Tuesday, 24 November 2015

(10.30 am)

MR JUSTICE HILDYARD: Yes good morning.

Closing submissions by MR DICKER

MR DICKER: My Lord, on this part of the trial your Lordship is concerned, as your Lordship knows, with questions 20, and 21 of the administrations application. Essentially three issues.

First of all, when and in what circumstances following LBIE's administration is a creditor entitled to make a damages interest claim. And that's a question of German law.

Secondly, if a creditor is entitled to make such a claim, whether and in what circumstances all or part of that claim could constitute the rate applicable to the debt apart from the administration for the purposes of rule 2.88, and that's obviously a question of English law.

Then, question 30 which deals with some miscellaneous points including, most importantly, the question of assignment.

Now, my Lord, for the purposes of our closing submissions we've essentially dealt with this in two parts. The first part, so far as German law is concerned, we've sought to reduce to writing and I hope

your Lordship has a copy of our closing submissions dealing with German law issues.

My Lord, the second part concerns the rate applicable to the debt which I'm proposing to address orally. For reasons which I will explain, I think it can be dealt with very shortly, certainly so far as the Senior Creditor Group's primary case is concerned.

But, my Lord, what I was proposing to do now, subject to your Lordship, was to take you through, hopefully without it being too tedious, our written closing submission so far as German law is concerned, identify where and how we dealt with various points, and hopefully, during the course of that, answer any questions your Lordship may have, and then turn to deal with the English law question separately.

My Lord, if that's convenient, can I ask your Lordship then to turn to our written closing submissions.

MR JUSTICE HILDYARD: I mean, as you know, Mr Dicker, I have only just seen these and I certainly haven't read them. I do not know whether Mr Allison has seen them or been able to assimilate them.

MR ALLISON: My Lord, I received them in court this morning if that assists.

MR DICKER: My Lord, we took your Lordship's suggestion

yesterday to try and produce something in writing. Your Lordship is quite right, your Lordship has only just received them, Mr Allison has only just received them, and that's why I'm proposing to spend a little time taking your Lordship through the document. Hopefully Mr Allison will have a chance to see where we address the particular points and how we address them.

As I understand it, he also is proposing to let your Lordship have something in writing which I have not yet seen.

MR JUSTICE HILDYARD: I mean, there's always a row about written replies, which is why I raised it yesterday. It is in fact -- all I am concerned to ensure is that Mr Allison has in due course and at whatever time an opportunity to assimilate. But obviously your explanation will assist in that process. If he needs a little time just to pause and think, well and good, but otherwise it seems to me to be a great assistance.

MR DICKER: My Lord, we certainly hope it is going to be of assistance to your Lordship and no doubt in due course when we receive Mr Allison's written closing submissions, the same would apply.

MR JUSTICE HILDYARD: The same courtesy will be extended Absolutely.

MR DICKER: My Lord, turning then to the written closing

submissions, if I may, and taking your Lordship through our closing submissions on German law by reference to this document. We have an introductory section beginning on page 2. Paragraph 5 sets out certain basic common ground between the experts.

MR JUSTICE HILDYARD: It's a very useful document, that, and I am just finding it -- it's in 4, isn't it, the common ground between the -- the joint statement, which is quite a sort of useful overview.

MR DICKER: It's tab 13.

MR JUSTICE HILDYARD: Yes.

MR DICKER: Your Lordship is right, it does identify both the common ground and also summarises each expert's views on --

MR JUSTICE HILDYARD: And tells me what isn't any longer an issue, because, as is not unusual, some of the initial salvos went over the ship, as it were.

MR DICKER: My Lord, just picking it up at paragraph 5 of the written closing, the common ground that sections 247, 280, 286 and 288 of the German civil code permit a creditor to claim compensation by way of damages for late payment, and that such compensation can be expressed as a rate which will be applied to the amount for which the debtor is in default.

I should add there, not in all circumstances as

Dr Fischer explained, but where the damages interest claim can appropriately be expressed as a rate, then it will be expressed as a rate applied to the amount for which the debtor is in default.

Then, 3, further damages interest claim can only be asserted if the debtor has defaulted in its obligations before the creditor within the meaning of section 286 and a default cannot take place unless the relevant obligation has fallen due.

We then in paragraph 6 identify what we understand to be the principal areas of dispute.

MR JUSTICE HILDYARD: Just before you go there, does anyone have a spare of this?

MR DICKER: Yes.

MR JUSTICE HILDYARD: Just so my judicial assistant can --

MR DICKER: Oh I'm sorry. (Handed)

Paragraph 6, we identify the principal areas of dispute and they will be familiar to your Lordship. The first concerns whether the single compensation claim fell due immediately on automatic termination of the GMA as we contend or only once it has been calculated, as Wentworth contends. So that's the first issue due.

The second is concerned with the requirement or rather the exception to a warning notice, namely LBIE having seriously and definitively refused performance.

The third is our alternative case, in other words, if we can't succeed on serious and definitive refusal, can we succeed on the basis that a proof of debt is capable of constituting a warning notice?

And the fourth point over the page concerns the question of assignment.

Paragraph 7, we add there's a subsidiary issue in relation to abstract calculation but I think we can deal with that very shortly.

My Lord, then section B, Senior Creditor Group's position, paragraph 1, we say LBIE's application for administration order caused an automatic termination.

Subparagraph 2, so far as the question of due is concerned, we say the single compensation claim arose and became immediately due on automatic termination.

We also say in 3 that LBIE's administration application constituted a default by virtue of a serious and definitive refusal of performance.

Paragraph 5 --

MR JUSTICE HILDYARD: When you say "due", you mean what Judge Fischer described as enforceable? I mean he -- he differentiated between two events. One was when a liability was, as it were, struck, and the other was when the amount of that liability became due.

MR DICKER: And we mean --

MR JUSTICE HILDYARD: And enforceable in his terms.

MR DICKER: -- for the purposes of section 286 of the BGB, in other words so as to entitle a creditor to damages interest provided that it can also establish default.

My Lord, again, your Lordship will see how this plays out in due course.

So far as the Senior Creditor Group's position is concerned, that's the first two points in 8.

The third point is we say LBIE's administration application did constitute a default by virtue of a serious and definitive refusal of performance, so as a result creditors are entitled to make a claim for damages. Your Lordship will see 4(a), they're entitled to the minimum damages interest, and they're also entitled to a further damages interest claim under section 288(4) in particular.

Then 5 is our alternative case in relation to a proof of debt. We say proof of debts are capable of constituting a warning notice. So far as proofs in an English administration are concerned, obviously ultimately whether or not they do so depends on the precise terms of the proof of debt.

We in (c) make a few comments --

MR JUSTICE HILDYARD: I mean as to 5 in B, the sort of -- the characteristics of an English administration and how

that would meld in with the provisions of section 286, that was only lightly explored really because -- inevitably because neither expert was operating with any detailed knowledge of curiosities of English insolvency law.

MR DICKER: What -- there were a few points as your Lordship has seen in due course that were established. First of all, there's no German authority dealing with the position in the event of a foreign insolvency proceeding.

MR JUSTICE HILDYARD: Yes.

MR DICKER: Secondly --

MR JUSTICE HILDYARD: I didn't know what sort of insolvency proceeding, but yes.

MR DICKER: In a sense --

MR JUSTICE HILDYARD: Anything that we would regard as an insolvency proceeding, I suppose I should assume is the same, absent some different --

MR DICKER: Well, the first point is simply from a German law perspective, there is no authority on the point your Lordship has to decide, because the German cases have only concerned themselves with German insolvency proceedings. That's the first point.

The second point is -- this was explored in cross-examination -- that there are particular policies

underlying German insolvency proceedings and particular aspects of provisions of the governing German insolvency proceedings which appear to dictate the conclusion that a proof of debt can't constitute a warning notice.

So, for example, a general policy level, the fact that in Germany when they talk about the shutters coming down on insolvency, they really do mean the shutters coming down. It is not open to a creditor to do anything after then which may improve his position, including saying that he's delivered a warning notice triggering an entitlement to interest.

That's obviously a policy that operates in relation to a German insolvency proceeding. The issue for your Lordship is whether that policy is reflected equally or indeed at all in an English administration, and if it's not, is there any reason why a proof of debt in an English administration can't amount to -- can't satisfy the requirements for a warning notice as a matter of German law.

So one has the two aspect of German law. We have the civil aspect, what is required for a creditor to be entitled to interest, which is the debt must be due; that's a matter of German civil law. There needs to be a default which is either a warning notice or an exception to a warning notice. Again, that's

a matter of German civil law, but when you overlay on German civil law German insolvency, the specific policies and provisions of German insolvency law can have an impact on the answer to the civil law questions.

Now, we say when one gets to that last stage, it's not enough obviously to say: well, this would be the effect of a German insolvency, you can't have a warning notice. One has to say: well, that's a German insolvency; is an English administration the same; and does an English administration therefore equally, as a matter of policy or provisions, prevent a proof of debt constituting a warning notice?

My Lord, I'll come to this in due course. It's dealt with during the course of the written closing submissions.

Just going back to the document, if I may. In section C we make a few comments about the experts. The only one I draw your Lordship's attention to at this stage is paragraph 11. My Lord, we heard two and a half days of expert evidence, but the reality is that there are no cases dealing with the closeout mechanism under the GMA. In that respect they appear to be in a similar position to the one this court was in not so long ago, in relation to the ISDA master agreement.

Such cases as there are which the experts referred

to by way of analogy are, on some occasions, at least, some way distant and the commentary on various of the points again isn't in a number of respects conclusive.

My Lord, your Lordship is for better or worse going to decide issues which have not been decided by a German court, and some issues in respect of which German academic commentary is divided.

My Lord, so the next section, section D, deals with the first question, when does the single compensation claim fall due? Just so your Lordship sees how the written closing works, section D takes one up to page 27. Page 28, there's then a similar section in relation to the question of default.

Default takes one up to page 47. Then on page 48 there's a section dealing with assignment. There's a final short section at page 63 dealing with the abstract calculation of damages.

MR JUSTICE HILDYARD: Yes.

MR DICKER: So dealing with the first section and the first question, when does the single compensation claim fall due?

Paragraph 14, the parties agree the GMA doesn't expressly stipulate the date on which the single compensation claims falls due. In those circumstances agreed the issue is to be determined by reference to the

terms of the GMA in the light of general principle rules and principles of German law.

15 summarises Professor Mulbert's view.

16, 17 and 18 summarise by way of introduction Dr Fischer's evidence. My Lord, these are the passages which I think your Lordship referred to just before we broke yesterday.

In 16 Dr Fischer initially contended in his reports that since the GMA contains provisions for the calculation of the single compensation claim, it was evident from the circumstances that the obligation to pay the single compensation claim could not be due before the calculation had been performed.

Then three passages from his oral evidence that we've identified. Firstly, he said once a contract is terminated because of unusual circumstances, the conditions provide the party claiming damages can do this immediately and also the calculation can take place immediately. That's the passage in examination-in-chief, I think your Lordship referred to yesterday.

MR JUSTICE HILDYARD: Mm.

MR DICKER: Then two passages from cross-examination. The first in 17.2:

"If the GMA is terminated by notice, Dr Fischer

accepted that interest would accrue on the single compensation claim from the date that notice of termination was given."

So, as we understand it, at least in the case of termination by notice under clause 7(1), Dr Fischer appeared to accept termination on notice led to the claim being immediately due.

Similarly, so far as insolvency is concerned, he accepted the position is the same in the event the agreement is terminated -- automatically insolvency, although we add at least if the insolvent party has no counterclaim.

I'll come back to that, because that's a reference, as we understand it, to Dr Fischer's understanding of the operation of clause 9(2).

18 gives your Lordship the passage from re-examination.

Now, the point we make at 19 at this stage is a very simple one. If it's correct that you have a termination under clause 7(1) on notice, and the sum becomes due in that situation so as to give rise to a right to interest, then it wouldn't be logical to say that the position is different in relation to insolvency. Put another way, given that both are equally affected by clause 9(1), it wouldn't make sense to say that clause

9(1) operated to defer the date on which interest started becoming payable but only did so in the event of termination on insolvency.

My Lord, turning then to the detail. We have a section beginning, paragraph 22, dealing with the relevant principles of construction. We say in 22 that the experts agree on the approach to the interpretation of German law governed contracts.

My Lord, obviously in part at least the approach is familiar to this court. There is a distinction your Lordship will have noted, paragraph 22, subparagraph 3, Germany, obviously being a civil law jurisdiction, contracts also have to be interpreted in accordance with the requirements of good faith.

My Lord, 23 and 24 deal with section 271 which seems to be the statutory starting point. In other words you ask whether a time for performance has been specified. If it hasn't, is one evident from the circumstances; if not the creditor may demand performance immediately.

MR JUSTICE HILDYARD: Just returning to 22(3), I note that as a matter of theory, and whether it departs from English law in that regard may be a bone of contention in some other case. But is there any particular point on which the override of good faith makes a difference?

MR DICKER: My Lord, I -- I don't think there is anything in

the experts' reports which puts specific weight on the doctrine of good faith when they construe the effect of clauses 7 to 9 of the master agreement.

MR JUSTICE HILDYARD: Yes.

MR DICKER: My Lord, that's not to say that there wasn't something unspoken, if I can put it in that way, in their thinking that led them to the conclusion that they expressed.

MR JUSTICE HILDYARD: That I can appreciate but no difference emerged.

MR DICKER: That's absolutely right. My Lord, I think -- my Lord, I think the only caution here would be to remind yourself that you can't, as it were, entirely throw away the views of the respective experts and just construe it as if it were an English law contract.

My Lord, we do say that takes one a considerable amount of the way, given the experts' stress, at least in relation to contracts like this, on the wording the parties have used. It just seemed appropriate to remind your Lordship that obviously their rules of construction are not --

MR JUSTICE HILDYARD: Well, my duty as I understand it, when operating in the sphere of German law, is to do the best I can to replicate the construction which would be favoured by a German court faced with that issue.

MR DICKER: Yes.

MR JUSTICE HILDYARD: Therefore I have to rigorously adopt German rules of construction so far as I'm equipped to do so. But because good faith is the one you singled out as distinguishing the position, I simply wanted to test with you, as I shall test with Mr Allison, whether there's any particular point on which an orange or even red light goes on which in effect says: judge, watch out lest you fall into English ways.

MR DICKER: The answer to that in our submission is no.

MR JUSTICE HILDYARD: Yes.

MR DICKER: Certainly none as far as we can -- we've been able to recall was identified by either of the two experts. My Lord -- and obviously the question of construction is a question for your Lordship. It's not simply a question of, as it were, listening to the two experts and deciding or effectively being forced to choose between the two views expressed by them.

MR JUSTICE HILDYARD: I don't have to weigh their opinions as to interpretation and say it's you, at the end of the day, I have to satisfy myself.

MR DICKER: Correct.

MR JUSTICE HILDYARD: Yes.

MR DICKER: Absolutely.

My Lord, so 23, 24 are the starting point

section 271.
26, then I'll come back to this because this is significant. Now, where damages are due for breach of contract or in termination for cause, there is an immediately due right to damages, even if they're not yet calculated. Your Lordship will recall the passage from Professor Mulbert's supplemental annex and my cross-examination of Dr Fischer in that respect.
So then starting at --
MR JUSTICE HILDYARD: I know you are going to come on to interest, and I very much remember your focus on the point as to whether interest ran without break from an earlier stage.
There is something instinctively difficult about that notion, because part of the notion of interest is that someone has been kept out of his money, and before the amount which he is being kept out of is established, it seems difficult conceptually to assume that interest runs on an uncertain amount. You may say yes, but that's you talking on the Clapham omnibus, because in English law as, a matter of fact, and in German law, the notion of interest running on a sum uncertain is not particularly legally curious, but I do need a bit of help.
MR DICKER: That's absolutely right. Your Lordship is right

so far as English law is concerned. It's obviously commonplace to say that if you've got an unliquidated claim for damages, the mere fact that the quantum may need to be calculated, determined by the court, doesn't prevent the party from being entitled to interest in the event as and when the amount of the underlying obligation is established.
Similarly, there's nothing illogical or contrary to policy if the calculation is effectively delegated to one of the contractual parties in taking the same approach.
Now, we say the position is exactly the same in German law, certainly at that level of generality. Professor Mulbert referred to the -- for example, the vehicle damage case. Again, if you didn't have to wait until the calculation of the cost of repairing the vehicle was established, that that cost was notified to the tort feasor to be able to say: you damaged my vehicle, it's taken me some time to work out how much damage you did, but having done so, I should be entitled to interest from a period prior to the date.
MR JUSTICE HILDYARD: I find that situation easier to grapple with than the situation where there's a netting or set-off.
I don't think there was a case on that.

