based upon your contractual rights to interest post-administration, whether through 2.88 or whether by reason of a non-provable claim thereafter?

Because in those circumstances, we say the prerequisite for a currency conversion claim exists in relation to that, and it follows, we say, that there should be a broad aggregation set/offset, everything you are entitled to by way of contract is on one side of the equation, on the other side is everything you are entitled to pursuant to statute, converted back into dollars. And if at the end of the process you have fewer dollars than you are entitled to, you have a claim.
LORD JUSTICE BRIGGS: You get the difference.
MR ZACAROLI: I'm going to start dealing with that broad proposition, that the statutory scheme permits claims based upon your contractual rights post-administration. The easiest way to imagine it is through the non-provable claim, so there is no complete code.
The judge's conclusions on this are at paragraphs 228 to 230 of the judgment. We've already looked at 228, which is his conclusion that because there's a complete code, it bars any right to interest, whether under your foreign currency or in sterling, any claim to post-administration interest is precluded. So that's if there is a complete code.
He deals with the question if there isn't a complete code at 229 and 230 very shortly. In essence, he says

there isn't a single composite claim; there is one claim for the principal and a separate claim for interest, the assumption being that if you've made a loss on one, in terms of foreign currency, there isn't to be set against that a gain made from the other. That's where we say he got it wrong.
So to make our submission clear, we say that the calculation of this currency conversion claim in this world, what I'm considering here, should be to compare the totality of your contractual rights expressed in dollars with a totality of the receipts from the administration estate once converted to dollars at the date of receipt.
LADY JUSTICE GLOSTER: Well, you say that's logical because you say you calculate the currency conversion claim at the end of the day when you've received everything in sterling.
MR ZACAROLI: Yes.
LADY JUSTICE GLOSTER: That's the point.
MR ZACAROLI: That's part of the point yes. There's a little bit of development, if I may, but that's the essence of it.
LORD JUSTICE BRIGGS: I think you are saying it doesn't make any sense to look at these two in separate compartments. You just say add up everything you get under the

statute, add up everything you would have got under contract if there'd been no insolvency, and if B equals more than A, you get the difference.
MR ZACAROLI: That is right.
LADY JUSTICE GLOSTER: And you have to convert at the same time.
MR ZACAROLI: Yes. Exactly. The reason you are getting interest in sterling is only because of the conversion of the principal claim itself, the proof claim. It follows on necessarily that you get interest in sterling because your debt was converted into sterling.
LADY JUSTICE GLOSTER: To work out what you've lost, you say you have to do that at the end of the day.
MR ZACAROLI: Not only that. As has been made clear by the Court of Appeal judgment in Waterfall I, currency conversion claims are not payable until all creditors have otherwise been dealt with through proof and statutory interest. So the claim can only ever be paid if there's a surplus remaining after that process, and the reasoning for that was, in essence, that the currency conversion claim doesn't exist whilst the creditor is in competition with other creditors, because it's all part of a pari passu distribution; you can't claim the debtor for not having paid your full foreign currency amount. But once you are not in competition

with creditors, it's just you and the debtor, you are remitted to your rights in contract to get the difference. That's a very short summary of it, but that's the essence of it, we say.
LADY JUSTICE GLOSTER: But your rights under the contract, if you're remitted to them, would be the right to be paid in the foreign currency at a certain date, wouldn't they?
MR ZACAROLI: That's correct. That's why your contractual claim gives you a right to interest.
LORD JUSTICE BRIGGS: Yes, but on any given day you can produce a figure.
MR ZACAROLI: Between?
LORD JUSTICE BRIGGS: If you receive your final payment under the statutory scheme on a particular day, you can calculate what on that day you would have got under your foreign currency conversion claim. So once you get to that stage, you can do your conversion of currencies as at that date -- probably should do, because it's up to you whether you do or don't change currencies from then on in.
MR ZACAROLI: Yes.
LORD JUSTICE BRIGGS: And they have a figure, all sorted.
MR ZACAROLI: That's a figure for part of the claim. There may be --

LORD JUSTICE BRIGGS: For the difference.
MR ZACAROLI: But there may a multiple claimants. We may be at cross-purposes. Each time you get a payment, a dividend or a distribution of interest --
LORD JUSTICE BRIGGS: You said you could only do it at the end when there's been a final dividend or a --
MR ZACAROLI: No, the claim.
LORD JUSTICE BRIGGS: -- final payment of statutory interest.
MR ZACAROLI: No currency conversion is payable until after payment of all proved debts and statutory interest. That's all I was saying.
LORD JUSTICE BRIGGS: That's what I understood. So you don't look to see what the conversion rate is to calculate your currency conversion claim until, at the earliest, the date the last payment comes out under the statutory scheme above you in the waterfall.
MR ZACAROLI: Well, you don't bother to work out whether you have one perhaps until then, but the currency conversion claim is based on the conversion rate at the date of each payment you've received, not at the end of the day.
LORD JUSTICE BRIGGS: No, because you could convert that back on that date.
MR ZACAROLI: Exactly. There could be five dividends and five distributions of interest. That's ten payments

made to you. To work out whether you have a currency conversion claim, you must look at each payment separately and work out what the dollar rate was at that date.
LADY JUSTICE GLOSTER: Because you are deemed to have converted at that date. Thereafter, the risk is yours.
MR ZACAROLI: That's right, yes. That, I think, is how it's put in the Court of Appeal, it's a -- yes.
LADY JUSTICE GLOSTER: But the obligation to pay would have been on the due payment date under the contract.
MR ZACAROLI: Yes.
LADY JUSTICE GLOSTER: To pay in the foreign currency.
MR ZACAROLI: That's correct.
LADY JUSTICE GLOSTER: You are entitled to claim for that, that amount. If that is 1.5 million in the foreign currency, you are entitled to claim that, but in order, you say, to calculate what you've lost, you have to calculate what you have in sterling, and you say you can only do that at the end of the day.
MR ZACAROLI: Yes.
LADY JUSTICE GLOSTER: But you have to assume, going along the track, that you would have converted your dividends into the foreign currency.
MR ZACAROLI: Absolutely.
LADY JUSTICE GLOSTER: So there are about three different

dates which you have to use for the purposes of this calculation.
MR ZACAROLI: Multiple dates to work out whether you have a currency conversion claim. But the essence of a currency conversion claim is just the loss, although it's not a claim for loss, caused by reason of conversion. So we are solely focusing on whether, in your pocket, the pounds you've received equal the same, at the end of the day, when totted up, dollars you were ultimately entitled to under your contract.
Like in the case of dividends, where an earlier dividend gives you a surplus of dollars and a later one gives you a deficit, it's ironed out in deciding whether you have a currency conversion claim at all, which is the same should apply across the process of principal and interest. So if the interest you get is worth double in your hands, once converted, the actual dollar amount that you are entitled to that date, that should be offset against a shortfall that arose on an earlier dividend of principal. Or vice versa, or any combination of the two.
There's a small element of support for that in the fact that when one's talking about principal and interest, one is not necessarily talking in exactly the same terms as proved debt and interest on the proved

debt, because as we know, the proved debt can already include interest. So it already must be accepted that insofar as the underlying proved claim includes rolled up interest, you are offsetting gains in relation to the interest part of that debt against principal parts, that already happens because it's all part of your proved debt currency conversion claim. We say --

LORD JUSTICE BRIGGS: You roll up the interest in your foreign currency and only convert it on the date of the cut-off date.