MR DICKER: There was no authority, no German law authority on netting or set-off cases.
My Lord, again I did touch on this briefly with Dr Fischer during the course of cross-examination. I was going to come back to that. My Lord, I dealt with -- I made a -- submissions in relation to English and German law just now at a sort of level of generality. Obviously if you look at things more specifically, say in the context of the English ISDA master agreement, again, there's nothing remotely problematic in having interest running for the entirety of the period if it had previously started, or from interest effectively starting immediately upon termination.
Indeed, one might say that effect of the ISDA master agreement is what you would commercially expect to be the position.
MR JUSTICE HILDYARD: So no problem in that context at any rate, probably in a general English law context, on interest running on a subsequently ascertained net sum.
MR DICKER: Yes. Now, again I'll --
MR JUSTICE HILDYARD: Is that right? By net, I mean taking into account cross-claims, set-offs and netting.
MR DICKER: Well, absolutely not, that's how ISDA precisely works.

MR JUSTICE HILDYARD: Yes.
MR DICKER: Indeed, one of the points I explored with Dr Fischer during the course of cross-examination was from an English law perspective, when one talks about set-off, one -- the way we would analyse it is that effectively both the claim and cross-claim are treated as being due and payable, and one is set off against the other, set-off operates by way of payment, so essentially you have payment of claim and cross-claim as at the date of the set-off or -- as at the date of set-off.
And no conceptual problem with -- with that at all.
Now --
MR JUSTICE HILDYARD: No conceptual problem in the sense that it's not beyond contractual endeavour to provide for it.
MR DICKER: Well, nor is it -- nor is there anything inconsistent in saying that if the parties agree for there to be a set-off or netting provision with only the balance payable, nothing inconsistent with the parties saying: what we're effectively envisaging is treating all claims to be due and payable to the extent they -- there is a matching cross-claim, for that matching cross-claim to be treated as having been paid immediately, nor therefore in the balance also being

payable immediately.
My Lord, as I said, certainly as a matter of contractual drafting, that's precisely the effect the ISDA master agreement achieves, and from a wider English law perspective, nothing strange in that at all; no reason to think as a matter of English law that interest would only run in a situation like that once the calculation had been formed, as opposed to on the -- effectively on the date of the -- on the date the set-off took place.
Now --
MR JUSTICE HILDYARD: When you are talking about interest rates, it is a bit easier. When you are talking about the use to which one party would put the money, it is more difficult. I mean, do you net off the set-off amount, the contrary amount plus interest at the rate that person would have obtained for his money? Do you mix and match in that way or not?
MR DICKER: Can I deal with this just in terms of how the German master agreement works?
MR JUSTICE HILDYARD: Yes.
MR DICKER: Because that's the next section of the document.
So if your Lordship wouldn't mind just --
MR JUSTICE HILDYARD: I'm sorry --
MR DICKER: No, no, I am obviously concerned to answer

your Lordship's --
MR JUSTICE HILDYARD: No, no, when I'm bolting, you just rein me back. It's important, but just so you should know where I'm confused.
MR DICKER: My Lord, paragraph 28 is a section that deals with the construction of the GMA. We identify in paragraph 8 -- 28, a couple of academic commentaries, one of which your Lordship looked at. In our submission they are helpful, a little like English law not that long ago; if you wanted to try and understand how the ISDA master agreement went, worked, commentaries were certainly the starting point.
My Lord, 29, purpose and scope --
MR JUSTICE HILDYARD: We looked at Zerey, didn't we?
MR DICKER: We did, yes.
MR JUSTICE HILDYARD: Did we look at Zenke?
MR DICKER: No.
MR JUSTICE HILDYARD: Anyway, I should look at that.
MR DICKER: Yes, and there are other aspects of Zerey your Lordship will see picked up.
Now, if one goes on, paragraph 31, one starts with clause 3 of the German master agreement. These are the underlying payment obligations.
MR JUSTICE HILDYARD: Yes.
MR DICKER: So the parties agree the derivative transaction,

there are payment obligations pursuant to that transaction. 3(1):
"Each party shall make to the other party each payment owed and perform any other obligation no later than on the due dates specified in respect of the relevant transaction."
So these are -- one may call them the parties' primary performance obligations. To be performed no later than the due dates.
3(4):
"If a party fails to make a payment in due time, interest shall accrue on the amount outstanding until such amount is received."
Then there's a default interest rate which is the interbank interest rate charged by prime banks to each other for call deposits so that that's what you automatically get. But then in the last sentence of 3(4), the right to make further claims for damage is not hereby excluded.
So the underlying structure is primary obligations, dates for performance, if you miss the due date for performance you are obliged to pay interest, either at a minimum rate or at a rate established by any further claim for damage.
Now, that's equivalent to section 2 of the ISDA

master agreement.
One then gets the termination and calculation provisions which are 7, 8 and 9. Again just walking through these. Clause 7 contains two circumstances in which the agreement may be terminated. One, on notice for material reason. Material reason includes circumstances where payment or other performance due has not been received for whatever reason. So essentially a breach. This is, I think, what Professor Mulbert referred to as termination for cause.
But it will also terminate. One may say it's obvious that it will need to terminate in the event of insolvency, given the consequences of insolvency in the context of derivative transactions. That's dealt with by 7(2).
Then again, similarly to the ISDA master agreement, 7(3) provides that:
"In the event of such termination, neither party shall be obliged to make any further payment or perform any other obligation under clause 3 sub 1 which would have become due on the same day or later. The relevant obligation shall be replaced by compensation claims in accordance with 8 and 9."
So parties are released from performance of future obligations, their future primary obligations and those

are replaced by compensation claims in accordance with 8 and 9.

One then needs to distinguish between two situations. First of all, 8(1) and 9(1), and secondly 8(2) and 9(2), and it's easiest to deal with them separately.

8(1):

"In the event of termination, the party giving notice or the solvent party, as the case may be, hereinafter called 'party entitled to damages', shall be entitled to claim damages."

So regardless of how the agreement has been terminated, the non-defaulting party, if I can refer to him as that, is given a -- is entitled to claim damages. And there are two -- well, next sentence:

"Damages shall be determined on the basis of replacement transactions to be effected without undue delay ... provide the party entitled to damages with all payments and the performance of all other obligations to which it would have been entitled had the agreement been properly performed."

So the damages claim is intended to put the non-defaulting party in the same economic position that it would have been in if the contract had been performed; in other words, its damage is equal to the

expectation loss.

There are two ways of measuring them. Either it's the cost of replacement contracts entered into by the non-defaulting party, or, if it refrains from entering into substitute transactions, may base the calculation of damages on the amount that it would have needed to pay for such replacement transactions, and it does so at the time or by reference to the time of giving notice or becoming aware of the insolvency.

So in the event of termination, the non-defaulting party is given a secondary right, namely a claim for damages.

Now, if one then goes on to 9, 9(1) combines both unpaid amounts and the claim for damages combined into a single compensation claim denominated in euros, and if the various ingredient parts are in different currencies, for which purpose a money equivalent in euros shall be determined in accordance with the principles set forth in 8, subclause 1, sentence 2 to 4, in respect of claims for performance of such other overdue obligations.

So one gets a single compensation claim.

We say 9(1) effectively gives the non-defaulting party a claim for damages calculated in accordance with a contractual mechanism. It doesn't need to be

determined by the court. The non-defaulting party is entitled to calculate the amount of its loss and damage in accordance with clause 8(1), and that's then binding on the defaulting party.

Just emphasising, because I'll come back to this, in 9(1), the person who performs the calculation is the party entitled to damages. So in that respect again it's similar to the way in which the ISDA master agreement operates.

MR JUSTICE HILDYARD: Sorry Mr Dicker, I mean, you have said that the termination by the party entitled to damages of the amount in euros of the single compensation claim would be binding and not a matter for the court; that's not an issue which arises in this context, is it?

MR DICKER: No, your Lordship is right, but just focusing on the fact in 9(1):

"Unpaid amounts and other unperformed obligations and the damages which are payable shall be combined by the party entitled to damages."

The reason I stress those words is one of the points that Dr Fischer made, and he made I think again in re-examination, as to why the sum can't have been -- can't be due on termination, is because he said the calculation requires the cooperation, that's the word he used, of both parties.

Now, we say so far as his reasoning was based on that fact --

MR JUSTICE HILDYARD: Well, that's because he elides 1 and 2.

MR DICKER: Absolutely, that's part of it and I'll deal with 2 in a moment.

MR JUSTICE HILDYARD: Right.

MR DICKER: So far as 1 is concerned, there's no reference to cooperation, there's no need for cooperation there at all; the party entitled to damages simply works out the unpaid amounts, the amount it has lost, produces a single compensation claim and then notifies the other party of that sum.

Now, that's where one has a situation in which the party entitled to damages has suffered loss as a result of the termination of the transaction.

Now, on this -- so far we say this is exactly like any other case in which a party is entitled to damages in the event of termination for cause, termination on breach. The only difference in this case is that the party is allowed to calculate the amount of such loss itself. It doesn't need to be determined in court proceedings or by any other means.

That's so far; one then has 8(2) and 9(2). One has to ask, has to work out how these fit into the overall

position. My Lord, the short point is that 8(2) and 9(2) are similar to the two-way payment under the ISDA master agreement. So 8(2), if the party entitled to damages obtains an overall financial benefit from the termination of transactions, it shall owe -- owe the other party, subject to 9(2) and where agreed 12(4), a sum corresponding to the amount of such benefit, but not exceeding the amount of damages incurred by the other party.

Now, my Lord, there's a question of construction in relation to the extent of the two-way payment which I don't think your Lordship needs to decide, but as we understand it, what this permits the insolvent party or the party who received notice of termination to claim, what it is entitled to claim is essentially unpaid amounts which were due to it as at the date of termination.

MR JUSTICE HILDYARD: The solvent party?

MR DICKER: The insolvent party. So if the party entitled to damages obtains an overall financial benefit. So the non-defaulting party is out of the money on the date of termination, so has a benefit from termination. The defaulting party is entitled to -- to the amount of the benefit but not exceeding the amount of damages incurred by the other party.

The point of construction I just referred to concerns, as I said, I don't think your Lordship needs to decide it, but it's whether this is essentially a full two-way payment mechanism or a limited one.

MR JUSTICE HILDYARD: As I read it, the "it" refers to the party entitled to damages.

So if that party, the party entitled to damages, obtains an overall financial benefit, it shall owe the other party, subject to some gubbins in clause 9 and subclause 2, a sum corresponding to the amount of the benefit received by the party entitled to damages, but not exceeding the amount of damages incurred by the other party.

MR DICKER: Now just -- yes. So there's a -- there's a question of construction as to what the phrase "but not exceeding the amount of damages incurred by the other party" involves; that wasn't really explored with the experts. My Lord, your Lordship doesn't need to decide that. The short point is there are circumstances in which a payment may be owed by, slightly unhelpfully, one may say, defined as the party entitled to damages, owed by the non-defaulting party to the defaulting party, to use the ISDA language.

Now -- so one can have a termination. If the party entitled to damages has suffered loss, all he does is

perform the calculation under 9(1). If that's not the case and the transaction was out of the money, that brings into play 8(2). He's obliged to make a payment to the defaulting party, and he's obliged to make a payment in accordance with clause 9(2). So we then turn in this situation and look at how 9(2) works. 9(2) says:

"A compensation claim against the party entitled to damages shall become due and payable only to the extent that such party does not, for any legal reason whatsoever, have any claims against the other party."

So non-defaulting party makes a gain on termination. It owes a compensation claim therefore to the defaulting party, that's 8(2). Put another way, the defaulting party has a compensation claim against the party entitled to damages. 9(2) then says, well, that claim shall not become due and payable, or shall become due and payable only to the extent that such party does not for any legal reason whatsoever have any claims against the other party.

So defaulting party makes a compensation claim. Non-defaulting party is entitled to turn round at that stage and say, "Well, I have counterclaims against you". We say, although I'm -- we say that must mean any claims, including claims outside the GMA, for the simple

reason that the single compensation claim effectively has incorporated everything that goes on within the GMA.

Then 9(2) continues. Assume that the non-defaulting party, faced with a compensation claim, but says, "Well, I've got counterclaims against you", last five lines:

"The party entitled to damages i.e. the non-defaulting party may set off the compensation claim of the other party against the counterclaims calculated in accordance with sentence 3. To the extent that it fails to do so the compensation claim shall become due and payable as soon as and to the extent that exceeds the aggregate amount of counterclaims."

So we say this is dealing with the following situation: the defaulting party says to the non-defaulting party, "You made a gain on termination and you are liable to pay me a single compensation claim". The non-defaulting party is entitled to say, "Well, that's true, but subject to setting off any counterclaims that I may have against you".

What 9(2) provides is that non-defaulting party is entitled to work out its counterclaims, is entitled to set off those counterclaims and only when that exercise has been done, will the non-defaulting parties' compensation claim be due to the defaulting party.

Now, we say this is the rationale for this is

perfectly obvious. It's exactly like the landlord and tenant example that Dr Fischer referred to. The non-defaulting party shouldn't be obliged to pay a single compensation claim to another party who may well be insolvent without working out whether it has compensation claims against the defaulting party, because otherwise if it's due and it pays and it subsequently realises it has a compensation claim, it may never recover the compensation claim.

So that's why it's entitled to work out, does it have any compensation claims, it's entitled to set them off against the single compensation claim and it's also entitled to say, "The single compensation claim which I owe you shouldn't become due until I've done that exercise".

Now, my Lord, a couple of points in relation to that. Firstly, Dr Fischer during the course of his oral evidence, I think made it plain, with the greatest respect to him, that he didn't understand how clause 9(2) operated. He kept on referring to compensation claims by the defaulting party against the non-defaulting party and that's not the way these compensation claims go, thereby the non-defaulting party, the party entitled to damages, that was the first point.

The second point is so far -- Dr Fischer also referred to the need for cooperation. But similarly the exercise that is being done in 9(2) is also not an exercise that requires the cooperation of the defaulting party. This is also an exercise done by the party entitled to damages. Your Lordship will see that about seven lines down in 9(2), the sentence beginning:

"For the purpose of calculating the value of the counterclaims, the party entitled to damages shall~... convert~..."

Then five lines from the end, the sentence we saw a few moments ago:

"The party to damages may set off~..."

So there's no cooperation actually going on in 9(1) or 9(2). The person who does the exercise is the party entitled to damages. In 9(1) the exercise it does is to say, "I've suffered loss, here's the amount of my loss".

In 9(2), if it's made a gain on termination, the exercise it does is working out the amount of its gain, working out whether it has any counterclaims against the defaulting party, the insolvent party, setting them off and then saying: whatever balance I owe you after the set-off only becomes due when I've done that exercise.

MR JUSTICE HILDYARD: Why do you limit, in the first sentence of 9(2), a compensation claim to the benefit

that the non-defaulting party has secured from closeout?

MR DICKER: Because that's what's indicated -- well, so far as being limited to a compensation claim against the party entitled to damages, that's because that's what 9(2) says.

MR JUSTICE HILDYARD: Why couldn't it be any old claim that the party in default may or may not have against the -- against the party entitled to damages?

MR DICKER: Well, we say what 9(2) is picking up is 8(2), so that's a situation in which a sum is owed under the GMA.

MR JUSTICE HILDYARD: Why do you say they are yoked? All 8(2) says is that it's subject to clause 9, subclause 2, which means you've got to take that into account also, but why are they yoked in that way in your submission?

MR DICKER: Well, for two reasons. The way this is structured is that you have 8(1), which is the damages claim by the party entitled to damages --

MR JUSTICE HILDYARD: Yes, yes.

MR DICKER: -- which reads through into 9(1). 8(2) is where the claim is payable in the other direction, and that's dealt with by 9(2).

MR JUSTICE HILDYARD: Under the agreement.

MR DICKER: Under the agreement.

MR JUSTICE HILDYARD: Yes.