MR ZACAROLI: That's right, yes.

LORD JUSTICE BRIGGS: Yes.

MR ZACAROLI: We say this is an approach -- the aggregating approach is one which more accurately reflects the purpose of a currency conversion claim, that is to compensate creditors for the shortfall arising from the fact that their claim was converted into sterling.

So while we have to accept for the moment that the currency conversion claim arises only one way, you can't claim against the creditor. We say it would be wholly unfair if gains made by the creditor under the same contractual right in relation to some of the payments in relation to interest were not to be offset against losses suffered by that creditor under the same contractual umbrella.

That deals with a creditor who has a contractual right to interest.

The next category to deal with is a creditor who has a contractual right to interest but it's less than 8 per cent, so they get under the statute an uplift between, let's say, a 2 per cent contractual right up to 8 per cent. So it might be said against us, well, you are then comparing apples and oranges because the statutory interest is a statutory right given to all creditors who have been kept out of their money for the period after administration.

We say that's right and, very importantly, we are not suggesting any part of the statutory interest should be withheld from the creditor. This is no part of our argument. The argument only relates to the calculation of the currency conversion claim which comes afterwards. We say the same principle should apply because the only reason that creditor is getting the uplifted rate to 8 per cent, which is a judgment rate applied to judgments in sterling, is because it's underlying foreign currency claim has been converted. He comes into the statutory process, he gets a package of benefits and burdens. A burden potentially, depending on the way currency movements work, is that he has to suffer the conversion of his claim to sterling at the

outset and be paid sterling dividends. A corresponding benefit is that the rate of interest that that debt attracts is one which is specifically attributable or aligned to a judgment debt in sterling.

So we say, actually, on analysis, the same broad aggregating approach should apply. Ultimately, if, after that statutory process has run its course, that creditor is sitting on, once converted back into dollars, the same dollars or more dollars than it was ever contractually entitled to, it can't come back and say, "Oh, I'm suffering a currency shortfall".

LADY JUSTICE GLOSTER: Where does the judge disagree with this point?

MR ZACAROLI: Paragraphs 229 and 230. The whole argument was condensed into two paragraphs, or the whole decision was condensed into two paragraphs in the judgment.

He rejected it for the reason that they're two different rights: the right to principal under the proved process and the right to a statutory interest.

Now, to take it one step further, we say the same applies in the case of a creditor with no contractual right to interest. Again, still living in the world of there not being a complete code. Because in same way as the previous one, that creditor comes in to a package of benefits and burdens and takes the benefit or burden of

its claim being converted into sterling, but because it's converted into sterling, it gets an interest rate that it would not otherwise have been entitled to.

LORD JUSTICE BRIGGS: In a sense, that's just reducing your contractual interest rate to zero.

MR ZACAROLI: Yes. The same point applies.

LORD JUSTICE BRIGGS: Yes.

MR ZACAROLI: So those are our submissions in relation to the way you calculate a currency conversion claim and offset interest in the world where there is no complete code or where the contractual rights to interest are brought within 2.88.

I want to deal with the corner next which is offset of statutory interest against the claim to interest on a currency conversion claim. So just picking up on if there is a claim to interest on a currency conversion claim, which we say there shouldn't be, but if there is, we say that the statutory interest received should be offset against that claim.

LADY JUSTICE GLOSTER: And which item --

LORD JUSTICE BRIGGS: Is this a fall-back submission from your -- stick it all in a pot and see which pot is bigger argument?

MR ZACAROLI: It would be because I think it's unnecessary if we are right so far.

LADY JUSTICE GLOSTER: Which item are we on now?
MR ZACAROLI: Item number 8 now.
LORD JUSTICE BRIGGS: Thus far you have really been dealing with both items together, as I understand it. You are saying it is wrong to split them out, you should take an overall approach (inaudible).
MR ZACAROLI: Yes, that's correct. This is now if we are wrong, if the judge is right that there a complete code --
LORD JUSTICE BRIGGS: And you probably accept that Bower v Marris would probably apply to the calculation of your contractual claims.
MR ZACAROLI: I can't see a way of avoiding it.
LORD JUSTICE BRIGGS: And, indeed, the creditor could probably appropriate.
MR ZACAROLI: Yes. In the foreign currency.
LORD JUSTICE BRIGGS: Yes.
MR ZACAROLI: Yes.
I am now turning to supplemental declaration 4 and item number 8. What we say here is that in this event, the claim for interest on the currency conversion claim for the post-administration period should be offset by statutory interest received so that if and to the extent that the total amount of interest received by that creditor in relation to the post-administration period

converted into dollars is equal to or greater than its entitlement, so he can't come back for more. Let's assume he has post-administration interest, under the statute which, converted into dollars, is as much as he would be entitled to by way of interest on his foreign currency claim. We say you can't come back for more and say, well, he has an interest claim on the currency conversion claim and, therefore, can claim that even now. We say there's a cap, and the cap is when you have your contractual entitlement.
The judge disagreed, and he deals with that in the supplemental judgment, core bundle A, volume 2, tab 1, paragraphs 48 to 54. In particular, at paragraph 52 he refers back to his conclusion that rule 2.88 is a complete code for proved debts which is unconnected with any right to interest under the contract.
We say there's a very close connection between the two, because the statutory interest is payable in respect of the creditor being kept out of its money from the date of administration onwards. The only money it's being kept out of is that due to it under its contract. There is a very obvious connection between the two.
At paragraph 53, the judge specifically rejected our submission -- this is the last two lines -- in reply that the currency conversion claim represents that

portion of the proved debt which is not satisfied by the payment of dividends. The proved debt is the sterling sum and has been satisfied in full by dividends.
Now, the essence of our submission is really not that it's the proved or the provable debt; it is the debt which the creditor has claimed. It's a foreign currency debt -- I have made this submission before -- which is converted into sterling for the purposes of proof. There is only one claim, it's just expressed in two ways: one is in dollars, one is in sterling; it is still a unitary debt.
Echoing my previous submission in relation to whether this claim for interest exists at all on a currency conversion claim, we say that statutory interest has been paid on the whole of that underlying debt, interest has been paid under the statute for being kept out of that debt for the period after the date of administration.
The judge's conclusion that there is a claim for interest on a currency conversion claim assumes to a limited extent -- as my Lord pointed out, his conclusion in paragraph 228 that there's no continuing right to interest because of the complete code, is subject to an exception in relation to currency conversion claims.