MR DICKER: Now so far as the phrase, "a compensation claim

against the party" --

MR JUSTICE HILDYARD: Why is that under the agreement? Why?

MR DICKER: Yes. Because it wouldn't make sense for 9(2) to be concerned with any claims that the --

MR JUSTICE HILDYARD: But it is, in the next phrase, any claims in that phrase you say refers to any claim. Why should I restrict one and broaden the other?

MR DICKER: Because compensation claim is a compensation -- the concept of a compensation claim is a compensation claim arising on termination of the GMA. This isn't intended to be, as we understand it, effectively a global set-off mechanism between the defaulting party and the non-defaulting party. It's essentially to say if there's a benefit on termination and the defaulting party claims that benefit, he is then met by, capable of being met by, set-off of counterclaims which the party entitled to damages has.

My Lord, I'm not sure that the construction issue your Lordship has just raised in fact affects the argument. Our submission is essentially under 9(1), you have a claim for damages on termination for cause. There's no question of cooperation being required. There's no suggestion, unlike as in 9(2), that the single compensation claim isn't due immediately.

That's essentially an end of it.

MR JUSTICE HILDYARD: Well, one of the reasons why I raised this, apart from the fact that I want to try and understand the whole thing, is that if the compensation claim in the very first line refers to any claim, then I can see you need the cooperation of the other side to try and identify what it is. Likewise, when you get to the end of it, and the question I sought to ask both experts, I'm not sure that I fully understood what the result was, doesn't set out any timing. So 9(2) is a rather sort of -- it's quite a sort of dense provision, but does not necessarily spell out all that is to happen.
MR DICKER: No, but in our submission, when you see the words "compensation claim", what you are dealing with is essentially the same subject matter as is dealt with in 9(1). The only difference is that in 9(1), it's a single compensation claim, because nothing else can be wrapped up into it. In 9(2) it's not, because the party entitled to damages is entitled to set off any counterclaims that it may have.
MR JUSTICE HILDYARD: It isn't entitled, you say?
MR DICKER: My Lord, I'm sorry, I -- so 9(2) uses the phrase "compensation claim".
MR JUSTICE HILDYARD: Mm, well, I think I've got your submission at any rate, that in the first bit of 9(2) --

first line, a compensation claim in your submission means -- a compensation claim against the party entitled to damages, means a compensation claim against the party entitled to damages in respect of any overall financial benefit which that party has secured and which is dealt with under clause 8(2).
MR DICKER: Yes.
MR JUSTICE HILDYARD: That's what it means in your submission.
MR DICKER: Yes, because --
MR JUSTICE HILDYARD: And then the next bit, to the extent that such party, that's the party -- who is "such party" in the second line?
MR DICKER: That's the party entitled to damages.
MR JUSTICE HILDYARD: So the party does not for ... have any claims against the other party.
MR DICKER: Yes.
MR JUSTICE HILDYARD: I see. So -- so the compensation claim which the defaulting party has in respect of the matters which you say are referred to in clause 8(2) can only be -- become due and payable to the extent that there isn't some contrary claim called a counterclaim by the party entitled to damages against it.
MR DICKER: Correct. Now, so far as the scope is concerned, in other words what is covered by the opening words

"a compensation claim", in our submission your Lordship's alternative possible construction, i.e. it covers every claim which the defaulting party happened -- has against the non-defaulting party, can't be what's intended, because if it was, what would be going on in 9(2) is effectively the parties agreeing that any other claim that the defaulting party may have against the non-defaulting party, whatever the terms on which it -- it is going to become due and payable, the parties would effectively be agreeing that it will only become due and payable to the extent that the party entitled to damages doesn't have any counterclaims.
MR JUSTICE HILDYARD: Right, but then when you go on, the party entitled to damages is entitled to pray in aid any counterclaims within or without the agreement, probably without the agreement owed to him, he says, for any legal reason whatsoever.
MR DICKER: Yes.
MR JUSTICE HILDYARD: He's entitled to rely on anything, could be something totally separate from this agreement.
MR DICKER: Yes, and the reason for that is that the defaulting party is either insolvent or the agreement --
MR JUSTICE HILDYARD: He has a sort of deposit security, taking the analogy of the landlord, against any misadventures as regards any party outside the

agreement.
MR DICKER: Yes.
MR JUSTICE HILDYARD: As against the other party's agreement in respect of any failed adventures.
MR DICKER: And nothing commercially unusual in that at all. This is a defaulting party who may be insolvent, saying, "I know I'm the one in breach, I know I'm the one in default, but the agreement provides that if you've made a benefit from termination, you have to account to me". All this is effectively saying is, yes, but, only if -- only if and to the extent that I don't have any counterclaims against you.
That's to ensure that the non-defaulting party doesn't have to account for a benefit in circumstances where it will then be left, yes, under any other transactions --
MR JUSTICE HILDYARD: So it takes it out of the insolvency process.
MR DICKER: Absolutely. That's precisely what this is intended to do, and perfectly understandable, given the nature of the claim that the defaulting party has against the non-defaulting party, it's --
MR JUSTICE HILDYARD: That's why you say it says "for any legal reason whatsoever".
MR DICKER: Yes.

MR JUSTICE HILDYARD: By way of emphasising that it's --
MR DICKER: Yes. That can't logically be limited to, we say, just claims arising under the GMA, because you've already got the concept of a single compensation claim. We've got a situation in which there is a benefit. We know what the outcome is. If the non-defaulting party has made the benefit, it's obliged to make a payment to the defaulting party, but not if the defaulting party owes any sum to the non-defaulting party. Your Lordship is absolutely right to try and ensure that the position of the non-defaulting party is protected in the event of an insolvency which is exactly what the draftsman --
MR JUSTICE HILDYARD: So you don't get into the question of insolvency set-offs or anything else; it simply operates outside that universe?
MR DICKER: Assuming that this is effective as a matter of German insolvency law or whatever the relevant insolvency law is, yes.
MR JUSTICE HILDYARD: What do you say about the last bit of 9(2)? Or are you coming to that? To the extent that it fails to do so, that's the right of the party entitled to damage, to bring into account before paying back the deposit any counterclaims, the compensation claims shall become due and payable as soon as it exceeds the aggregate amount of counterclaims.

You may say: well, jolly interesting, it doesn't arise in this case for determination; but there seems to be no timing; would that be a good faith issue or what would it be?
MR DICKER: My Lord, can I answer that question after having put it in context as I think your Lordship just indicated.
MR JUSTICE HILDYARD: Yes.
MR DICKER: Your Lordship is absolutely right, we say not an issue on this case. The only thing that is significant is that 9(2), both at the start and at the end, contains provisions for postponing the due date. The draftsman didn't take a similar approach in relation to 9(1), for the simple reason he didn't intend a postponement to 9(1).
Now, so far as your Lordship's question is concerned, which is essentially how long is the postponement under 9(2), I think it's fair to say that we on this side, like your Lordship, don't find it entirely clear, simply because, as I think your Lordship just observed, it is triggered by the phrase "to the extent that it i.e. the party entitled to damages fails to do so". It's not clear, at least from the clause, how long the party entitled to damages has to work out its counterclaims and then to effect a set-off.

My Lord, it may be governed by questions of good faith or implication of reasonable period or something of that sort, but my Lord, I think that is one issue your Lordship does not need to decide.
MR JUSTICE HILDYARD: Unless I -- I mean, the various themes which are integral to your presentation, none the worse for that, but one is the yoking of 8(2) with 9(2); the second is the separation of 9(2) from 9(1). In order to test the robustness of those themes, I should be happy if I knew exactly how it all works. That's why I'm looking at it -- each bit of it, but -- so although I may not have to provide a determinative ruling, the robustness of which in Germany I wouldn't care to -- you know, speculate about, the understanding of it is important just to see how tight is your -- your premises.
MR DICKER: My Lord, and we say one effectively has -- one starts with the notion of termination of the cause, so far as the party entitled to damages has suffered loss, it's perfectly straightforward, it's dealt with under 9(1), that is a damages claim following termination of a cause and as we'll come on to in a moment, we say as a matter of German law, becomes due immediately.
9(2), we say is a different situation and not one obviously that's going to arise in relation to claims by

creditors against LBIE, because it arises where the party entitled to damages has actually made a gain. There is a postponement in that case but importantly the draftsman has not used similar postponement language of the sort he uses in 9(2) in 9(1), because he didn't intend to postpone.
So far as Dr Fischer's point about cooperation is concerned, there isn't cooperation; it's required all of this, whether under 9(1) or 9(2), is done by the party entitled to damages. He works out: has he suffered a loss? Yes, that's 9(1). Alternatively, has he made a benefit? Yes. What are my counterclaims? Should I set off et cetera? That's 9(2).
There's no need for any cooperation by the defaulting party. Indeed, again commercially one wouldn't expect it because if the cooperation of the defaulting party is required, and if the effect of requiring its cooperation was necessary and if the consequence of that was that interest would not run, it would be an obvious incentive for the defaulting party not to cooperate, slow the process down and delay any liability for interest, which can't commercially have been what the draftsman had in mind.
My Lord, just one last point, just going back to the written closing, paragraph 44.

I made a comment earlier that it seemed to us that Dr Fischer had not understood how 9(2) operated. We've given your Lordship the references to that.

Dr Fischer does appear to have understood that the single compensation claim is owed by the defaulting -- where one is dealing with it under 9(2), he got Professor Wood's nomenclature, he got the arrows the wrong way round.

MR JUSTICE HILDYARD: Well, it's -- I am trying to read it -- I mean it is bedevilled by the difficulty of nomenclature, because "the party entitled to damages" is misleading and a counterclaim is rather misleading in the context.

MR DICKER: It's terribly easy to see how you can read 9(2) and get the arrows the wrong way round, and your Lordship is absolutely right. On this side we only escaped that problem by -- when one reads 9(2) thinking about it in terms of defaulting and non-defaulting party, using the language of ISDA.

MR JUSTICE HILDYARD: Yes, and substituting all this.

MR DICKER: If you do, we say it's perfectly clear what 9(2) is concerned with. It's concerned with a situation in which non-defaulting party has made a gain, needs to account to that to the defaulting party unusually, but is entitled to set off cross claims it may have. Once

Dr Fischer accepted that wasn't the effect of 3(1).

We say equally in relation to the damages claim under clause 8, given you have to calculate your damages by reference to the date you receive notice or the date of the notice or of notice of the insolvency, again, it wouldn't make sense if that sum was effectively frozen in aspic unless and until the calculation was actually worked out, and you only then had interest from some subsequent date in the future.

So if you work out how much it would have cost you to replace the transaction on a particular day, but it takes you a year to perform that calculation and you don't then get interest for the year, you're not effectively receiving a payment which will put you in the position you would have been in had the contract been performed; you've lost the time value of money.

The final point on this is to the extent that Dr Fischer accepted it wouldn't make sense for there to be a gap in relation to a clause 1 -- clause 3 payment, given the way clause 9 operates, you can't sensibly treat unpaid amounts differently from a damages claim under 8. Clause 9 must operate in the same way for both.

MR JUSTICE HILDYARD: The warning notice which I know you are going to come to, but the warning notice does not

one gets past the definitional confusion, we say it's perfectly straightforward.

My Lord, so that's construction. But the next section of the written closing from paragraph 45 onwards deals with some commercial points. I am sure your Lordship has these in mind.

My Lord, I notice or I am reminded of the time. Would that be a convenient moment?

MR JUSTICE HILDYARD: Does that suit you for a break?

(11.45 am)

(A short break)

(11.53 am)

MR DICKER: My Lord, in the written closing submissions, there's a section beginning, paragraph 45, headed "Commerciality ... circumstances for the purpose of section 271 of the BGB". My Lord, these points will all be familiar to your Lordship. The short point is that the single compensation claim is meant to put the non-defaulting party in the same financial position it would have been in if the contract had been performed.

If one takes firstly a claim under clause 3(1), which is accruing interest, there can't sensibly be a gap such that interest stops running when 3(1) is replaced by the single compensation claim and only starts running again when the calculation is done.

have to specify the amount, only the fact of something being due.

MR DICKER: Yes, as I understand it.

My Lord, then the next section beginning paragraph 52 deals with wider questions of German law. Essentially the cases and the -- to the extent there was any academic commentary. My Lord, going to 54, we say, as your Lordship is fully aware, clause 7 of the GMA operates a termination for cause and as Professor Mulbert explained, German courts and legal literature very broadly agree, upon an early termination of a contract for cause, compensation in claim in favour of the party exercising its termination right becomes due and payable immediately on termination.

Dr Fischer agreed with that statement, adding that there could also be a claim for performance rather than for damages, in other words no doubt as in England people claim specific performance.

55 is a paragraph dealing with characterisation. We say that perfectly clear that a claim arising pursuant to clause 7 and 9 of the GMA is a damages claim, such that we fall within Professor Mulbert's explanation in 54. In 55(1) through to 4, we've just picked up the language of 7, 8 and 9. It's all about party entitled to damages, compensation claims, extinguishment of

primary obligations, replacement with secondary rights to damages. It's not concerned with ensuring performance but putting the party in the same position as they would have been if the contract had been performed, et cetera.

Then 57, we turn to the authorities which Professor Mulbert and Dr Fischer referred to. My Lord, there is an issue about ultimately how helpful your Lordship finds these authorities. They obviously don't deal with netting, they don't deal with the GMA, they don't deal with netting provisions, and certainly we say Dr Fischer's reliance on the landlord and tenant security case by way of analogy was some way distant from a claim for damages under clause 9(1). To the extent it had any analogy at all in this case, it's with the different situation in 9(2).

But in 57 onwards, we deal briefly with the authorities that the experts do rely on and were cross-examined in relation to.

58 is the damage to a vehicle case.

MR JUSTICE HILDYARD: Is that a limitation case?

MR DICKER: Is~...

MR JUSTICE HILDYARD: The time bar case?

MR DICKER: No.

MR JUSTICE HILDYARD: It was the motor car repair case?

MR DICKER: If your Lordship goes to volume 1, 29A. My Lord, it may be your Lordship is thinking of the heating bill case --

MR JUSTICE HILDYARD: Maybe I was.

MR DICKER: -- which was a limitation case.

My Lord, paragraph 1, a vehicle was damaged in a traffic accident; an invoice subsequently submitted for repair costs. We, or rather Professor Mulbert, relied on this for the general statements of German law which your Lordship saw at paragraph 9.

MR JUSTICE HILDYARD: Yes.

MR DICKER: Particularly the reference about halfway through:

"If the injured party may demand restoration of a damaged object or the amount of money required to restore the object ... the due date is the same as the date ... the damage to the legally protected interest occurs."

My Lord, the second decision that Professor Mulbert referred to was the prepayment case, and we deal with that in paragraph 60 and 61. In 61 we refer to the fact that in cross-examination, Dr Fischer agreed that the court concluded that the damages claim in respect of the prepayment compensation was due immediately, and that this was the case despite the fact the claimant needed

to calculate the amount of the prepayment.

We do say if your Lordship is looking for an analogy, that may be the closest one gets. Dr Fischer accepted the case had been correctly decided and stated that in German prevailing opinion, such a damages claim can arise immediately with the prepayment before the actual due date.

65, we deal with the two authorities, primary authorities, relied on by Dr Fischer in his report. The first in 65(1), your Lordship may recall, was an extract from an academic commentator who gave various examples, including where a party had a duty to perform work under a work agreement, the obligation can't become due before the time required to produce the work has passed. Dr Fischer accepted that wasn't an important case.

Subparagraph 2, the security deposit case. Again, we address that in subparagraph (b) and give your Lordship the reference to where Dr Fischer accepted that the rationale for the decision in the deposit cases lie in the purpose of the deposit as security. Your Lordship may recall, I went to an authority referred to there, bundle 3, tab 95, which said exactly that.

Now, my Lord, paragraph 66, the line that my learned friend appeared to take in cross-examination of

Professor Mulbert was to say: well, this case is essentially equivalent to a bill or invoice case. In other words, we're really dealing with a situation here where the parties agreed to perform work or services, will receive a bill or an invoice for the work or services, and -- and have to pay. Now, in that regard Professor Mulbert accepted that generally where a contract requires a bill or invoice to be presented, then the amount may well be treated as not being due until the bill has been presented.

He also made it clear there are many situations where no bill is required and the situation is different.

My Lord, the real point we say is that this claim under 9(1) is not analogous to a situation in which you supply goods or services subject to production of a bill or invoice that has to be paid. 9(1) is essentially a secondary right, it's a claim for damages arising on termination.

One simply can't analogise between the two.

67 deals with the landlord heating claim.

Our response to that is set out in 67.

We say in subparagraph 3:

"The nature and terms of the particular agreement in relation to a particular type of relationship heavily

regulated by German law led the court to conclude that claims should not be regarded as being due until the bill was delivered.

"In that specific context the court placed weight on the ability of the debtor to know what it would have to pay prior to service of a bill. The facts can be distinguished from a damages scenario where it is clear a damages claim exists but only the scope is unclear."

69, ultimately, we say, the question remains a simple one. As a matter of construction of the GMA of a whole, are the circumstances such that it's evident the single compensation claim should be regarded as due from the point of termination, or only as and when the party entitled to damages has conducted the calculations required by 8(1) and 9(1).

We say it's the former, not latter.

My Lord, that's all I was proposing to say in relation to the question of due.

The written closing then goes on to deal with the question of default. In 71 as your Lordship notes we have two submissions. The first relies on a serious and definitive refusal, and the second on an alternative case on the filing of a proof of debt.

My Lord, 73, no relevant case law on whether or in what particular circumstances a foreign insolvency

proceeding, still less an application for administration order, could amount to a serious and definitive refusal. As such the answer ultimately depends on the court's assessment of the facts.

My Lord, turning to the detail. 76 to 80 set out what's required for a default. Your Lordship will know, paragraph 78, section 2861 provides that default will occur where the debtor fails to perform when performance is due and a warning notice is provided. Then 79, 2862 sets out the circumstances in which a default will occur without the provision of a warning notice. That's serious and definitive refusal.

81, we deal with the test for serious and definitive refusal.

Obviously, the point we make in 81 is there's no need for a warning notice if the debtor seriously and definitively refuses performance. That would just be an empty formality.

82, test for a serious and definitive refusal largely agreed.

Your Lordship will see 82(1) may be explicit or implicit. Subparagraph 2, it can be concluded from external circumstances. 3, it needs to be the last word. 4, I think a point Professor Mulbert was not cross-examined on: a refusal is serious and definitive

if the debtor states or conducts itself in a way where it can be implied that it may be able to pay some time in the future but not at the time performance is due or within a reasonable grace period. In other words, serious and definitive refusal is tied to what you have promised to perform. It's not good enough to say, "I'll do it at some later date"; that can still be a serious and definitive refusal.

Subparagraph 6, it doesn't require a declaration of intent nor a quasi-declaration of intent, it's a real act.

My Lord, there was then an issue about whether or not the serious and definitive refusal needs to be communicated to the creditor. That's paragraph 83. Professor Mulbert's view was that a serious and definitive refusal does not need to be communicated to the other party in order to become effective, although obviously the creditor will need to become aware of it at some point in order to rely on it.

My Lord, we deal with Dr Fischer's view in subparagraph 2. His view, I think it's fair to say, was slightly less clear. He didn't suggest the refusal needed to be communicated directly to the creditor, but stated the communication must be capable of being known by the creditor. As we understood him, the thrust of

his point was essentially not secret or private. Your Lordship will see the references to his cross-examination. It's all expressed in terms of usually a definitive refusal is explained to the other party, the other party must be capable of being aware. Subparagraph (d), it must be acknowledgeable or recognisable. In (e), his answer over the page, the other parties shall also be able to have knowledge of it.

Everything appears to be phrased in terms of capability rather than actual receipt.

MR JUSTICE HILDYARD: I mean, it's always difficult to know how much to invest into a word in a language, one's own language, which is a translation from the actual text. But the words used is "refusal", not "failure". Refusal rather connotes some crossing of the line whereas failure is an objective event.

MR DICKER: Not -- again, my Lord -- not necessarily. You can ask, has a party refused to perform. You can assess it objectively. You don't necessarily need to put yourselves in the shoes of the counterparty in making that assessment. He's just refused -- he's just made it perfectly clear that he is not going to perform.

My Lord, then one needs to bear in mind it's clear that a serious and definitive refusal can be constituted

by -- it can be explicit or implicit, it can be derived from circumstances. There was a reference in one of the commentators to selling merchandise to a third party, no suggestion at least in the commentary that there would only be a serious and definitive refusal when that actually came to the knowledge of the other contracting party.

My Lord, there's also a commercial point here. Take the example of a seller who does sell to a third party. Is he entitled effectively to avoid being held to have made a serious and definitive refusal if he can keep that sale secret from the counterparty so that the counterparty doesn't actually become aware of it? Is he entitled to say: unless and until you in fact become aware of it, I haven't committed a serious and definitive refusal, I have actually put it completely out of my hands to perform; I intended to put it out of my hands to perform, but nevertheless no serious and definitive refusal at that stage; only later when you actually find out about it; as a result I only have to pay damages from that later date.

In other words can the defaulting party benefit from ensuring that the relevant circumstances don't in fact come to the attention of the counterparty.

My Lord, we say it would be rather odd if that were

a sense a contract being something between at least two parties, it's alien to think that something can go wrong without the knowledge of one of them which nevertheless affects him in a very material way.

MR DICKER: Well, only insofar as this respect, as the running of interest is concerned. If one stands back, the German position is the debt needs to be due and you also need a default which can be constituted either by a warning notice or by a serious and definitive refusal, and put very simplistically, in a normal situation you have to serve a warning notice reminding the creditor -- reminding the debtor that he should pay. Serious and definitive refusal comes in when that would just be an empty formality; in other words the debtor can't sensibly turn around and say, "I didn't realise that I was obliged to perform, I didn't realise that I was at risk of paying interest".

Now, if one tests it that way, in other words from the perspective of the policy, is it an empty formality? Well, it's an empty formality if the debtor has clearly, unequivocally evinced an intention not to perform.

MR JUSTICE HILDYARD: It is, I accept. That's a different matter. But I agree with you that you have to look at it as being the equivalent of a warning notice such as to make a warning notice unnecessary but the warning

the position.

Now, conversely one can understand Dr Fischer's language of "capable", simply because if he hasn't made it sufficiently plain externally, then there may be an issue about whether this is in fact his last word. So there may be an element about -- whether "publicity" is quite the right word, I'm not sure, but -- but this may go to the question essentially of whether this is his last word, if he has come out either by act, either by word or act, and looking at what he has said or done, it's clear that he's not going to perform. That's good enough. But it's not good enough if you are sort of rooting around amongst his private thoughts.

MR JUSTICE HILDYARD: Again, it's dangerous because it's possibly using the wrong perspective or spectacles, but ordinarily in English contractual law, there is an emphasis on conduct which crosses the line in order to have contractual consequences, sometimes very strict like repudiation, where it actually has to be not only discernible but accepted, or else it would be writ in water.

MR DICKER: There is, as I'm sure your Lordship knows, a great danger in assuming --

MR JUSTICE HILDYARD: It is, but I am just wondering if there is a certain measure of sense in it, because in

notice is the biggest -- is the paradigm of notification. It is the paradigm of conduct crossing the line.

MR DICKER: But that is notification by the creditor to the debtor.

MR JUSTICE HILDYARD: Of it being due, yes.

MR DICKER: Of it being due.

MR JUSTICE HILDYARD: Yes, yes, I accept that, but it just seems to me to emphasise that evincing is what is important and it's got to be evinced to the counterparty. And I mean, you know, that's the thought.

MR DICKER: We would say no, because if one goes back to the policy, it is -- would it have been an empty formality for the creditor to tell the debtor to serve a warning notice on him. If the circumstances are such that it would have been an empty formality, he shouldn't have to do that and the debtor shouldn't be entitled to say, "I haven't received a warning notice, I'm therefore entitled to proceed on the basis that the sum isn't in default", which is what this is really concerned with. "I therefore shouldn't have to pay interest, I'm entitled to effectively an interest holiday unless and until this information comes to you which makes it perfectly plain I do not intend and I will not perform". At that point, you say, "Okay, I'm aware of your serious

and definitive refusal".
The vice it's getting at is essentially -- what it's trying to address is ensuring that the debtor is treated fairly, either receives notification that he should pay or alternatively isn't sensibly in a position to say, "I really should have received notice", and he's not sensibly in a position to say, "I really should have received notice", if what he did, whether by words or conduct, made it plain that any notice --
MR JUSTICE HILDYARD: He has made it plain to whom, which we are on about. Take the case of anticipatory breach; would you accept that in the case of anticipatory breach, there must be some conduct crossing the line?
MR DICKER: Professor Mulbert distinguishes between the question of whether or not there's been a serious and definitive refusal and whether the creditor is in a position essentially to assert that. Now, he says if the debtor has made it plain by act or words, not necessarily to the creditor, that he's not going to perform, that's a serious and definitive refusal.
MR JUSTICE HILDYARD: There's no commercial logic to that, is there? I mean, by definition it being anticipatory, the other counterparty has not suffered any interest, loss, opportunity cost or anything else. Why would you

in that context attach such contractual significance to an event of which the counterparty has no knowledge?
MR DICKER: Because this is a situation in which the defaulting party has basically -- he -- he has indicated he -- he has done something which prevents him from being able to say, "I'm going to perform". It's clear he is not going to perform, he's in -- he's in --
MR JUSTICE HILDYARD: It's depressing, but it doesn't have any significance, does it, until the event which is anticipated?
MR DICKER: Well, it does have significance in our submission because he's from that point on, whether one calls him a defaulting party or a party in breach or whatever, he's -- in our submission he's not someone who would be entitled to the protection which the warning notice and its exceptions are intended to provide. He's not someone who is legitimately entitled to say, "Yes, German law operates on the basis that I shouldn't have to pay interest from that date, I should only have to pay interest if I'm reminded that I need to perform, or if there's a serious and definitive refusal".
He's done enough for his serious and definitive refusal. He's not -- he's not deserving of protection. Whether or not he's managed to ensure that at that stage, the counterparty isn't aware of what he's done,

and obviously Professor Mulbert's view is obviously counterparty needs to end up knowing, to be able to say there has been a serious and definitive refusal, but once he does that, he's able to say, "Look, on this day this debtor put it out of his hands perfectly clearly to perform the contract. If I had known at that stage, sending him a warning notice would be a complete waste of time. He can't be in a better position by concealing that fact from me. He can't be in a better position so far as running of interest is concerned. He can't just say he was deserving of protection in some way by the requirements for a warning notice or the exceptions to it".
MR JUSTICE HILDYARD: You say the purpose of the warning notice is to ensure that the debtor knows he's got to cough up, and if he knows already and has evinced his knowledge by some act which is unequivocally inconsistent with performance, then that's enough?
MR DICKER: Absolutely. It doesn't make sense in describing such an individual as deserving of protection such that he shouldn't have to pay interest until either he gets -- he does get a warning notice, a complete waste of time, or knowledge of those acts finally reaches his counterparty. Particularly given that you know when they do so, whether or when they do so, may partly be in

his own hands.
So he can prevent interest from running due simply by ensuring that although he doesn't intend to perform, makes it perfectly plain he's not going to, I mean that objectively, not necessarily to the knowledge of the counterparty, and does everything he can to ensure that he can't, interest doesn't run simply because he's managed to conceal those facts from the counterparty in the meantime. Why is that individual deserving of protection? Why shouldn't interest run against him?
There would be no point during that period in serving a warning notice if it had come to his attention. Why can't the counterparty say, "I didn't know about it, if I had known about it, no point serving a warning notice". Why isn't the counterparty entitled to say, "There was a serious and definitive refusal, whether or not I knew it at the time, and interest therefore should run from day 1".
My Lord, at 86 we deal with a slightly different point which we've referred to in terms of motive.
86, in response to a question from the court Dr Fischer agreed with the proposition that for an event to constitute a serious and definitive refusal, the event must be explicable exclusively by reference to a refusal to pay.

We make two points, firstly in subparagraph 1. The precise interpretation of a party's conduct obviously depends on all the circumstances. For example as illustrated by the discussion during cross-examination, the position may be different the seller was drunk when he destroyed the goods, if the goods to be sold were fungible and if the seller would be able to find a replacement within the time permitted for performance.

If this is what Dr Fischer was seeking to convey his view is unobjectionable.

There was a slight hint -- and just in case anything is sought to be made of this -- there was a slight hint that there may be a question of motive here. If that is what is going to be said, we say that's not supported by any of the commentary or authorities. We refer in particular, for example, to Schwarze.

While the author correctly notes the circumstances of the individual case are relevant, no suggestion the issue turns on whether the seller's or the tenant's actions are motivated solely by a refusal to perform their respective obligations. If that were the test, one would expect it to be stated somewhere in the commentary. Such a test would also appear, we say, commercially nonsensical. On such a test a seller who deliberately sold unique goods to a third party to

say that it matters whether he was drunk or not?

MR DICKER: No. You can test it this way --

MR JUSTICE HILDYARD: Does it matter if he's drunk or not?

MR DICKER: No.

MR JUSTICE HILDYARD: No.

MR DICKER: You can test it this way: would it be an empty formality, he having destroyed the goods, the unique goods, albeit whilst he was drunk, would it be an empty formality to serve a warning notice? Totally empty formality.

MR JUSTICE HILDYARD: I mean, an example I had in mind, take -- contrast two examples. One is a chap knows he's got to pay a lot of money in two days' time, and what he does is transfer all the money to his wife with whom he's still friendly. Right? And then contrast that with the position with the chap in the same predicament who rings up the person to whom he's to pay the money and says, "Come and have a look at this", and solemnly tears it all up. Right?

Now, the first may not be the final word. Because it's not inconceivable that his friendly wife may return the money.

MR DICKER: Nor --

MR JUSTICE HILDYARD: The second, it's all torn up.

MR DICKER: Harder, unless he starts -- unless it's some

obtain a better price would still be able to assert that no serious and definitive refusal had occurred because "I wish it had not come to this".

It's a little like the old cases one discussed in the context of intention for criminal law, that a terrorist who puts a bomb on a plane intending to recover insurance monies and says, "Well, of course my intention wasn't to kill the passengers." The answer is, "Well, that was your intention, it may be that wasn't what you desired". My Lord, we say questions of motive can't form any part of this --

MR JUSTICE HILDYARD: Sometimes it's difficult to draw the line, I take your point on this in 2, but your example in 1, if the seller was drunk, why is that relevant? I mean, your real point is if -- the destruction of goods, if they can be replaced or are fungible, may not necessarily connote refusal to perform.

MR DICKER: That --

MR JUSTICE HILDYARD: But the drunkenness on your example, stripping out motive is irrelevant.

MR DICKER: If the goods are unique --

MR JUSTICE HILDYARD: Supposing they were unique and he was drunk as an owl and he destroys them, and actually as a matter of fact, it was a special contract delivery of those goods, and there's no chance of doing it, do you

complicated and rather elaborate negotiating strategy, leaving him the option of sellotaping it all back together afterwards if he doesn't get what he wants.

MR JUSTICE HILDYARD: Yes, it all goes down the drain!

MR DICKER: Again, your Lordship may be making it harder --

MR JUSTICE HILDYARD: Into the shredder.

You see, I mean, does motive count as the first? Does the secret -- does the possibility of obtaining back the money from the wife make any difference? Or is the act of transfer unequivocal, or don't you have to bother?

MR DICKER: The short answer is it's a question of fact in every case.

MR JUSTICE HILDYARD: Right.

MR DICKER: This case doesn't concern those facts.

MR JUSTICE HILDYARD: No.

MR DICKER: Your Lordship doesn't need to essentially write a textbook on --

MR JUSTICE HILDYARD: No.

MR DICKER: -- the law of serious and definitive refusal.

MR JUSTICE HILDYARD: No. I think it was really Judge Fischer's point that -- my understanding of it was that the act has to be unequivocally referable to a refusal.

MR DICKER: And.