LORD JUSTICE BRIGGS: Yes. Well, in relation to anything it's not a proved debt.
MR ZACAROLI: Yes, but in particular for this purpose, currency conversion rates.
Unless and until all dividends are paid, it is impossible to identify which part, if any, of that claim which is being proved and converted into sterling has not been discharged by way of dividends. I think Lord Justice Briggs made the point on Monday that you don't know which part interest is attributed to until long down the road. It's being paid on the whole of that $100 claim, conversion to sterling as at the date of administration, and interest immediately is running on the whole amount undoubtedly. It's only when currency fluctuations cut in and go this way or that that you begin to work out whether there was in fact interest paid on part of it.
LORD JUSTICE BRIGGS: May it not depend on how, or at least how the judge thought, an interest on a currency conversation claim was going to be presented as a claim? If the currency conversion creditor says, "Well, I get a payment of 20 per cent of my debt in sterling at the end of year 2, had I had it in dollars then" -- indeed, you assert this, I think -- "I would have been X dollars better off, I only got so many cents for my dollar, and

I want interest from that shortfall from that date", would that not, as it were, build in a credit for having had interest, albeit not necessarily at the same rate, on that part for which he was paid?

So he is suffering a shortfall of, say, 20 cents in the dollar at that date. He is not claiming interest on the 80 cents for which he has hard a sterling payment and sterling interest is running. He is only claiming interest for the shortfall.

I don't know how these currency conversion claims and particularly the interest element are being presented or how the judge thought they were being presented.

MR ZACAROLI: I don't think the judge went into that level of detail or it's an issue that's yet been resolved by the parties.

LORD JUSTICE BRIGGS: No. Whereas if you present your currency conversion claim for interest as simply being all the dollar interest which you would have earned if there had not been an administration, then I can see your submission gains force. It just depends how the claim is presented.

MR ZACAROLI: It does, but going back to the answer to my Lord's question earlier, you couldn't -- in the case of a shortfall having been suffered at the point dividend A

being made up wholly by later dividends, you don't have a currency conversion claim at all, and therefore could never claim for interest you say you lost because in an interim period you got fewer dollars than you --

LORD JUSTICE BRIGGS: No, but you yourself said that when you get to the end of the day, you then look back, see what you got on those various days and notionally convert them to dollars on those dates.

MR ZACAROLI: I'm not saying you only do in an exercise at the end. You only have a claim at the end --

LORD JUSTICE BRIGGS: Yes, but when you are calculating --

MR ZACAROLI: You are looking back.

LORD JUSTICE BRIGGS: -- you have to look back, work out what your dollar shortfall was every time you got a sterling payment, and if you only claim interest on the difference, this is all a storm in a teacup, isn't it? The only difference will be if the interest rates are different. But if you are only claiming your interest on the shortfall from each date when you received a sterling payment converted into dollars, well, then, you will have been paid interest on that bit in respect of which you are not claiming, namely the extent to which you did get sufficient dollars for your sterling. And you will have had statutory interest on that, but you won't have had any interest on the

shortfall. And if you present your claim in that way, it matches the judge's thinking. I'm reading what the judge says as assuming that that is how the interest claim would be presented. It would only be presented on the shortfall element, not on the whole of the dollar claim.

MR ZACAROLI: Well, that must be right. No doubt that's right, that it's a claim for interest on your currency conversion claim, ie the shortfall you suffered.

LORD JUSTICE BRIGGS: Yes. Not on what you've received, for which you've had statutory interest instead.

MR ZACAROLI: I accept that. The short point I want to finish with -- I will think about that question over the break -- is this: we say that however you characterise it in those terms, you are essentially getting interest on the same underlying contractual right for the same purpose. That is to compensate you for being kept out of that contractual right for the period after administration. And that therefore from the premise it should follow that where you have already received, because of sterling payments in relation to statutory interest and in relation to that period, the same as or more than you would have been entitled to by way of contract for that period, in this area at the very least there should be a cap, and you can't claim more by way

of coming back for a second bite of the cherry to claim more by way of interest on a currency conversion claim when, in fact, you have the dollars already. It is a subset of the broader point I made earlier in relation to the broad answer.

I think that point remains good irrespective of the way in which the claim is to be calculated, as my Lord, Lord Justice Briggs --

LADY JUSTICE GLOSTER: I'm not sure I understand this point about the difference of the claim being calculated, because the claim will be calculated from -- the foreign currency claim at its maximum is what you are entitled to at the date of contractual payment. Right?

MR ZACAROLI: Yes.

LADY JUSTICE GLOSTER: The due date for payment under the contract. And that will be a figure in dollars and you are entitled notionally to interest while that remains unpaid. During the course of the administration, you will have to prove, as at the date of proof, in sterling, whatever that is, you say as I understand it, you then have to work out what you've received in the interim, you calculate as at the date of each dividend what the notional figure in dollars is, and you do likewise in relation to interest, and at the end of the day you put one against the maximum of the original

contractual claim in dollars. You set one off against the other.
MR ZACAROLI: Yes.
LADY JUSTICE GLOSTER: I'm not sure that there is any variable in how the claim is put. How else could the claim be put?
MR ZACAROLI: Yes. That's how we say the aggregated approach works, but I'm here --
LORD JUSTICE BRIGGS: You're here working on a fall-back.
MR ZACAROLI: I am.
LORD JUSTICE BRIGGS: If you're not right on your aggregated claim, on your disaggregated claim, how does it all work?
LADY JUSTICE GLOSTER: How does it work on a disaggregated claim?
MR ZACAROLI: The judge said you have no claim for currency conversion loss in relation to any post-administration interest, there's a bar because of the complete code. So the judge was only dealing with a principal claim. In the alternative, he said that if there is no complete code -- this is paragraph 229 and 230 -- there are two separate calculations. You have to look at the principal, ie the proved debt, and work out whether you have a currency conversion claim based on shortfall and payments in dollars because of the proved debt

dividends. And then secondly, and as a separate matter, you look at the receipts you had by way of statutory interest and work out whether those translate into the right amount of dollars in accordance with your contractual right to dollars. So there are two different claims, on his view.
LADY JUSTICE GLOSTER: You say that's wrong.
MR ZACAROLI: We say that's wrong, yes. And if we are right about that, none of this matters. If we are wrong about that, and the judge -- this point works if the judge is right on the complete code. The real purchase of this point is if there is a complete code, so there's no claim to interest beyond the date of administration, and yet, as the judge held, there is a right to claim interest on a currency conversion claim in the post-administration period, and that's the real issue here. So it's complete code, but with this exception, that you can claim interest on that portion of your claim that was provable but did not get satisfied in dollars in full. Then we say that it must follow, in order to avoid overcompensating the creditor, that to the extent he has had interest under the code, statutory interest --
LADY JUSTICE GLOSTER: He has to get credit.
MR ZACAROLI: He has to get credit for it.