MR JUSTICE HILDYARD: There must be no doubt whatsoever.
MR DICKER: And one could see why -- one can obviously see why that may depend on the circumstances. But the point remains, even if you say something, you still have to establish that's your last word in the sense that it's not a negotiating position. So even if you say in the clearest possible terms --
MR JUSTICE HILDYARD: Yes.
MR DICKER: So the same issue arises on the facts, can you conclude to the necessary degree of confidence, whatever that may be, that this party is not going to perform his obligations?
MR JUSTICE HILDYARD: Yes. There was a slight difference in emphasis between the experts as to how beyond recall the last word had to be.
MR DICKER: We would invite your Lordship to take a realistic approach, we're not in the context of criminal law or anything of this sort, this is a civil question as to when interest starts running.
My Lord, in paragraph 87 onwards, we deal with more specifically with the position in the event of an application for administration, including, indeed specifically, LBIE's application for administration.
Your Lordship, I am sure, knows how this arose. Your Lordship could simply have been asked to rule on

what constitutes a serious and definitive refusal as a matter of German law and leave it at that. My Lord, we thought it might be more useful for the administrators and indeed for the parties if there was a factual situation which your Lordship could consider. The one that we identified was whether LBIE's application for administration, in other words the form plus Mr Sherratt's witness statement was sufficient. Your Lordship knows I went through that to some extent with Dr Fischer.
We've dealt with both experts' views in that respect, Professor Mulbert starting at 89.
MR JUSTICE HILDYARD: This application was made ex parte, without notice.
MR DICKER: Yes, but in circumstances where it would undoubtedly, to use Dr Fischer's language, be capable of becoming known to the counterparty. It must have been one of the most publicised events, not just on 15 September --
MR JUSTICE HILDYARD: Certainly the collapse became known, but --
MR DICKER: Well, and -- and Mr Sherratt's witness statement, once the administration order was made, no doubt equally capable of becoming known.
MR JUSTICE HILDYARD: Once made, but I thought the important

thing -- this is where the question of notification is relevant -- is when you apply for an insolvency process such as administration ex parte and without notice, even if that is an unequivocal statement that thereafter you're not going able to pay and don't intend to do so, is that event, prior to the making of the order, enough? Once the order is made, it's too late, isn't it, to serve the warning notice? That's the whole point of whether notice is necessary. At least that is what I get.
MR DICKER: My Lord, in relation to that, we say if there is a serious and definitive refusal, the fact that it may only come to the attention of the --
MR JUSTICE HILDYARD: I understand your point on that, yes. Then the question is of its essence, is such an application enough?
MR DICKER: We say yes. In a sense it's not -- it's not very different from the -- the example given in the textbooks about selling the goods to a third -- a third party, you've put it out of your hands to perform. One point in relation to that, it's possible to lose focus, if that's the right phrase. The issue for your Lordship is whether or not there's a serious and definitive refusal in relation to contracts governed by the German master agreement. So it's -- one may say well, it's

possible that in LBIE's administration, some contracts would be performed.
MR JUSTICE HILDYARD: Yes.
MR DICKER: That's irrelevant for present purposes.
MR JUSTICE HILDYARD: Is it? Because that was the point of paragraph 9(3), or whatever it was, of Mr Sherratt's witness statement.
MR DICKER: But we say that's not the issue, because your Lordship here is concerned with contracts governed by the German master agreement, and you know they're not going to be performed for the very simple reason --
MR JUSTICE HILDYARD: Because they -- the contractual terms.
MR DICKER: Absolutely, by making the application you have -- you have yourself --
MR JUSTICE HILDYARD: If that is an insolvency proceeding for the purpose of the relevant clause in the GMA, then that's the answer, and I don't think anyone has suggested that administration is not within the description insolvency proceeding in the GMA. I thought to ask it, but as no one had tackled it, I thought possibly I shouldn't.
MR DICKER: Both experts accept that the application for administration order in relation to LBIE constituted an insolvency for the purposes of all contracts under the GMA for which clause 7(2) --

MR JUSTICE HILDYARD: That's common ground. That's not -- that's not in dispute.
MR DICKER: Correct.
MR JUSTICE HILDYARD: Right. So you say the fact that it was envisaged expressly, including expressly by Mr Sherratt, that some -- that you weren't thereby saying that no contracts would be observed is irrelevant because, although that may be so, the fact is that the mere application under the contractual terms of the GMA simply worked as a termination.
MR DICKER: Yes, I mean one could go further, but one doesn't need to. One could say, having got an administration order, the effect of that was no doubt that contracts like the GMA would be incapable of being performed, I mean, whether or not they necessarily terminated.
MR JUSTICE HILDYARD: I just don't know about that.
MR DICKER: Well, simply because, going back to the administrators, the point they have made repeatedly, no one expected there to be a surplus.
MR JUSTICE HILDYARD: No, I know, but they didn't close out that, and I think I could only -- I would have to give weight to what was stated, but I think what you are cautioning me is that although it's not unusual in administration for optimism to be expressed, it's

irrelevant in this context because of the operation of the contractual provision.
MR DICKER: That's all I need for my purposes.
MR JUSTICE HILDYARD: That's all you do need as well.
MR DICKER: Yes.
MR JUSTICE HILDYARD: Until Mr Allison explains why more is required.
MR DICKER: Now, Dr Fischer, we deal with his position in paragraphs 94 onwards. Again, this is still in the context of serious and definitive refusal. 94 in his third report, he stated:
"An application for institution of German insolvency proceedings ... not sufficient to amount to a serious and definitive refusal."
The first point we make in 95 is the question of whether a German insolvency application constitutes serious and definitive refusal, not being discussed in the case law or the literature, and your Lordship saw the only relevant authority which was the decision of the Munich Court of Appeal. That was the -- an insolvency alone, doesn't amount to a serious definitive refusal and that was the temporary liquidity block case.
In 96 we make the point that, clear from his cross-examination that Dr Fischer's view on whether

a German insolvency application by itself amounts to a serious and definitive refusal, based on the particularities of the procedure and policies relating to a German insolvency application, and I think there were three points discussed.
Firstly, he said: well, the application is procedural; it's addressed to the court; does not constitute a declaration to the individual party for the contract; and that's going back to the underlying requirements which I've dealt with.
He says in 2, the fact that an application for a German insolvency does not contain a statement referring to the intent to perform, but expresses only a possibility and not a certainty the debtor would not want to perform.
Again, one could understand why in that situation, a petition wouldn't constitute a serious and definitive refusal. If all you say in the petition is: there's a possibility I may become insolvent; if that is all you say, well, you wouldn't read that as a serious and definitive refusal even on Professor Mulbert's test.
3, the fact the German court would also have to consider when deciding whether a petition in Germany amounts to a serious and definitive refusal, whether it would cut across the policy of the insolvency order

including section 103, your Lordship may recall that was the point I put to Dr Fischer. Essentially in Germany, the shutter comes down as a matter of insolvency law so far as the creditor is concerned, but under 103 the insolvency administrator is entitled to perform contracts during the course of insolvency.
If a creditor can say: well, I don't have to because you were guilty of a serious and definitive refusal; then the policy underlying section 103 would be undermined.
Obviously that's not the position here because we don't have similar provisions. We don't have executory contract provisions in the way that the US does or it appears 103 provides for in Germany.
Where we I think ended up in 98, we say that whatever the position as a matter of procedure and policy of German insolvency law, Dr Fischer accepted that in order to determine whether the same reasoning adopted by him in the context of German insolvency proceedings applied to the facts of LBIE's administration application, an examination should be made of foreign procedural law to ask whether the reasons according to German law for serious and definitive refusal in an insolvency application exists in the foreign legal system.

99, we just summarise certain differences which we say arise in relation to an application for an administration.

I think I've essentially made those points already.

100, sub 2, is a point I think not picked up in cross-examination, in a sense didn't need to be. One of the points made by Dr Fischer in his report was the institution of German insolvency proceedings cannot constitute a refusal of performance, if only because there is no act by the debtor.

MR JUSTICE HILDYARD: Mm.

MR DICKER: My Lord, we say well, that may be the position in Germany but it's not the technical position as a matter of English law.

My Lord --

MR JUSTICE HILDYARD: Does it matter that -- at least theoretically the application might fail?

MR DICKER: Well, again, one has to look at the facts. There are two parts to this and that's why I dealt with it in that way in the cross-examination. There's both what Mr Sherratt was saying as a matter of fact. It didn't have any money, it couldn't continue trading, it wasn't going to perform; indeed, in relation to the GMA contracts, it couldn't perform because by making the application, it had terminated the contracts.

Now, there's a second question which is what would be the consequence as well if the administration order was granted? My Lord, obviously if it wasn't granted, then I can't rely on those secondary consequences.

MR JUSTICE HILDYARD: No.

MR DICKER: My Lord, I think those are all the points I need to emphasise on serious and definitive refusal.

There's a repetition of the -- essentially a repetition of the point in relation to motive at 102 which I've dealt with.

MR JUSTICE HILDYARD: Yes.

MR DICKER: So we then come on to the alternative case which concerns a warning notice. In other words if we were wrong on serious and definitive refusal, is a proof of debt in an English administration capable of being a warning notice?

107, experts are agreed as to the formal and substantive requirements.

109, experts agree the filing of a proof of debt in German insolvency proceedings cannot constitute the serving of a warning notice under section 2 --

MR JUSTICE HILDYARD: Sorry, when does interest run, from the service of the warning notice or from the prior event?

MR DICKER: If it's a warning notice, it's from the date of

the warning notice; if it's a serious and definitive refusal, it's from the date which constituted -- which gave rise to the serious and definitive refusal.

MR JUSTICE HILDYARD: Right.

MR DICKER: The only qualification, of course I'm reminded by my learned friend, there are two ingredients for default: the first is due; the second is either a warning notice or an exception. You have to have both. Due and either warning notice --

MR JUSTICE HILDYARD: So you would expect the interest to run from the due date, wouldn't you?

MR DICKER: I think the position is the experts agreed that it would be --

MR JUSTICE HILDYARD: From the date of the warning.

MR DICKER: Provided that -- my Lord, again we say on our case it doesn't matter here, because both experts also agreed that a serious and definitive refusal can occur before, at or after the debt is due. If it occurred before, then it takes effect when the debt is due. Now, we say essentially both events occurred at the same -- same moment, on our case. We have the application for administration that terminated the GMA. We say the compensation claim became immediately due, and we also say the same application for administration constitute a serious and definitive refusal, and again we're

looking at the same time. So on our case, we say we're looking at the same moment and interest started running from the same date.

My Lord, I mentioned or referred your Lordship, 109, experts agree filing of a proof of debt in German insolvency proceedings cannot constitute service of a warning notice.

We say in 110 that that is a consequence of the particularities of German insolvency law.

And, as was accepted by Dr Fischer in cross-examination, three features of German insolvency law support the general policy which he referred to as the essential principle of German insolvency law.

Creditors are not entitled to prove their position by serving a warning notice and thereby claiming interest after insolvency has started.

Firstly, contrary to the German law articulation of the policy of treating all creditors equally.

Secondly, the distinction under German law between the insolvency estate and the insolvent debtor.

Thirdly, that in order for a default to occur, a claim must not only be due and payable; it must also be enforceable. Dr Fischer's view being that after German insolvency proceedings have started, claims are no longer enforceable; since the creditor is not allowed

to bring a claim against the debtor, must instead satisfy his claim against the assets in the estate.

We say obviously the distinction is clear in relation to an English administration. Most importantly, we don't have a rule that the shutter comes down on the making of an administration order such that creditors are prevented from serving a notice or anything of that sort thereafter.

We obviously have a situation in which, as this case illustrates, one is entitled to post-insolvency interest.

In any event, 111, Dr Fischer accepted that if there are material differences on these points between German insolvency law, a different assessment of the problem of default during the course of insolvency may be required.

The obvious point is your Lordship shouldn't assume simply because a warning notice doesn't work given the policy of a German insolvency, the position is necessarily the same in relation to an English insolvency.

My Lord, one perhaps might make this additional point. The fact that German insolvency law operates in that way provides an obvious explanation, we say, for why the draftsman of the GMA drafted it in the way we say he did. In other words, drafted it so that the debt

is due on the application being made, and the application is likely to amount to a serious and definitive refusal such that interest runs.

So that's that.

We end in 112 by saying in light of the differences between an English administration and a German insolvency proceeding, Professor Mulbert's view is to be preferred.

German authorities and commentary regarding a German proof of debt would not apply in the case of a proof of debt submitted in an English administration.

The only point I add there is of course it's going to depend on the terms of the proof of debt; we haven't got into discussion about different ways in which proof of debt might be capable of being formulated and whether they would all necessarily amount to a warning notice.

We say they're certainly capable of doing so.

My Lord, then the --

MR JUSTICE HILDYARD: What is the question that I need to be satisfied here, as to the answer? Was it the intention of the parties as expressed by the draftsman in the words that he used, that when he said warning notice, he could reasonably have contemplated a proof of debt in an English administration? Is that what I've got to be satisfied about?

MR DICKER: I think it's whether the proof of debt in an English administration satisfies the requirements for a warning notice under German law. The draftsman may or may not have had any view about English administrations, let alone proofs in relation to it, but if your Lordship goes back to 107, we say the question for your Lordship is whether a proof of debt in an English administration is capable of satisfying the formal and substantive requirements for a warning notice, namely, 1, an unequivocal demand for payment of a sum due --

MR JUSTICE HILDYARD: So it is the characteristics, you say that the parties and the draftsman would simply have said: well, a warning notice is a piece of paper with the following characteristics.

MR DICKER: Yes.

MR JUSTICE HILDYARD: The question for me is has a proof of debt in an English administration those characteristics? If the answer is yes, it's a warning notice.

MR DICKER: Yes. The only caveat we'd make to that is, as I said, it may conceivably depend on the precise terms of the proof of debt. I mean, you can imagine cases in which it was made absolutely plain, if only because there was a covering letter saying, you know, I demand payment of this sum -- actually that would probably be

all that was required. But absent that --

MR JUSTICE HILDYARD: Well, inconsistent with a notion that you are going to prove, as it were.

MR DICKER: Yes.

MR JUSTICE HILDYARD: Yes.

MR DICKER: My Lord, so that's default.

The third section we deal with is assignment.

That starts at paragraph 113. We set out in 113 points on which the experts agree. Your Lordship will note in 113(3) for the period before the transfer, the only default damages that can be asserted is the default damages claim belonging to the transferor. Then 4, for the period after the transfer, the focus of any default damages claim is on the transferee and not the transferor.

As your Lordship knows, as is set out in 114, the dispute concerns whether there is a cap.

115, the experts agree no clear decision of the German courts on which the issue has been resolved, has been expressly left open by the BGH.

They also agree that the prevailing view in the commentaries on the effect of an assignment is that there is no cap. Indeed, your Lordship will have noted from cross-examination -- this is 116 -- that Dr Fischer accepted that to the extent he relies upon articles or

commentaries which suggest a contrary view, such materials acknowledged the prevailing view is as set out by Professor Mulbert, and he also accepted it was possible that the BGH would agree with the prevailing view.

My Lord, we then deal with section 398, which is the section that provides that when the contract is entered into, the new creditor steps into the shoes of the previous creditor. Your Lordship may recall in the context of the US law evidence a similar debate as to how far the metaphor takes one. My Lord, we say it doesn't assist much for the reasons we set out in 119(1) through (3).

First, if an assignee is treated as stepping into the shoes of the assignor, the question remains as to what rights the assignee is stepping into, whether they permit an assignee to assert a claim for increased damages.

Secondly, Dr Fischer cannot be suggesting the "stand in the shoes" metaphor entitles the assignee to exactly the same rights, no less and no more than the assignor, precisely because it is common ground between the experts, the assignee cannot recover for the greater loss, if any.

So we know from that alone that standing in the

shoes isn't a metaphor to be taken entirely literally.

We say no limitation on the extent of the damages that the assignee may recover.

MR JUSTICE HILDYARD: I mean, I have asked, I am not sure I have received a definitive answer, and it may be therefore that I simply won't know, but the English translation, is that, as it were, a market translation or a party translation, if I can put it that way? Was that translation for the purposes of these proceedings or is it a coordinate translation?

MR DICKER: Your Lordship asked that question yesterday and I'm sorry I didn't ensure that I had an answer to it.

MR JUSTICE HILDYARD: I was surprised to see stand in the shoes in a way.

MR DICKER: There was some discussion, I think, as to whether stepping into the shoes was -- was in any event quite the concept.

MR JUSTICE HILDYARD: Yes.

MR DICKER: At least if taken literally. My Lord, can I give your Lordship a --

MR JUSTICE HILDYARD: Perhaps you can between you discuss it and produce an agreed answer, or even if it's an answer that it is just one of those uncertainties that I can't know. Do you see what I mean?

MR DICKER: I am sure we can tell your Lordship. If they

have been prepared specifically from this case, no doubt we would know that.

MR JUSTICE HILDYARD: Yes.

MR DICKER: My Lord, Senior Creditor Group's position is set out, developed at paragraph 120 onwards.

MR JUSTICE HILDYARD: Yes.

MR DICKER: 122, Professor Mulbert explained that sections 404, 406, 407 tended to protect the debtor from having his legal position disadvantaged.

120 --

MR JUSTICE HILDYARD: We went through these, didn't we?

MR DICKER: Yes. 123, we've set out in the hope it may be helpful to your Lordship what we think are the most useful references from setting out the prevailing view.

That's 123.

125, we turn to Dr Fischer's view. Third line of 125. Nevertheless Dr Fischer states the Federal Court has tended to take a broad interpretation of section 404, interpreting it as stating the legal position of the debtor should not be made worse by a transfer of the claim to the new creditor. Dr Fischer says these decisions, together with the general principle in German civil law, contracts cannot be made that impose obligations on third parties, support the view that a change of creditor cannot entail greater

obligations for the debtor, including the sphere of damages and would have been to the original creditor. 404, 406, 407 are a manifestation of this principle.

My Lord, there's a footnote 15 which just deals with the reference to contracts cannot be made that impose obligations on third parties.

My Lord, no doubt that's the case, but that has no relevance here, no obligation is being imposed on a third party.

Now --

MR JUSTICE HILDYARD: I mean, the problem I had with the cap was in a sense the sort of practical difficulty, is that it would necessitate in all cases when it was relied on an inquiry into the affairs of someone who is no longer by definition a party.

MR DICKER: And may not have been for a number of years.

MR JUSTICE HILDYARD: And may have been -- he may be way down the line. May have been --

MR DICKER: The question one has to get that no longer interested party to answer is what damage would you have suffered if you had still been the contracting party? A hypothetical, wouldn't be surprising in our submission if the response of the assignor in that situation would be to say, "Well, what on earth is the relevance of that?"

MR JUSTICE HILDYARD: Also the assignor might have been a bank, for example, and the assignee might not have been, so you then get into the question as to the -- I can't remember what it's called, virtual --
MR DICKER: Abstract and concrete.
MR JUSTICE HILDYARD: The abstract which I know is in itself a debate, but I am partly saying this for Mr Allison's benefit, I find the practical difficulties hard to vanquish. The court would have no jurisdiction, I think the judge didn't suggest to me that it would. I just don't know how you would do it. That's in a way my principal anxiety.
MR DICKER: My Lord, understood. I have a couple of minutes more only on assignment.
MR JUSTICE HILDYARD: Right. Let's finish that.
MR DICKER: My Lord, in 127, we, in case your Lordship wants to look at them, deal with the cases referred to by Dr Fischer in his report, dealing with the effects of section 404, 406, 407. Your Lordship may recall in cross-examination, I simply asked Dr Fischer whether any of these cases were concerned with anything other than the legal rights of the debtor and he said no, they weren't, so I didn't take him through it, but the detail is here in 127.
MR JUSTICE HILDYARD: Was there not a discussion as to the

boundaries between law and fact, as it were?
MR DICKER: Yes, and we deal with this in 130 and 131.
MR JUSTICE HILDYARD: Yes, I see.
MR DICKER: Your Lordship will see from 130, Dr Fischer's response was that the question of how damages developed was not just a factual question, but also a question of the type of investment the transferee would have been -- would have been made. This is not a question of fact, but it is a question of the legal transactions.
My Lord, two points. First of all, we had some difficulty in understanding the second point, not a question of fact, question of the legal transactions, because obviously the amount of loss that the assignee has suffered is simply a question of fact in relation to it. It has nothing to do with the underlying transactions, if that was what Dr Fischer was referring to.
The first is -- I think two responses to the first. The first is it's not a distinction drawn in any of the commentaries, either that relied upon by Professor Mulbert or referred to by Dr Fischer. This question of damages is really a legal question. That isn't a point that appears to be --
MR JUSTICE HILDYARD: I suppose you could have some that were difficult. Supposing the assignor was not a bank

or someone entitled to the particular hypothetical, but the assignee was, and ramped up his damages on the footing of it?
MR DICKER: That's one possibility, another --
MR JUSTICE HILDYARD: That would be a mixed fact and law, wouldn't it?
MR DICKER: Well, one thing Dr Fischer might have conceivably been referring to or seeking to illustrate is a similar distinction to that made by Lord Justice Millett in the L/M case between heads of damages on the one hand and quantum of damages on the other. All we would say is if that is what he was seeking to convey, your Lordship won't, as far as we can see, find that reflected in any of the commentaries.
The line that the commentator seemed to take, so far as protection of the debtor is concerned, is that if, when the assignee acquires the claim, his level of damage is likely to be materially higher than the assignor, unusual, unexpected, whatever; there may be an argument that the assignee needs to give notice of that to the debtor such that if the debtor doesn't want to bear that exposure, he does what he should do which is pay up.
My Lord, that principle, again to English eyes, one can understand it's not that different from

a Hadley v Baxendale foreseeability and remoteness question, but that seems to be the line that the commentators take when considering possible means of protecting the debtor.
My Lord, that I think is all I need to say in relation to --
MR JUSTICE HILDYARD: I suppose you answer to the assignee who was a bank from an assignor that wasn't, quite apart from any question of whether there's any difference, would be, well, the use you are entitled to make of the underlying contractual right is a different question.
MR DICKER: Yes.
MR JUSTICE HILDYARD: I.e. the Lord Millett line. What you get is a bundle of rights. How you measure the effect of their vindication is a different matter from their substance.
MR DICKER: Yes, it's interesting, if one goes back to the commentators, the prevailing view seems to start at the concept of trust.
MR JUSTICE HILDYARD: Yes.
MR DICKER: The view appears to be that because the debtor knows that you are entitled to assign, and because this arises in a situation in which the debtor is in breach, the contract has been terminated, there really isn't any entitlement to trust that he can assert that enables him

to say, "I shouldn't actually be liable for the assignee's losses". That seems to drive --
MR JUSTICE HILDYARD: Yes. That's a rather different line I think.
MR DICKER: Yes.
MR JUSTICE HILDYARD: Yes.
MR DICKER: The final point in 133 on this is simply that your Lordship raised a question about double recovery.
MR JUSTICE HILDYARD: Mm.
MR DICKER: The question involved an example whereby the assignor said: I'm entitled to X, what I would have done is lock up the money for five years, and then after three years transfers it to an assignee.
My Lord, we say there's a simple answer to this. Ignore for the moment existence of an assignment. So you just have the original creditor. The original creditor can't say at the same time both, "I would have locked it up for five years and therefore recovered 12 per cent for the first three years", and also say, "Well, but after three years, I'd like to treat it as if it wasn't locked up and have done something different". That would simply be factually inconsistent.
If it's factually inconsistent such that the assignor can't assert that claim, then nor can the assignor and assignee between them in combination assert

a similarly inconsistent claim.
So there isn't an issue in that context any more than there is if the claim hadn't been assigned in the first place.
My Lord, I have just one small topic to finish, but I wonder whether it would be convenient to just deal with that, and it will only take me a few minutes, after the short adjournment.
MR JUSTICE HILDYARD: Yes. 2.10.
(1.10 pm)
(The short adjournment)
(2.10 pm)
MR DICKER: My Lord, I said I had one very short topic left to deal with in relation to German law and that is abstract calculation of damages.
We deal with it in paragraphs 134 to 138 of the written closing. My Lord, the only point, again, I am sure your Lordship will be alive to this, is 137, Professor Mulbert referred to commentary by Staudinger, and your Lordship may recall I took Dr Fischer to that. That's the only commentary that deals with entities analogous to banks.
138, Dr Fischer referred to other commentaries. The point that I put to him in cross-examination is, well, when you look at those, they don't descend to detail;

they just say other creditors can't; they don't consider the position of entities analogous to banks which -- they invest in the same way.
My Lord, that's all, subject to your Lordship, I was proposing to say on the German law issues.
There's one remaining issue which is question 20.2 which is the rate applicable to the debt, which I think at this stage I can deal with very shortly.
My Lord, my submissions are obviously premised on the judgment of Mr Justice David Richards in relation to part A. It is subject to appeal, but I am assuming it's the last word on the subject for the purposes of this afternoon.
My Lord, the short point is that if we are right in relation to our primary case, there is, as we understand it, no issue as to whether it's the rate applicable to the debt apart from the administration. The reason I say that is because on our primary case, the debt became due prior to the making of the administration order, and there was also a serious and definitive refusal before that time constituting a default for the purposes of 286.
So in other words, every aspect of the creditors' right was in place before the administration order was made, and interest therefore was running from that date.

So we simply don't get into any question about whether there is some aspect of the nature of the rights such that, because certain things only occurred after the commencement of -- after the making of the administration order, there's an issue as to whether it forms part of the rate.
That's on our primary case, there's simply no issue.
On our alternative case when we rely on a proof of debt, we say that it is equally -- equally forms part of the rate applicable to the debt apart from the administration. Now, again, dealing with this very shortly at this stage, there are three questions which Mr Justice David Richards considered as part of his part A judgment which are relevant. My Lord, it's probably easiest to do this from the judgment if your Lordship has bundle 6, tab 3.
Now, the three issues that are potentially relevant are firstly issue number 5, which is dealt with, page 153, at paragraphs 27 to 29. Now, this question focused on the phrase in 2.889, "whichever is the greater of the rate specified in paragraph 6", which is the judgment at rate and the rate applicable to the debt apart from the administration.
It asks, do you work out which is the greater by reference to the total amounts of interest that would be

payable? Or do you just take the percentage rate?
Then -- and in either case how the total amount of interest was calculated when the rate applicable to the debt, apart from the administration, varies from time to time.
This is an example of a rate which varies from time to time. How do you work out whether it is greater or lesser than the judgment at rate?
On this issue the parties were in agreement and it's recorded in paragraph 28:
"The parties essentially agreed that the comparison is to be made between the total amounts of interest that would be payable under rule 2.887 based on each method of calculation rather than between only the numerical rates themselves."
The relevance of this issue is limited, but its relevance is that plainly the mere fact you have a rate that's variable, changes after the administration order is made, doesn't prevent it being the rate applicable to the debt apart from the administration.
So that's the first.
The second is issue 6 and 7. If your Lordship goes on to page 190, paragraph 184: issues concerning the application of 2.887 to future and contingent debts. The aspect of this that is relevant is the part dealing

with contingent debts.
Question 6 is again concerned with how do you work out which is the greater of the judgment at rate and the rate applicable to the debt apart from the administration.
But the issue here is do you calculate the amount of interest from the date of administration or the date when the debt became due?
So that's 6.
It concerns the start date under the rules for the running of interest.
More importantly, issue 7 concerns contingent debts, and again a similar issue in relation to contingent debts, does interest run from the date of administration or the date on which the contingent debt ceased to be a contingent debt?
My Lord, the short point here is that if you have a contingent debt, the underlying debt is itself contingent, then it will only become due and payable as and when the contingency occurs. And, as a matter of contract, the interest would also only become due and payable from that date, i.e. when the contingency occurs.
Now, the conclusion reached by Mr Justice David Richards was that -- the mere fact that a debt was

contingent, the mere fact that the interest on the debt was therefore equally contingent, didn't prevent the interest forming part of the rate applicable to the date, so contingencies aren't a problem.
Indeed, Mr Justice David Richards went further if it's -- if that's the right expression -- by saying, well, although a contingent debt only becomes due and payable as a matter of contract on the date the contingency occurs, nevertheless for the purposes of the rules, you get interest from the date of administration.
So that's second topic.
The third topic that is relevant is if your Lordship goes back in the judgment, there's a further issue which is issue 4. Paragraph 171, the issue is whether the words, "the rate applicable to the debt apart from the administration", in rule 2.889 of the rules, acts to include, and if so in what circumstances, a foreign judgment rate of interest or other statutory interest rate.
Now, my Lord, three possibilities canvassed, the first in 172 is if you had a judgment before the commencement of the administration, then it's the foreign judgment, the foreign judgment rate will be a rate applicable to the debt. That's the easy case.
Two other possibilities identified in paragraph 173.

The first is that the words "the rate applicable to the debt apart from the administration" are out to include not only a rate which is in fact applicable to the debt, but also a rate which would be applicable to the debt if the creditor obtained judgment for it. So in other words, a judgment obtained during the course of the administration.
Secondly, if a creditor obtains a judgment -- I'm sorry, the first is even if you haven't obtained a judgment, nevertheless the rate is the rate of a judgment you could have obtained. The second is where you obtain a judgment during the course of the administration.
Now, the hypothetical judgment is dealt with in 177. In other words, where you haven't got a judgment from the date of administration and indeed you never got a judgment, Mr Justice David Richards says at 177, second sentence:
"The words 'the rate applicable to the debt apart from the administration' cannot be read as including a hypothetical rate which would be applicable to a debt if the creditor took certain steps."
What he was dealing with there was obviously a situation in which you didn't have a judgment at the time of the administration, you haven't obtained

a judgment subsequently, but you were nevertheless saying, well, hypothetically I could have obtained a judgment, and the interest rate on that hypothetical judgment is the rate applicable to the debt for the purposes of 288. Mr Justice David Richards said that just -- that just simply doesn't work.

Now, the other possibility, which was the second possibility referred to in 173, is where one actually obtains a judgment after the commencement of the administration. That's dealt with in 178 through to 183.

So the premise here is creditor didn't have a judgment at the date of administration, but obtains one afterwards, is that enough?

The short answer is Mr Justice David Richards held that, no, he gives a number of reasons in paragraph 180. One of the reasons he provides, if one goes over the page, about one-third down paragraph 180, where he says:

"... the wording in the relevant provisions in the Insolvency Act is wider than that ... clearly includes interest at the relevant date on a judgment entered before the commencement of the administration. It suggests it was not intended to include rates of interest for which no right existed at the commencement of the relevant insolvency proceeding."

Picking it up in the last two sentences of that paragraph:

"If the creditor does not have a judgment at the date of the administration, the debt proved by the creditor is not a judgment subsequently obtained but the debt as at the date of the administration."

So in other words, even if you obtain a judgment afterwards, what you are proving for is the debt as at the date of the administration, not the post administration judgment.

So in this case as well, Mr Justice David Richards said: well, as at the date of the administration order what did you have? The answer is you had some contractual rights for which you can prove. Did you have a right to judgment interest in any sense? Answer: no, you didn't because you hadn't obtained your judgment.

My Lord -- so that was the answer to that.

We say in this case, on our alternative argument based on filing of a proof of debt, constituting a warning notice, we say this is effectively no different from the contingent debt, position dealt with in issue 7. In other words, you have a right under German statute; it's on a debt that's due, provided there is a default for the interest to start running,

you have to serve a warning notice, but that's just a contingency. And no difficulty in that rate of interest following a warning notice forming part of the rate applicable to the debt.

My Lord, we say it's obviously different from the two situations considered by Mr Justice David Richards in the context of issue 4. It's plainly different from the case in which you are claiming judgment at rate, although you never obtained and still haven't obtained a judgment; but it's also different from a case in which you didn't have the judgment at the relevant date, given that at the moment your only entitlement is as a matter of contract to the interest in accordance with the contract, as a matter of English law when you get your judgment the contractual right is removed. It's replaced with a right to a judgment at rate interest. That right to a judgment at rate interest isn't sufficiently existing right as at the date of the administration order.

What we understand Mr Justice David Richards to have been doing is in a sense not that different from -- your Lordship may recall the line of cases, Glenister v Rowe is an example, about orders for costs and interest post insolvency and the discussion at one stage to the effect that those were not rights

contingent or otherwise capable of proof at the date of the insolvency.

My Lord, obviously in the context of proof, those cases were commented on by and reversed by the Supreme Court in Nortel, but there seems to be a similar distinction being drawn by Mr Justice David Richards here. For some reason if you haven't got your judgment, you don't have a right as a matter of English law to interest at the judgment at rate for the purposes of rule 2.88.