LORD JUSTICE BRIGGS: You can either do that by doing an overall calculation or you can do it by only claiming interest on the shortfall.
MR ZACAROLI: Our preferred position obviously is the broad aggregated approach. This is very much a fall-back. Is that a convenient moment?
LADY JUSTICE GLOSTER: Yes. Five minutes.
(3.22 pm)
(A short break)
(3.28 pm)
MR ZACAROLI: Just one final point on this aspect. The essence of any non-provable claim, as we know from Humber Ironworks and the Court of Appeal in Waterfall IA, is all about reversion to contractual rights. That's what's happening here. We say that if you are remitted to your contractual rights, it makes absolute sense that you look at the contractual rights as a whole and compare those contractual rights with what you get out of the scheme. That deals with everything except one other corner of this, and that is if the judge is right on the complete code argument, so if he is right that there is no right to interest at all on your contractual basis following the date of administration, and I dealt with the position in relation to interest on currency

conversion, let's park that for the moment, just a general offset argument, that even in that situation there ought to be an offset between globally the creditors rights in dollars, to get whatever he is entitled to by way of contract as compared to everything he gets under the statutory scheme.
LORD JUSTICE BRIGGS: That's the underpinning for your main submission, I thought.
MR ZACAROLI: I was working then in the world where there isn't a complete code. Now, we say very broadly, and it's a very short point to add, that in this world as well, the same results should be arrived at, that is that you simply --
LADY JUSTICE GLOSTER: Just remind me which world we're in.
MR ZACAROLI: We're in the world now where the judge is correct. The judge is right that there is a complete code.
LADY JUSTICE GLOSTER: So there is a complete code.
MR ZACAROLI: And on his reasoning, there is no right to interest, there's no remaining contractual right to interest, remaining after the date of administration. And this is where those other two --
LORD JUSTICE BRIGGS: On provable debts.
MR ZACAROLI: On provable debts, correct.
LORD JUSTICE BRIGGS: By which I think he meant that part of

a foreign currency debt which you can prove in sterling.
MR ZACAROLI: Yes.
LADY JUSTICE GLOSTER: Then you say broadly --
MR ZACAROLI: We say broadly then the same answer should apply, that is that if a creditor's claim has been converted into sterling, it gets the benefits the Act gives it, which includes the right to 8 per cent because it's debt has been converted to sterling, which otherwise it wouldn't have had, and therefore you are entitled to look at its global contractual rights as against the global receipts from the insolvency estate.
We would say all distributions from the statutory scheme are ultimately referable to that creditor's contractual rights, even where it didn't have a claim to interest -- let's say it didn't have a claim to interest at all and therefore statutory interest is compensation for being kept out of your money. The sole focus of the question here is not did you get more interest than you should have been entitled to, the question is: did you get fewer dollars at the end of the day than you were entitled to? The currency conversion is solely focusing on the dollars in the back pocket of the creditor, it having converted the pounds it received into dollars and put into its back pocket.
That's all I propose to say, my Lords, on offset

between the two.
LADY JUSTICE GLOSTER: Yes.
MR ZACAROLI: There are two topics left. One is interest under 2.88(9) at a rate applicable to a foreign judgment. That is --
LADY JUSTICE GLOSTER: Item?
MR ZACAROLI: Item number 11, declaration 10.
LORD JUSTICE BRIGGS: Issue?
MR ZACAROLI: Issue 4.
LADY JUSTICE GLOSTER: Yes.
MR ZACAROLI: There are three propositions presented by the SCG. The first is that a creditor is entitled to a foreign Judgments Act rate in respect of a judgment it actually obtains after the date of administration, and that that rate is the rate applicable apart from administration within rule 2.88(9). It might be helpful just to go back to the rules to remind us what we are dealing with --
LADY JUSTICE GLOSTER: This is now -- you're responding?
MR ZACAROLI: Yes, I'm responding to an appeal made by SCG.
If we pick up rule 2.88(9) again, just to put the point in context, this is the rule which says:
"The rate of interest payable under paragraph 7 is whichever is the greater of the rates specified under paragraph 6 [the Judgment's Act rate] or the rate

applicable to the debt apart from the administration."
That's the context.
First, the SCG say that within that rule, if you actually get a foreign judgment after the date of administration, you can substitute that foreign Judgments Act higher rate in the rule. Secondly, they say even if you don't get a judgment, then you can say that the rate applicable apart from administration is a Judgment Act rate you might, could or would have got post-administration. And thirdly, and I think I'm right in saying for the first time before the court today, it wasn't a point raised below or in their skeleton, they say there's a non-provable claim in relation to a judgment obtained after administration. Not entirely clear what that non-provable claim is for, it has not been developed in any argument in the skeleton and it's not dealt with in the judgment. I will deal with that at the end.
LADY JUSTICE GLOSTER: So we're looking at a situation where the currency of payment is dollars, and interest is obtained contractually at, say, 10 per cent in dollars, but in the foreign Judgment Act, say 12 per cent of dollars. We are looking at that sort of situation.
MR ZACAROLI: I think the only point in that that matters is that it's obtained under a foreign judgment, where the

rate of interest is greater than 8 per cent. It doesn't matter what the contractual rate was, it only arises if you get a judgment, let's say, in the New York court and you claim a right of interest under the judgments rate there at 9 per cent.
LORD JUSTICE BRIGGS: Yes.
MR ZACAROLI: That's how it arises.
LORD JUSTICE BRIGGS: Correct me if I'm wrong, it having been common ground that a foreign judgment with an interest rate attached that came before the cut-off date would be usable.
MR ZACAROLI: Yes, because that's your right at the date of administration.
LORD JUSTICE BRIGGS: Quite apart from accumulating the interest due under it up until the cut-off date, you can go on using that rate for post-cut-off date interest.
MR ZACAROLI: Yes.
LORD JUSTICE BRIGGS: Yes.
MR ZACAROLI: Can I deal first with the shorter of them, which is the hypothetical judgment, so this is at the date of administration they say that the rate applicable to the debt apart from administration is that which they might get under some future judgment. In their skeleton, or I think in the judgment, this is noted as their preferred position, no doubt because in fact there

are very, very few cases where anyone did in fact go and get a judgment debt most surprising actually in the circumstances of the LBIE administration.

The judge dealt with this at paragraph 177 of the judgment. We're back in the main judgment below. In essence, the words, "The rate applicable to the debt apart from administration" are intended to refer to the rate in fact applicable to the debt proved. He notes in this paragraph the difficulties that would arise, and I repeat them, I made the point a moment ago, but what is the precise counter-factual one has to give effect to here? Is it any judgment rate the creditor could have gone and got judgment for? Is it the rate that he would have gone and got judgment for? What do you do if the creditor can pick between multiple jurisdictions with different rates?

The counter-factuals that are given rise to by this issue are multifarious and totally undealt with by the rule. If the draft of the rule had intended to include the possibility you could substitute a rate of the judgment in a foreign jurisdiction --

LADY JUSTICE GLOSTER: Where you haven't obtained judgment.

MR ZACAROLI: Where you haven't obtained judgment, on the basis that you might do or would do or could do, there would have to have been some rules defining how that was

supposed to work. It is clearly, we say, not intended to be covered by the sub-rule.

LADY JUSTICE GLOSTER: What about A, where judgment has been obtained?

MR ZACAROLI: Before I move to that, may I just deal with one other point the judge made?

Paragraph 182, there is a suggestion that a right to a future judgment is some sort of contingent right, and the judge dealt with that at paragraph 182. We say it bears reading. We would support the conclusions he reaches there for the reasons he gives and, again, I can't really improve on what the judge said there.

LADY JUSTICE GLOSTER: No.

MR ZACAROLI: There is one further point on this, which is actually -- it covers quite a lot of this area, whichever way you put it. We say it would be a highly odd intention to have imputed to the draftsman that he was to permit a rate under rule 2.88(9) under a foreign judgment, because this would have required the draftsman to have considered that this wording was sufficient to cover some future judgment obtained elsewhere in world. Very odd to impute that when the starting point is this is a rate of interest on sterling debts. Everything is converted into sterling, you are providing rates of interest from sterling debts. The judgment rate is

a sterling rate.

LADY JUSTICE GLOSTER: Why is that odd per se? Because if you are looking at a rate applicable to the debt apart from the administration, you are bound in some cases to be looking at a foreign rate, possibly under a judgment.

LORD JUSTICE BRIGGS: You've sold the (inaudible) anyway by not fighting a pre-cut-off date --

MR ZACAROLI: Yes, I accept that. In order for this to be right, we say -- the wording doesn't exclude a foreign contractual right. So we see --

LADY JUSTICE GLOSTER: Why should it exclude a foreign judgment rate?

MR ZACAROLI: Well, it doesn't include -- we say it doesn't even begin to include a rate in a judgment that hasn't yet been obtained. We don't say it excludes a judgment that has already been obtained because that would be the rate that is applicable at the date of administration. The question is here: should it be extended to include the possibly of a judgment that has not yet been obtained under some foreign jurisdiction, which we say would require the draftsman to consider that possibility and intended to include it within the rule. That, we say, is a remarkable proposition.

LADY JUSTICE GLOSTER: Once it has been obtained during the course of the administration -- I am leaving to one side

the B situation which you've just been addressing, there's a sort of hypothetical possibility of a foreign judgment, but where during the intervening period between the date of administration and the arising of a surplus there has been a foreign judgment, why in that situation shouldn't it be -- as is the foreign contractual rate, why shouldn't the foreign judgment rate --

MR ZACAROLI: Yes.

LADY JUSTICE GLOSTER: That seems to me to be the point.

MR ZACAROLI: I'm going to turn to that next. The creditor has in fact obtained a judgment after administration.

LADY JUSTICE GLOSTER: Before the surplus has arisen.

MR ZACAROLI: Yes. The key point, we say, is that --

LADY JUSTICE GLOSTER: Given that you have conceded pre-admin.

MR ZACAROLI: Yes. The key point is in paragraph 179 of the judgment, which I don't think my learned friend Mr Dicker took you to specifically. He took the judge's conclusion in the next paragraph as being a single cut-off date as really being the essence of this. We say the essence of this is paragraph 179, bolstered by the propositions 180. But the first sentence of 179:

"The rate applicable to the debt apart from administration refers to the rate applicable to the debt

by reason of the rights of the creditor as at the commencement of the administration."

LADY JUSTICE GLOSTER: Why, in circumstances where you are looking at something that has necessarily happened after the administration date, namely the arising of a surplus?

MR ZACAROLI: That's where the five reasons come in to bolster that. First of all, there is the single cut-off date point, which is an important point. I won't take you to the cases, you've been referred to them. Wight v Eckhardt is one of them, Dynamics is the other. There is a single cut-off date for claims. Statutory interest is payable only on the proved debts, we know that, and the date of administration is undoubtedly an important cut-off date for the purposes of statutory interest. You don't get interest accruing after that date by way of proof, that's the date for the distinction, and statutory interest is payable from that date, from the commencement of the administration.

So that's the first point. There is importance in that being the cut-off date generally, as much for interest as for provable claims.

Secondly, that is bolstered by the fact that the default position under section 2.88(9) is the Judgments Act rate, but not just the Judgments Act rate, the

Judgment Acts rate at the date of administration. So if the Judgment Act rate was increased after the date of administration, that's irrelevant. So if the creditor with an English debt, which is perfectly possible, got permission to proceed in the action because it was more convenient to determine the issues in an action rather than in administration --

LORD JUSTICE BRIGGS: And the Judgment Act rate went up in the meantime he wouldn't get it.

MR ZACAROLI: He wouldn't get it, no. So the SCG's argument here would draw a distinction between a foreign judgment and an English judgment, which we say is simply unwarranted.

LORD JUSTICE BRIGGS: The judge makes that point somewhere.

MR ZACAROLI: He does.

LADY JUSTICE GLOSTER: 177.

LORD JUSTICE BRIGGS: Yes.

LADY JUSTICE GLOSTER: 177 he makes it.

MR ZACAROLI: Yes. The third point -- and these are following the numbered points in paragraph 180 of the judgment -- is this is consistent with the Cork Report and the White Paper. The Cork Report, as you know, recommended the judgment rate for all. The White Paper, and it's perhaps worth just reminding ourselves what that said -- it's only a sentence -- the White Paper

recommended a nuance to that which was:

"The minimum rate should be that applicable to the date of the relevant order which applied to judgment debts. If, however, a higher contractual rate applies to the debt post-insolvency interest will be chargeable at that rate."

Sorry, this is tab 212 of bundle 5, I'm sure you are aware of the provision.

Their intention was to introduce the possibility of a contractual rate. So no intention in the Cork Report or the White Paper that they should be extended to some sort of future judgment that might be obtained.

LADY JUSTICE GLOSTER: Sorry, Mr Zacaroli, can I just ask about that. Say the contractual rate, the rate applicable to the debt, is a moving rate, so it goes up and it flexes by reference to some other underlying rate or a reference to the period of time at which the debt hasn't been paid. Are you saying that that has to be looked at?

MR ZACAROLI: No, no. If you have the right to a rate of interest at the date of administration --

LADY JUSTICE GLOSTER: That moves.

MR ZACAROLI: -- that fluctuated, it's the fluctuating rate throughout the period.

LORD JUSTICE BRIGGS: Yes. Because that's a right you have

at the cut-off date.

MR ZACAROLI: Exactly. It's about rights.

LORD JUSTICE BRIGGS: And the judge says so.

MR ZACAROLI: He does, yes.

LORD JUSTICE PATTEN: I thought one of the judge's main points was that it's the subsequently obtained judgment isn't the debt you are proving.

MR ZACAROLI: It is one of the points, yes.

LORD JUSTICE PATTEN: If you haven't got the judgment at the time the company goes into administration you can't prove in respect of the judgment, you prove in respect of the judgment debt, you prove in respect of the debt. And therefore, the provisions of (9) have to relate back to the date to which you proved. So if you obtained subsequent judgments, it is irrelevant.