We say the position here is different, there's a statutory right under German law, can't matter whether it's statutory or contractual, and the mere fact you serve, required to serve warning notice, is just a contingency required to trigger the running of that interest.

In other words, we're within issue 7 rather than issue 4.

MR JUSTICE HILDYARD: I will have to read this quite carefully. I haven't grappled with Mr Justice David Richards' judgment sufficiently.

MR DICKER: It may be I may need to say something more in reply. As I say on our primary case, actually your Lordship doesn't, we say, need to grapple with --

MR JUSTICE HILDYARD: No. But does it come to this? If the

root of your claim is in the contract, you will be able to claim interest at the trigger date. If the root of your claim to interest will not be in a contract but in some future instrument, as it were, such as a judgment, you won't be able to?

MR DICKER: My Lord, that appears to be the distinction drawn by Mr Justice David Richards. It doesn't quite deal, we say, with this case. The first point is it cannot sensibly make a difference whether your contract gives you a right to interest in certain circumstances, or statute effectively says: well, you don't need to include the contractual right because we just have a general statutory right --

MR JUSTICE HILDYARD: It's as if the statute was read down into the contract.

MR DICKER: Absolutely. Now, we say the way one analyses 286 as a matter of German law is that you don't need to insert, indeed, you can't insert provisions in your contract unless they are to modify the statutory right to the extent you are allowed to. The German statute includes provisions dealing with interest, they apply to the contract, the parties could have replicated the terms of that statute if they wished in the contract mutatis mutandis but that is pointless.

Your Lordship is absolutely right, that is how it

ought to be analysed. If that is how it ought to be analysed, then the mere fact that the contract or the statute says interest will only run following a service of a warning notice, doesn't mean it can't be part of the rate applicable to the debt. It simply means it's contingent and therefore, as I say, dealt with in accordance with the reasoning on issue 7.

Now, that's a slightly -- that's one characterisation we say is the right characterisation.

The judgment is, one can see, analytically distinct because it doesn't really make sense in quite the same way to read down the judgment rate into a contract. You know, you have to commence proceedings, the court has to find in your favour --

MR JUSTICE HILDYARD: It's a separate source of entitlement to judgment. The contract may be submerged in it but the source is different.

MR DICKER: That was the point relied upon by the courts for example in Glenister v Rowe. Lord Neuberger, as I say, took a slightly different approach to this in one context which he says: well, okay, but what happens if you had commenced proceedings before the insolvency; you haven't yet got your judgment, but you've really brought yourselves sufficiently within the statutory regime that you have a contingent right to interest.

Now, that reasoning doesn't appear to have fed through into, if it was capable of, fed through into Mr Justice David Richards' approach, but we do say conceptually the way of looking at it is, is the proper analysis essentially to read the statute into the contract? That's one route. Alternatively, are we actually dealing with a situation in which the root of your right only arises, separate proceedings, judgment, exercise of discretion by the court, to give you a particular rate of interest.

We say, as between those, we fall on our alternative case within the first category and not within the second category.

That, as I say, was all I was proposing to say at this stage, subject to one point which I think your Lordship has in mind. When I showed you the terms of issue 4, which is paragraph 171 of the judgment, your Lordship may have noted that issue 4 refers to a foreign judgment rate of interest or other statutory interest rate.

Now, there was some discussion about the words "other statutory interest rate" at the consequentials hearing in front of Mr Justice David Richards. The long and the short of it is that the order which has not yet been, I think, finalised, but his decision was that the

order should not refer to other statutory interest rates. The reason for that was because there hadn't in substance been any discussion about other statutory interest rates. All of the discussion had been focused on judgments.

Can I just make that good by showing your Lordship one short reference from the transcript of that hearing? It's in bundle 8, tab 3A. It's bundle 8, tab 3A, and the passage is at page 42.

MR JUSTICE HILDYARD: Which date was it? I think I've split out my hearing transcripts from the prehearing transcripts.

MR DICKER: It's on 9 October 2015.

MR JUSTICE HILDYARD: Yes. It's page 42 internally.

MR DICKER: Yes. As in the transcript --

MR JUSTICE HILDYARD: Yes.

MR DICKER: -- paging, it's page 94 in our bundle.

MR JUSTICE HILDYARD: Yes.

MR DICKER: It's just the passage between lines 16 on page 42 and the bottom of the page. Mr Justice David Richards says:

"Could I just add this, the judgment clearly just deals with foreign judgments, I accept that ... question asked, the issue raised did refer to other statutory rates but it is not dealt with in the judgment as

I don't think it was really the subject of any or, at any rate, any substantial submissions to me. I mean, I tracked back, I think, Mr Zacaroli's written submissions did refer to other statutory rates, but it didn't really feature. That is why the judgment deals just with foreign judgments."

So in other words, the discussion in relation to issue 4, although seeking to answer a question which is expressed to extend to other statutory rates, needs to be read on the basis, the focus is in fact solely on judgments.

MR JUSTICE HILDYARD: What sort of other statutory --

MR DICKER: Well, in a sense any other statutory rates. One of the concerns Mr Justice David Richards had, well, without actually knowing what the possibilities may be, I don't know whether reasoning would apply to them or not. I mean, 286 of the BGB is in a sense another --

MR JUSTICE HILDYARD: It could be a -- under any legislature.

MR DICKER: I mean, in a sense one would have to ask the administrators quite what question -- the breadth of the question they were seeking to have answered.

MR JUSTICE HILDYARD: Yes. It extended to any foreign legislation?

MR DICKER: It's not even limited in its terms necessarily

to foreign legislation; it could be an English statute as expressed.

MR JUSTICE HILDYARD: Yes.

MR DICKER: The short point is that the judgment --

MR JUSTICE HILDYARD: The foreign legislator might have just said interest payable in any event. However -- I mean -- it is quite a~...

MR DICKER: Yes. Like our late payment of commercial debts, there could have been a provision that says any -- any commercial contract sum unpaid attracts interest at the following rate from the following date.

MR JUSTICE HILDYARD: The reason why judgment rate might not be applicable in a judgment not secured before the onset of the insolvency process might have been negated by express provision in the relevant legislation.

MR DICKER: Yes, or the treatment of -- the approach to other statutory rates may be different.

MR JUSTICE HILDYARD: Is this a question which, as it were, has been treated as asked and answered in the sense that the court cannot supply the answer? Or is this a matter which has been reserved for further judgment?

MR DICKER: No, it was not decided, it was not reflected in the order on part A because, as Mr Justice David Richards indicated, he hadn't really been thinking about other statutory rates. It was held over in part because

it was thought that the issue does arise on this hearing, albeit only in relation to one particular statutory rate.

There's obviously the York point which is seeking to explore, as we understand, they contend the full potential ramifications of issue 4, but what your Lordship has on this basis is essentially at least a statutory rate, we say susceptible to different analysis than that applicable to the judgments that Mr Justice David Richards was concerned with. But to the extent that the issue needs to be decided, it was parked, not decided as part of part A.

MR JUSTICE HILDYARD: Looking at my task, it's possible that I will have to give -- that I will have to make a decision if it arises as regards to the particular German legislation, that that would not necessarily lead me down the road of supposing some knowledge of a million other sorts of legislation.

MR DICKER: Well, there may be an issue for your Lordship as to the most convenient way of dealing with this. Now, one possibility might be that your Lordship decides this issue in relation to 286 of the BGB only and gives judgment on that and deals with York's question thereafter. Another approach might be that because essentially York's question also involves the ambit of

issue 4, maybe it would be sensible to hear that argument first.

MR JUSTICE HILDYARD: I mean, lest I tread on the York daisies in answering the specific question, I am slightly tempted to -- by the notion that I need to know all that they say before tilting at it.

MR DICKER: For our part, if I may say, we can see the good sense of that.

From York's perspective, it would be unfortunate if your Lordship expressed a view on 286, and York came along later and said: that's inconsistent with the submissions that we'd like to make.

MR JUSTICE HILDYARD: I might think I am being limited but there might be extrapolated from what I said, knowingly or unknowingly to me, i.e. advisedly or unadvisedly, some proposition which was damaging to their case.

MR DICKER: My Lord, one might say --

MR JUSTICE HILDYARD: Vice versa.

MR DICKER: In a sense illustrated by the parties -- or York's approach to the part A judgment.

MR JUSTICE HILDYARD: All right. Well, that's helpful.

MR DICKER: My learned friend reminds me, I think I -- I think I was referring to 286 of the BGB. It may be I misspoke, and it should have been 288.

MR JUSTICE HILDYARD: Yes.

MR DICKER: My Lord, unless I can help your Lordship further, that's all I was proposing to say at least at this stage.
MR JUSTICE HILDYARD: Well, that's extremely helpful, Mr Dicker. So two of the written submissions, I will consider those further knowing that I have the comfort of being able to quiz you in reply if -- if that would be appropriate.
MR DICKER: My Lord, I have just received what looks to be an even longer document from my learned friend.
MR JUSTICE HILDYARD: So they win!
MR DICKER: We always think quality rather than quantity! But, my Lord, I think what both parties, just so your Lordship know, are hoping to avoid is a situation in which this matter is not concluded by tomorrow. In other words that we don't roll on and end up with a series of further submissions in response. I hope I've dealt with my closing submission sufficiently to enable my learned friend to do so. We'll have to see obviously how we get on in relation to his. That at least is the hope of both parties.
MR JUSTICE HILDYARD: That's very helpful. Thank you very much indeed.
Closing submissions by MR ALLISON
MR JUSTICE HILDYARD: Mr Allison, you have some --

MR ALLISON: I do, my Lord. We thought it would assist your Lordship to put something in writing as well.
MR JUSTICE HILDYARD: In that case, will you send it to me in each case by electronic version as well? (Handed)
MR ALLISON: My Lord, of course.
MR JUSTICE HILDYARD: Thank you very much.
MR ALLISON: My Lord, the purpose of the submissions really is to frame the debate for the oral closing we intend to make. Subject to my Lord, I was going to follow through the structure of the written submissions, picking up particular points along the way.
The first few pages provide an overview which no doubt will be very clear to my Lord by now. Issue 20, primarily focused on the claim of the original counterparty, splits out conveniently into two separate parts. Issue 20, sub 1 looks at what the SCG needs to satisfy my Lord of in order to be able to make a claim for further damage under the German statute; therefore, for that provision to be of any relevance whatsoever to the English question under rule 2.889.
We say that there are a number of things that they must do. First, we say that they need to establish they can assert a claim under 288, subparagraph 4. This is paragraph 5. My Lord will have seen from the expert evidence that there are a number of hurdles in the way

of doing that, not least that both of the experts who appeared in front of my Lord agreed that a necessary ingredient of a further damage claim is demonstrating that one has a default under section 286 of the Act.
For the reasons that we'll develop, we say the SCG fails at that hurdle.
The second point is even if they can establish a default within section 286, the resulting claim still has to be something that can be expressed as a rate applicable to the debt proved. We say as a result of the Waterfall II A judgment that my Lord just saw, issue 4 of that, it has to be a rate applicable to the debt proved at the commencement of the administration by reason of the rights of the creditor at that date.
My Lord will have heard from the experts that a claim for further damage under section 288(4) is a claim for damages. It's a claim that must be proved and demonstrated to the satisfaction of the court and in essence is imposed as an exercise of the court's discretion.
It's very different to a contractual rate of interest which is applicable to the proved debt.
Therefore, for reasons which we will develop as foreshadowed in our written submissions, we say it's not a rate applicable to the debt apart from the

administration.
The third introductory point to issue 20 we say is even if they can get there, it has to be something which can be characterised as giving rise to an interest rate applicable to the proved debt. My Lord will recall that rule 288(9) is focused on the search for an interest rate. It's a rate applicable to the debt apart from the administration.
What one sees from the evidence of the experts is that it's a claim for damage. Most importantly, although the damages can in certain circumstances be awarded as a rate, the experts agreed that it's not necessarily at all by reference to the proved debt. We say it's not a rate applicable to the proved debt; it's instead a rate applicable to any borrowing or other loss that the party sustains. So it's not tied to the proved debt.
So we say for each of those three independent reasons that we'll look at in a moment, issue 20 should be answered in favour of Wentworth.
Issue 21, subissues 1 and 2, as my Lord knows, are focused on the position of the assignee; what can the assignee claim. In particular, can it assert a greater claim than that of the original counterparty?
My Lord, we say there are two distinct reasons why

it cannot. The first is based on Waterfall 2A again. We say that the parties recognise any assignment has taken place after the commencement of the administration, and Professor Mulbert recognised very fairly in the witness box and in the joint statement that an assignee can only assert a further damage claim for the period after the assignment.

Now, in circumstances where the assignment has taken place after the administration, we say again it can't get through the gateway imposed by rule 2.889. It's not a rate applicable to the proved debt by reason of the rights held at the commencement of the administration, the finding of Mr Justice David Richards on issue 4.

Secondly, the alternative reason, that my Lord heard evidence from both experts in relation to, is we say there's a general principle of German law that the claim of an assignee is capped at the claim that an assignor could have made. In other words, it cannot assert a greater claim for further damage than that could have been made by the original counterparty.

My Lord, that's a very brief overview of where we intend to go with our submissions and the different reasons why we say the SCG is unable to overcome the considerable obstacles in its way.

Unless my Lord had anything at this stage, I was

of the payment obligations of LBIE under the German and master agreement within the meaning of section 286.

Now, my Lord, that default requires, as we'll see in due course, two separate things. It requires that the performance is due and that there is a warning notice demanding performance which isn't actually answered by the debtor. Or, alternatively, one of the exceptions to the need to serve the warning notice.

My Lord, paragraph 23 sets out the areas which are common ground between the experts and indeed were accepted very fairly by Professor Mulbert at the commencement of his administration.

The first point is the default point.

The second point is the need for the performance of the obligation actually to have fallen due.

The third is that where an obligee is not in default prior to the opening --

MR JUSTICE HILDYARD: So a prospective default, anticipatory breach can't be sufficient?

MR ALLISON: My Lord, we say -- we say no in relation to the need for a default plus warning notice under section 286(1). In relation to the exception under 286(2), (3), as we'll come to in due course, what has to be established is a serious and definitive refusal to perform. My Lord will recall the wording at tab 83.

going to move straight to issue 20, sub 1.

MR JUSTICE HILDYARD: I mean 15 is very broadly expressed. It will need to be considerably honed. I mean, it covers a whole load of stuff.

MR ALLISON: My Lord, absolutely it does, and my Lord will see when we come to it, that's developed by reference to the evidence and the authorities at the relevant stage in the --

MR JUSTICE HILDYARD: It skates over -- I don't mean it rudely, but if you are going to rely on the general principle of the German law obligations, one can see that emerging as regards legal rights, but it is quite a grand description of what was still, with respect, their quantification.

MR ALLISON: My Lord, it is and what we will develop at the necessary point is the evidence of Judge Fischer in not worsening the position of the debtor and that being the focus of the principle in that context.

MR JUSTICE HILDYARD: Yes, thank you.

MR ALLISON: Issue 20, sub 1, over the page at paragraph 17, asking whether a creditor would be entitled to make a claim for further damage under section 288(4). My Lord will be aware we say no. The common ground, as I identified earlier, and as made clear at paragraph 19 of the joint statement, is that there must be a default

MR JUSTICE HILDYARD: N.

MR ALLISON: Indeed.

MR JUSTICE HILDYARD: Is that right?

MR ALLISON: It's N, yes.

So performance has to be due. That's the first element.

MR JUSTICE HILDYARD: Yes, I see. So --

MR ALLISON: That doesn't disappear. It has to be due.

Then one needs either the warning notice which is not responded to because there has to be a default in the face of the warning notice at 1. Or, as an alternative to the warning notice, we'll see in due course something that is described by the materials preceding the enactment of the provision as "the warning notice surrogates". One has to satisfy one of the exceptions at subparagraph 2, including the debtor seriously and definitively refusing performance.

I think that's a long way of answering my Lord's question which is yes, performance must be due whichever gateway you are relying on in addition to that.

MR JUSTICE HILDYARD: 6 is to be read subject to the warning notice surrogates?

MR ALLISON: My Lord, I'm so sorry?