MR ZACAROLI: My Lord is absolutely correct. It's the fifth point in paragraph 180. The last sentence in particular notes that if you get a judgment, where you have, say, an unliquidated claim, what the judgment does is ascertain the value of the claim. But it's not the judgment that is subject to proof, it's the debt underlying it which is subject to proof. And rule 2.88(9) says you will get interest on the proved debts. And exactly right, my Lord, the proved debt is the underlying claim, not the subsequently obtained

judgment. That's another of his reasons for concluding you just can't --
LADY JUSTICE GLOSTER: So what, the higher foreign judgment rate interest comes in as part of the conversion claim, does it?
MR ZACAROLI: No.
LADY JUSTICE GLOSTER: You can't seek out conversion claim.
MR ZACAROLI: No.
LADY JUSTICE GLOSTER: But why not?
MR ZACAROLI: Because it's not a right you are entitled to at the date of administration. You've proved for your underlying claim. I mean in theory -- and I say this just in theory -- you might envisage a creditor --
LADY JUSTICE GLOSTER: Sorry, why doesn't it come in as a non-provable claim down the track?
MR ZACAROLI: That's one of my points in relation to the way it's put now; that's double accounting. You've already proved your claim, you can't prove twice for the same claim, once in relation to the underlying claim; second in relation to the judgment you then get on it. And the claim is what you are proving for. You are not proving for the interest, remember, you are just proving for the claim. And statutory interest then gives you interest on that claim. But it's on the proved debt. So you can't prove twice and get the Judgments Act rate on the

basis, that's now my (inaudible).
LORD JUSTICE BRIGGS: Of course, if the floating rate was the judgment rate from time to time, you could get that.
MR ZACAROLI: Yes, but that's because the contract gave you a right at the date of administration. But that's completely different circumstance. I think what the statute is recognising, it's rights that you have at the date of administration because those are the rights that apply to your proved debt. And it's the rate applicable to the proved debt that is crucial. And that was indeed the fifth point.
LORD JUSTICE PATTEN: It's because the rate of interest that (9) specifies is the rate payable under paragraph 7. That's the link, isn't it?
MR ZACAROLI: That is right, my Lord, yes. And the rate under (7) is the rate payable on the debts proved.
LORD JUSTICE BRIGGS: And even if periods in respect of different parts of the payment of the principal by dividend end on different dates they all start on the cut-off date.
MR ZACAROLI: Yes.
LADY JUSTICE GLOSTER: So your point is that this is all going back to debts proved.
MR ZACAROLI: Yes.
LADY JUSTICE GLOSTER: So whatever is payable under (9) has

to link to that.
MR ZACAROLI: My Lady, yes.
LADY JUSTICE GLOSTER: And that's why you're stuck and why Mr Dicker's clients are stuck with the date of the administration, yes.
MR ZACAROLI: Yes. Just as an advert for what's coming down the line, there is an appeal by Mr Smith on behalf of York that relates to this issue, as to what is the rate applicable to the debt at the date of administration in a contractual sense, but I'll leave him to develop that later on. I will be returning to this issue.
But our case in relation to this point is that you are looking at the rights as they existed in the creditor at the date of administration. That's all.
I was going through the judge's reasons and the third one was the consistency with the pre-legislative materials. Under the pre-1986 law it's right to point out that it had never been suggested, so far as we can see, that a creditor who had not obtained a judgment pre-insolvency could in some way have interest as if it had obtained a judgment. You'll see that particularly in a case called Fine Industrial Commodities, a case I referred to in passing this morning, bundle 1, tab 41. It's a decision of Mr Justice Vaisey in 1955 and is the decision I was referring to in passing that decided that

if a company had been in insolvent liquidation -- a surplus arose, the cross-reference in the company's legislation to the bankruptcy provisions on interest no longer applied because it was no longer an insolvent company.
So the main point in the case can be seen from the first five lines of the headnote:
"The court has no power either by statute or under its general jurisdiction in the winding up of a company ...(Reading to the words)... in full is left with surplus assets."
It's just one passage in the judgment. It's on the penultimate page of the report, page 263. There's a quote from something we've seen before from Lord Justice Gifford in Humber Ironworks. If my Lords could read the paragraph beginning, "I rather hoped that I should find ..."
(Pause)
So there had never been pre-1986 a right to treat them as if they had a judgment.
And as the judge notes in his third point in paragraph 180 over on page 44 of the bundle, in reference to the pre-legislative materials:
"They suggest it was not intended to include rates of interest for which no right ...(Reading to the

words)... commencement of the relevant insolvency proceeding."

We say that's justified by the fact that there never had been -- the point, the date of liquidation rather had always been their cut-off date.

And the fourth point he makes --

LADY JUSTICE GLOSTER: Just stopping with this for the moment, quite interesting, I don't know how it impacts, at page 262 Mr Justice Vaisey says:

"Although for some purposes during the winding up proceedings this company must have deemed to have been insolvent, it seems to me that when the time comes for dealing with the surplus it is no longer deemed to be an insolvent company but has to be treated as a company which is and was and always has been insolvent."

Quite an interesting concept, isn't it?

MR ZACAROLI: It is.

LADY JUSTICE GLOSTER: I don't know whether it impacts on anything we have to think about.

MR ZACAROLI: What he is construing there is a section in the Companies Act, which I think is the one quoted on the previous page 261, section -- I think it's section 317:

"In the winding up of an insolvent company, the same rule shall prevail and be observed with regard to the

respective rights as secured and unsecured creditors and debts provable as are in force for the time being under the law of bankruptcy in England in respect of the estates of persons adjudged bankrupt."

So what he is saying is he is accruing that section saying that for the purposes of that section it is not now to be regarded as an insolvent company.

LORD JUSTICE BRIGGS: No, and nor ever was.

MR ZACAROLI: Nor ever was. But I would say nothing of any greater import arises from that.

LORD JUSTICE BRIGGS: But I'm assuming that the creditors in this case had no contractual right to interest.

LADY JUSTICE GLOSTER: No, they didn't.

MR ZACAROLI: They didn't. They may have had a simple contract, I think that's a shorthand for no interest-bearing debt.

LADY JUSTICE GLOSTER: Thank you.

MR ZACAROLI: The fourth point the judge made, which we support in paragraph 180, is that if the rule was to be construed as permitting creditors to incorporate into sub-rule (9) a foreign Judgment Act rate at a higher rate it would incentivise an unseemly rushed judgment which cannot have been the intention. Indeed, the starting point is there is supposed to be a moratorium on anybody obtaining a judgment. Now it's true that

that is not extra-territorial in effect, at least that's the accepted position at first instance. I think it's first instance, in relation to administration. It's the Court of Appeal in liquidation anyway. It's the accepted position. The reason for that is simply because the restraint of the English court show about interpreting statutes intended to interfere with foreign proceedings. It doesn't evidence a legislative intention that: oh yes, we are quite happy for people to go and get judgments abroad. Indeed anyone who gets a judgment abroad and seeks to enforce the rights under that judgment would find themselves subject to an injunction, or at least they wouldn't be able to enforce those claims in English liquidation and could well be injuncted against taking steps in relation to foreign assets.

So the starting point is the Act is assuming there won't be people getting judgments after the date of administration because they are not supposed to. Certainly not the opposite, that well if they do, they can get a higher rate of interest, because that would simply incentivise them to breach the moratorium.

That deals with the question of a creditor actually getting a judgment post-insolvency and the rate then becoming a rate within 2.88(9).

The last point my learned friend raised on this, as I say the (inaudible) point, was whether there's some sort of non-provable claims. My Lady raised this a moment ago.

LADY JUSTICE GLOSTER: Yes.

MR ZACAROLI: We say this is fundamentally flawed because one is dealing with a creditor who has proved for the underlying claim. And you cannot prove again for the judgment which simply ascertains the value of your pre-existing claim. It's not a new debt in the same way as someone who comes in, wholly after the administration, with a non-provable claim and gets a judgment. That's an utterly different matter, because they stand outside the proof process entirely.

LORD JUSTICE BRIGGS: This is a non-provable claim for interest on a proved debt.

MR ZACAROLI: Yes. Well, I'm not sure what this claim is for. It may be for the judgment or it may for the interest accruing on the judgment. I don't think it was made clear. It's for the interest alone.

LORD JUSTICE BRIGGS: That's what I thought.

MR ZACAROLI: Yes. It is in that section of his argument.

LADY JUSTICE GLOSTER: Well, it's interest on the judgment debt that you might have got in a foreign jurisdiction.

MR ZACAROLI: You did get.

LADY JUSTICE GLOSTER: That you did get.
MR ZACAROLI: Yes. We say that's interest on -- you are entitled to interest on your proved claim. That is statutory interest on the claim that exists at the date of administration. It cannot be right that, having got that, you then go and get a judgment in relation to the proved claim which you are not supposed to get because of the moratorium, for the purpose of incurring or acquiring a higher Judgments Act rate, and then say, "Well, I will have that as well or I will have the uplift between statutory interest and that" as some form of non-provable claim. Certainly in an English context, where you cannot do that without the leave of the court, I submit you would never get the leave of the court if that was your purpose.
LORD JUSTICE PATTEN: But I mean, isn't this curtailed by the -- don't ask me which of the points it is by number we've already had, which is whether or not the provisions of 2.88 effectively cut away any residual contractual rights you might have to interest. It seems very odd that a different result would apply if the source of the interest was a judgment. I mean, I can't see in principle why that would be any different.
MR ZACAROLI: Yes. If 2.88 stands as a complete code --
LORD JUSTICE PATTEN: Exactly.

MR ZACAROLI: -- then I don't think there would be -- it's difficult to see how this -- although -- well, that's right, because this is still interest relative to a proved debt.
LORD JUSTICE PATTEN: It has to come in, one would have expected, if it can come in at all, through the gateway of 2.88 and (9). But if it can't do that, it's difficult to see on what basis it can come in.
MR ZACAROLI: I would agree with that. We find it difficult to see how this could ever arise. The only theoretical possibility is a creditor who decides not to prove at all, but take its chance that there will be a surplus and get a judgment afterwards instead, having not proved. But the problem with that is it's still coming in with its claim that it always had, ie it is a provable claim. I don't think it can --
LADY JUSTICE GLOSTER: Well, that's my creditor, that's my foreign creditor.
MR ZACAROLI: That's right. It can't avoid the fact that if you claim, you are in fact proven within the meaning of the Act and therefore subject to the rules.
LORD JUSTICE BRIGGS: Even though, if the foreign law in question is like our law, your claim would have been subsumed in the judgment.
MR ZACAROLI: Yes.

LORD JUSTICE BRIGGS: So you would end up with a post-cut-off date claim, and your pre-cut-off date claim would have been somehow subsumed.
MR ZACAROLI: Yes. That cannot have been any part of the intention of the legislature here. It is all about bringing in the claims as at the date of administration.
So unless I can assist further, those are our submissions on the question of foreign judgment rates, and that leaves just the question of contingent debts. This is item 5.
LORD JUSTICE BRIGGS: And future or are we just looking at contingent?
MR ZACAROLI: Well, there's no appeal in relation to future. I have no doubt the question will come up in the course of my submissions, but there's no appeal on it.
It's item 5, declaration 14, issue 7. At the outset, I acknowledge the outcome of the discussions between my Lord and Mr Dicker yesterday. There are variety of possibilities when one's talking about a contingent debt, and it may well be there isn't one-size-fits-all solution here because this is an area which is complicated and the rule is rather simple.
Can I focus in the first instance, however, if only for forensic purposes, on the wholly contingent debt. That is a debt contingent both as to time, and

existence, and indeed amount.
So the classic case would be the insurance claim and the fire. Pre-occurrence of the contingency, the creditor is entitled to have an estimated value put upon that claim and prove for it. We say pre-occurrence of the contingency there is no sensible basis on which the creditor can estimate on the basis of a discount for futurity, because you simply do not know when that's going to fall in. So there's no sensible basis for any part of that estimation taking into account the date on which the debt will be paid. You just do not know.
Once the contingency has occurred, then, according to the judge, there is no discounting of the sum. You look at what in fact amount -- the amount occurred back then, let's say it is £100, which is the claim five years after the administration. That sum is substituted for the proof or in the proof, so you have a claim for 100.
On the judge's conclusion you get interest on that at 8 per cent from date of administration.
LADY JUSTICE GLOSTER: And that's illogical.
MR ZACAROLI: Exactly.
LORD JUSTICE BRIGGS: He says, well, that's just tough, the rules aren't perfect.
MR ZACAROLI: There are two possible responses to that.

LADY JUSTICE GLOSTER: That doesn't happen in an ordinary liquidation. Tell me if I'm wrong, but does that happen? When you got an insurance -- in an insurance company liquidation?
MR ZACAROLI: I'm pretty sure the rules have changed in relation to insurance.
LADY JUSTICE GLOSTER: Maybe they changed after my time, as it were, but --
LORD JUSTICE BRIGGS: This supposes, does it not -- I suppose it does suppose it's an insurance company, yes.
MR ZACAROLI: It does, but leaving aside an insurance company, it could be any other contingent --
LADY JUSTICE GLOSTER: Well, in a general insurance company you are going to get this sort of situation all the time.
MR ZACAROLI: Yes.
LADY JUSTICE GLOSTER: Are there special rules for winding up insurance companies?
MR ZACAROLI: There are.
LADY JUSTICE GLOSTER: Is that why this is all a bit useless, this debate, because I'll need to look at the rules?
MR ZACAROLI: The example may be useless but -- it used to be the case that it was and it's just that it's like --

it's an example. But there are other types of contingency which still obviously exist.
LADY JUSTICE GLOSTER: They're valuation rules, or at least they used to be, aren't they?
MR ZACAROLI: I'm not sitting here able to recite what the rules are, but there are rules in relation to that sort of case, but in this case there are all sorts of contingent claims, arising out of ISDA agreements, for example, contingent on a default, or rather a closeout. The creditor would have had a contractual right to terminate; it may not have done. So it's a very real issue in this case, there are claims which arose that were crystallised only subsequently, and there's a number that we put on that claim and the big question is: do they get that number, notwithstanding it only arose two or three years later, plus all the interest at 8 per cent in the intervening period? So it's a real issue, it's not a hypothetical one.
Logically there are two responses to the conundrum or the illogical position I put forward. One is that we are right and that statutory interest should run only from the date of the occurrence of the contingency. The other is if the court were to conclude that on the occurrence of the contingency there is indeed to be a discounting back for valuation purposes. Either way

gets rid of the illogicality, and if the court were to conclude against the judge, and actually in accordance with the submissions made by the SCG to the judge, that there is discounting back once you know the number -- once the contingency has occurred, then my arguments pretty much fall away in those circumstances.
LORD JUSTICE BRIGGS: That's their fall-back position.
MR ZACAROLI: Yes, and if that's correct then there's undoubtedly far less force in my submissions, which are essentially based upon the unfairness in a creditor receiving interest at a Judgments Act rate of 8 per cent, or any rate, for a potentially long period during which it was not kept out of its money at all.
LORD JUSTICE BRIGGS: Do you discount back in fixing a proof so he gets paid less for his proof plus interest, or do you discount back for the purpose of working out what interest to pay? Because there will be a priority issue in the sense that interest only comes into play one step down the waterfall. I think the alternative fall-back position is you discount back for the proof as well as the --
MR ZACAROLI: That's right, because the question here is you discount back to the proof, so you get paid 100 less --
LORD JUSTICE BRIGGS: You get paid less.
MR ZACAROLI: -- X per cent, and you get paid X per cent to

get you back up to speed.
LORD JUSTICE BRIGGS: If there's a surplus.
MR ZACAROLI: If there's a surplus, yes, that's right.
LORD JUSTICE BRIGGS: But if there's no surplus, do you still discount back for the proof?
MR ZACAROLI: You must do because it's a single solution.
LORD JUSTICE BRIGGS: Yes, because you do the proofs before the interest.
MR ZACAROLI: Yes. There would be a fall-back fall-back position, where you just discount back for the purposes of calculating interest.
LORD JUSTICE BRIGGS: The difficulty is fitting either of those solutions into the rules, isn't it?
MR ZACAROLI: Yes. In a sense, the rule is pretty vague on valuing contingencies. It says you have to value a debt that is uncertain --
LORD JUSTICE BRIGGS: No, but where the contingency occurs before dividend.
MR ZACAROLI: Yes. The problem there is, as the judge said -- well, not the problem, the answer is, as the judge said, it's no longer an uncertain debt at that point.
LORD JUSTICE BRIGGS: Yes.
MR ZACAROLI: The answer may be it's still uncertain -- it's uncertain in the sense of valuation because you need to

know what it was valued at at the date of administration. So that question of uncertainty remains, it's just you now have a better answer.

The argument is premised, we say, on giving rule 2.88 a purposive construction, because we accept the literal problem that we arrive at here, which is that we're looking at the meaning of the word "outstanding" in rule 2.88(7) for a different purpose now, that is when does the debt start to be outstanding? We accept the literal construction is that refers to proved debts, and there is a proved debt in sense that you've proved for an estimated value, that's your proved debt, at the date of administration. So literally speaking, there is a (inaudible). So we say you have to apply a purposive approach to rule 2.88(7), the purpose of which is to compensate creditors for the loss of the time value of their money in the period between the date of administration and the date that they are paid.

Contrastingly, the necessity for equality which drives the single date rule for the purposes of proof and the requirement to estimate the purposes of proof is not the driving force or the purpose behind the giving interest. We accept that obviously you have to estimate both a future and contingent debt as at the date of administration because that's what the rules require,

and they require that so that you are able to apply a pari passu rateable distribution to all creditors, even though you don't yet know what people's actual claims are going to be, and it's for the efficient administration of the estate so that it doesn't have to remain open for everyone(?) whilst you wait to see if contingencies arise. That is purpose behind giving people a proof in an estimated value.

But the purpose of the interest rule, we say, is different, to compensate for being kept out of your money, and in any real sense the creditor is not being kept out of its money in the sense of what it was entitled to under its contractual rights, until such time as the contingency falls in.

LADY JUSTICE GLOSTER: Just to pick you up on this, doesn't this depend on the nature of the contractual terms that inform the contingency? So actually, you have to look at quite a nuanced way in which you value the contingent debt.

MR ZACAROLI: The valuation of the right certainly depends upon the particular --

LADY JUSTICE GLOSTER: Whether or not interest is payable from the date of the administration or not may depend on the particular category of contingent debt, what are the factors that feed in to the contingency, whether you

value the contingency in terms of taking account or whether you can value the contingency in terms of taking into account the time before which the contingency will mature.

MR ZACAROLI: Yes.

LADY JUSTICE GLOSTER: Isn't it a sort of job for the administrators to work out rather than for the courts to say you always have to do it or you never do it?

MR ZACAROLI: Do what, discount back or apply --

LADY JUSTICE GLOSTER: Work out how long -- well, working out the periods during which they've been outstanding.

MR ZACAROLI: Well, we would be content with such an approach but it's not the approach the judge ruled.

LADY JUSTICE GLOSTER: No, but you are going for the absolute opposite of this, aren't you? I'm just wondering whether there isn't a halfway house.

MR ZACAROLI: Well, I think if there were, we would be content with a halfway house, that you actually look at the reality to see when in fact they were kept out of their money and apply interest from that date.

LADY JUSTICE GLOSTER: That depends on the type of contingency. So it's a sort of valuation exercise between the creditor and the administrator.

MR ZACAROLI: And problem is the rule --

LORD JUSTICE BRIGGS: I'm just looking -- your first

solution is the special meaning of "outstanding", because generally speaking 7 says:

"During periods during which they have been outstanding since the company entered into administration."

I think probably one's first blush reading of that is that they have all since been outstanding since the company entered into administration, you just have an uncertainty as to how far forward the period goes, not how far back it goes. I think you're saying you could read:

"During the period in which they have been outstanding but only since the company entered into administration."

MR ZACAROLI: Yes.

LORD JUSTICE BRIGGS: Yes. So that would accommodate a later start date for your period, where, because it was only contingent at the date of the administration, it wasn't outstanding.

MR ZACAROLI: Yes.

LADY JUSTICE GLOSTER: When you say "outstanding", you say that's payable, don't you, you don't say it's an obligation. If we're getting into the distinction between debts where there is an existing obligation, but not as yet a payment obligation -- do we get into that?

MR ZACAROLI: If we do, we say it's a latter, that is the date on which a payment --
LADY JUSTICE GLOSTER: It's when it's payable not when the debt actually --
MR ZACAROLI: Well, except that we will say there is nothing due or payable until such time as the contingency occurs. If I will pay you a £100 if it rains on Sunday, until Sunday there's no question of any debt other than a contingent one, in the sense that the debt itself is contingent, its existence is contingent on it raining on Sunday.
LORD JUSTICE BRIGGS: The trouble with this is that the basic scheme in relation to the debt itself is that if the administration could all be done over a long weekend, you would have got the payment immediately in relation to that contingency but only at the reduced amount.
MR ZACAROLI: Yes. Although you say if it's all done in a weekend and then --
LORD JUSTICE BRIGGS: But what's changed, where the contingency occurs, as I understand it, is not, as it were, a wholly different attitude to when you should have got paid, it's just a change in the valuation amount. I think Mr Dicker said it changed only for the purpose of dividend and not even for purpose of proof or

something.
MR ZACAROLI: I think he was talking about future debts.
LORD JUSTICE BRIGGS: I will have to have a look, but --
MR ZACAROLI: Yes.
LADY JUSTICE GLOSTER: The time it's after 4.15. I'm afraid we have to rise. You are up to time, are you?
MR ZACAROLI: I shall only be five or ten minutes.
LADY JUSTICE GLOSTER: Despite the fact we've been interrupting.
MR ZACAROLI: Yes, I only have this bit to finish and that's it, so I'm way ahead of time.
LADY JUSTICE GLOSTER: Thank you very much indeed. 10.30 tomorrow morning.
(4.18 pm)
(The hearing was adjourned until the following day at 10.30 am)

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