MR JUSTICE HILDYARD: The formal requirements of the warning notice et cetera as you describe in 23(6) of your

written closing, that is to be read subject to the alternative of what you have described as the warning notice surrogate?
MR ALLISON: My Lord, absolutely.
MR JUSTICE HILDYARD: Yes.
MR ALLISON: Absolutely.
I don't know whether my Lord's just refreshed through those each of those said paragraphs~--
MR JUSTICE HILDYARD: No, I am just making sure that I have them on board.
MR ALLISON: So that's the agreed framework of German law against which the issues arise for my Lord.
MR JUSTICE HILDYARD: Yes.
MR ALLISON: That means there are three key issues which are in dispute as a matter of German law which will inform the answer to issue 21.
MR JUSTICE HILDYARD: Yes.
MR ALLISON: The first is the time at which performance of the payment obligation under clauses 7 to 9 does in fact become due. My Lord recognises that we rely on the wording of the provision as properly understood to say that one couldn't sensibly say that there has been a default in performance until one knows what one has to pay after the two-way closeout operation that is performed under those clauses.

My Lord also knows that the SCG seek to rely on section 271(1) of the German statute which fills a gap and makes the -- an immediate necessity for performance if one cannot work out from the terms of the contract or the surrounding circumstances what in fact is the appointed time for performance.
That's the first issue.
The second issue is whether the filing of a proof in LBIE's administration constitutes an effective warning notice.
Now, the short point in that respect is the SCG seeks to do so despite the common ground of the experts that the filing of a proof of debt in a German insolvency does not constitute a warning notice. As explained in the evidence of Judge Fischer, both in his reports and in the witness box, there are very broad similarities between a proof within the two insolvency processes, on the one hand, the German insolvency and on the other the German administration, and the key point that we will develop in due course is what is the purpose of a proof?
So my Lord needs to apply the test, is there something falling within a clear, definite demand for the obligee for payment of an amount due? My Lord has to determine whether a proof amounts to that.

MR JUSTICE HILDYARD: A proof is usually thought to be a request to participate in the pond.
MR ALLISON: My Lord has the point. We'll see Supreme Court, Privy Council and first instance authority for that proposition. You don't file a proof until you get a request from the office holder to do so. Why do you file a proof? You file a proof to participate in the distribution of assets within the statutory process. It's not the equivalent to a warning notice saying: pay me this sum of money now; it's saying: this is my claim for the purpose of participation in the statutory scheme.
Just the same as under the German insolvency code, and that's why Judge Fischer, when looking at the administration summary, as the experts were asked to do in an attempt to help my Lord, while recognising ultimately it's a question for my Lord, he says: well, this looks exactly the same by way of analogy as to what happened in Germany. It's not, insofar as I am concerned, a warning notice as required by section 286.
My Lord, we flag here as well, again, we'll come back to it in due course, the key point there is Professor Mulbert did accept on more than one occasion that the proof of debt in a German insolvency proceeding, what's the key point? The key point is it's

about participation in the collective proceeding according to the rules of that proceeding; we say a point which is directly applicable to the English insolvency.
So, my Lord, the third point is on the assumption that the SCG cannot establish point 2; it has to establish point 1 in any event.
On the assumption it cannot establish point 2, its alternative argument based on the exception at section 286, sub 23, and they say that's engaged by the filing of an administration application.
My Lord again has seen the clear evidence of Judge Fischer in relation to what is required for a serious and definitive refusal to perform. It must be the final word of the debtor. That's something that Professor Mulbert agreed with absolutely during cross-examination. He says, quite properly in our submission, that the filing of an insolvency application is a million miles away from the last word of the debtor on whether it will pay its obligations. It is instead a statement of an inability to pay its debts or whatever it needs to get through the statutory gateway as part and parcel of entering into the statutory process.
We'll look at the chronology when we come to it, but we say there is absolutely nothing in the facts of

LBIE's administration application that supports the case made by the SCG that the claims under the German master agreement must be treated as being subject to a serious and definitive refusal to perform.
MR JUSTICE HILDYARD: Did we see a case or a commentary -- I may be imagining this -- which invested in refusal, a sort of certain time quality? I.e. if it's going to be a long, long time before performance, that amounts to a refusal, if you like?
MR ALLISON: My Lord, we didn't, no, we didn't, we --
MR JUSTICE HILDYARD: There was something which put me in mind of that, I can't remember what it was. Anyway.
MR ALLISON: My Lord is thinking of a point that is made in my learned friend's closing that was made in Professor Mulbert's evidence. We cross-examined him in relation --
MR JUSTICE HILDYARD: I'm sorry --
MR ALLISON: -- to the point, and my Lord will see from the evidence when we get to the relevant passage, he agreed that it must be the final word. It must absolutely be the final word. It's not a probability test, it's got to be the final word.
In that context as well what he made -- what he also agreed, as we'll see, is that even in the context picking up on my Lord's temporal point, even in the

context of section 271, going back to when the claim becomes due, he relied on the fact and agreed with the fact that there has to be an objective meaning to immediately, and, my Lord, of course that's also important in the 20-minute period that one is looking at in this case between the filing of the application and the making of the order.
My Lord, with that introduction over the page at page 9, I was first going to address our submissions on when the compensation claim becomes due.
Three topics for my Lord, first, the principle which I think can be taken relatively briefly.
Second, what is the meaning and effect of the statutory provision that Professor Mulbert based his case on and the cases he relied on in that respect?
And, thirdly, the application to the particular provisions of our contract.
My Lord I don't think we need to turn the GMA up at this point. It's well known, it's governed by German law, and what we've sought to do at paragraph 31 is to set out the agreed principles which were both agreed in the joint statement and again were confirmed during the cross-examination of Professor Mulbert.
MR JUSTICE HILDYARD: I don't think there's much difference between you in your closing, except you emphasised the

three more than perhaps Mr Dicker did.
The importance of the wording in the context of a standard form is -- is heightened.
MR ALLISON: Which was accepted, as my Lord will recall, by Professor Mulbert during his evidence.
MR JUSTICE HILDYARD: Yes.
MR ALLISON: What we've sought to give my Lord at subparagraph 6 is three key references in relation to the propositions, including one of the clearest decisions of the Bundesgerchtshof on the point.
Unless my Lord had anything on interpretation, I was going to move on to section 271.
Now, the key point, which is an agreement between the experts, is this provision is a gap-filling provision. It only operates if firstly you cannot ascertain the due date from an express or an implied term in the agreement. Or, secondly, you cannot ascertain what should be the due date from the surrounding circumstances, including looking at, unsurprisingly, the nature of the contractual obligation.
MR JUSTICE HILDYARD: In this it's not a million miles from the English position, is it?
MR ALLISON: My Lord, we'll come there, because we were, I confess, slightly surprised that in his evidence,

Professor Mulbert sought to draw parallels with the ISDA master agreement, but then said that the debt was payable immediately. As my Lord well knows, under the ISDA master agreement, there is no payment obligation until the notice is actually served after the parties have performed the calculation. Eminently sensible because how can one know what one has to pay until one is told what one has to pay?
The evidence in relation to --
MR JUSTICE HILDYARD: My point was not as honed as that; my point is that in English law obligations, if you like, if no payment time is specified, it is the general law that is -- the amount in question is repayable on demand.
MR ALLISON: My Lord, yes.
MR JUSTICE HILDYARD: That's our gap-filler.
MR ALLISON: My Lord, absolutely. Absolutely. It really is no more than that, and perhaps, because of the confirmation by Professor Mulbert that "immediately" means objective immediately in the context of section 271, perhaps not a million miles away from our gap-filler because of the necessary time for preparation that must be interpreted into section 271.
What we've sought to do at paragraph 34 is to summarise the evidence given by the experts and point

my Lord to the key passages in the commentary.
The first point is -- I think it's something that my Lord addressed to Mr Dicker this morning -- in the context of Judge Fischer's distinction between two German terms actually within the German master agreement that we'll see in due course, is what's the necessary time, is it the time of performance? Is it when you can enforce your claim to payment? The answer is yes, that was accepted by Professor Mulbert and we give my Lord the reference to that.
It's also made clear by the Bundesgerchtshof in the case we refer to.
My Lord I should just say at this point due to time constraints, unless my Lord would like me to, I wasn't proposing to go to the underlying references now.
MR JUSTICE HILDYARD: Which is the case you say? Is this Palandt?
MR ALLISON: Paragraph 34(1)(b).
MR JUSTICE HILDYARD: Of Palandt?
MR ALLISON: No, bottom of page 10.
MR JUSTICE HILDYARD: I'm so sorry. Ah. Okay. Now I'll look -- unless you want to --
MR ALLISON: No, my Lord, the evidence is there as well. I mean, we thought this would be a helpful way of guiding my Lord through the key parts of the evidence.

MR JUSTICE HILDYARD: Thank you.
MR ALLISON: Over the page, again, agreed by both of the experts, Judge Fischer in his expert reports not challenged on that point and Professor Mulbert during cross-examination, that it's a gap-filling provision. That's how it operates.
The surrounding circumstances include the nature of the obligation. My Lord will recall, we looked at the commentary of Judge Gruneberg during Professor Mulbert's cross-examination on that point.
My Lord will also recall that we looked at the --
MR JUSTICE HILDYARD: You said something, I was thinking about something else but I'm sorry. You equate the performance being due with the time at which the relevant obligation can be enforced.
MR ALLISON: My Lord, yes, absolutely. My Lord, at subparagraph 4, what we do in that regard is refer to what the commentators have said about performance not falling due until someone knows what they have to pay.
The two key commentaries are the ones that we looked at with Professor Mulbert. Again, it's Judge Gruneberg in the Palandt commentary and Ernst which both make that clear. The references are there for my Lord.
Subparagraph 5, my Lord may recall asking Professor Mulbert about whether, if a debt were to be

payable immediately immediately, before you knew what you have to pay, wouldn't that make life quite difficult for the debtor? Professor Mulbert sought to answer my Lord's question by saying that under German law, that's okay, because nothing happened if you just had performance due, because you needed either the warning notice and a default in respect of it, or an exception in order to trigger default.
Now, my Lord, what we say at paragraph 6 is why that answer doesn't actually account for the consequences which do in fact happen on a claim becoming due.
The key point is that the consequence of Professor Mulbert saying that a claim becomes due immediately is that someone can immediately serve a warning notice which would have the exact effect which Professor Mulbert said could not happen in his answer to my Lord's question. His way of seeking to overcome that problem doesn't work. Because as soon as performance is due, there is the ability under the German statute to serve a warning notice.
My Lord, what we say at B is the prospect of a default before you know (1) who is going to pay, and (2) what needs to be paid is quite likely, in my Lord's words, to make it quite difficult for both sides of the equation in the GMA, because you simply do not know who

will be paying and how much they will be paying until the exercise under clauses 7 to 9 has been carried out.
MR JUSTICE HILDYARD: I mean, this is invariably a difficult question, isn't it? Often it depends whether you are coming at it -- it depends the angle you are coming at it. I mean, for example, if it's a limitations case, the question is going -- or something analogous to it, all you have to know are the constituent elements of the claim without quantifying. There's no doubt the claim arose from the moment you could plead it, even if you couldn't quantify it. So the law is schizophrenic in some senses at least in England about this.
MR ALLISON: My Lord, what we will see, foreshadowing the way we will discuss the only two decisions Professor Mulbert relied upon, is he seeks to place reliance, we say wrongly, on the general law of damages in circumstances where a party is actually in breach already. So in breach of a duty of care in the tort case, the road traffic accident case, or in breach of contract in the loan prepayment case when a claim does immediately arise. We say that that analogy doesn't operate in circumstances where one is actually searching for, as the terms of the contract, when does the claim fall due in the first place.
It's not a breach case.

This is a search for what is the timing of the payment obligation.
MR JUSTICE HILDYARD: You stress it's default in payment --
MR ALLISON: My Lord, we do.
MR JUSTICE HILDYARD: -- rather than breach of the obligation.
MR ALLISON: Absolutely. And what we stress in that regard at paragraph 36 of the submissions is my Lord is really seeing only one case that considers the question of the due date in the context of 271, in a case which is not a breach of a duty of care case or a breach of contract case. My Lord will recall that was the landlord heating bill case. The question there was, well, when does that claim arise? When does that claim arise --
MR JUSTICE HILDYARD: That was the limitation case, wasn't it?
MR ALLISON: It absolutely was a limitation case, but the question the court posed expressly in the context of section 271 to see whether there was a gap, and expressly having found there was no other provision of German law that drove one to a particular answer, the court expressly said: well, there was no agreed due date in the case; that was the first point the court fastened on. They said they thought, though, that a bill needed to be sent to make the sum due.

The reason they said that -- on the facts of the case, it was in favour of the landlord against the tenant. The reason the court said that is because the tenant doesn't know what they have to pay until they get the bill.
Now, the import of the case actually goes further because my Lord will have seen, as we looked at from the end of the judgment, it was a two-way case because the court expressly recognised that if the tenant had overpaid for the heating over the period of the rent, and therefore once the calculation had been performed, it would have been due a refund rather than having to pay an additional sum, again the sum wouldn't become due until that calculation had actually been done and the party knew how much it had to pay in order to perform the obligation.
My Lord, we say that is the best analogy to the present case, it being general in its reasoning, and it not being focused in the landlord deposit scenario. There's no mention of deposits in that case. It's a question of when a claim becomes due when there's no agreed date in the contract and the calculation needs to be performed to work out who has to pay and what has to be paid.
Now, my Lord may recall paragraph 38, we remind

my Lord that Professor Mulbert did at first seek to distinguish the reasoning of the case, but was then forced to acknowledge he had misread the judgment, and in fact acknowledged that the court was making clear in that case just how general its reasoning was, distinguishing as irrelevant the other potential provisions of the German civil code, so it was a case focused in the context of section 271.
My Lord, over the page, paragraphs 40 onwards, look at the two authorities cited by Professor Mulbert. As I foreshadowed both are breach cases. There was no doubt in the first case that there was a tort claim against the driver of the other car who crashed into the car. There was no doubt in the loan case that the bank had a claim for damages for breach of contract by reason of the borrower failing to perform its obligations under the loan contract.
So they're not cases that arise in the context of a termination for reasons other than breach.
Paragraph 43, we deal with the road traffic accident case and pick out the key points that Professor Mulbert agreed to during his cross-examination.
First, he confirmed that the question for the court was when the damage to the legally protected interest occurred. In that case it was clear, because it was

from the time at which the accident occurred.
Secondly, he confirmed that as it was a breach of duty, it did in fact give rise to an immediate claim and he confirmed that it was different to termination for reasons other than breach. Thirdly, importantly, even in that context my Lord will have seen that what the court said is you need the information to assert the claim for the claim to become due. Even in that context, the court talked about the need for the injured party to have the information necessary to put the bill together to claim the costs of the repair to its car.
Fourthly, and again importantly, even in the context of a breach of duty of care, where a claim does become immediately due, the court didn't actually find in that case that payment was due, performance was due from the date of the crash. The court actually said that it was payable from at least the date around two months after the accident, by which time the person knew how much they had to pay.
So that's not even a case which supports the sum being payable immediately on breach of a duty of care.
My Lord, paragraph 44, the loan repayment case, three key points accepted in relation to that case during cross-examination. First, in that case there was a breach of contract, it was termination for breach.

Secondly, that where you do have a breach of contract, there is an immediate right to assert a damages claim.

Thirdly, actually that case did not even contain any dispute or any reasoning as to when the damages claim fell due for payment. So the short point is, Professor Mulbert produced only two cases to support his argument on section 271, the immediate payment. Neither of those cases provide any support for the proposition he seeks to make.

My Lord will have seen in Judge Fischer's supplemental report, the fourth report after these matters were raised by Professor Mulbert after the joint meeting of experts, Judge Fischer points out very clearly the paragraphs indicated, at paragraph 45 of the submissions, why those cases are completely irrelevant to this context. For the reasons we've explained to my Lord, for the answers given during cross-examination and for the reasons given by Judge Fischer, we say those cases are offside here.

In fact the only authority my Lord has which gives any guidance on how section 271 does operate is the landlord heating case.

My Lord, that is section 271.

So we say their argument goes nowhere on section 271.

MR JUSTICE HILDYARD: You're agreed -- shall I ask this -- that a warning notice does not, in order to comply with section 286, have to specify the amount due?

MR ALLISON: My Lord, I don't believe my Lord has the benefit of any evidence one way or the other on that point. What my Lord has is the benefit of the agreed position by the experts that there must be a clear, definitive demand from the obligee for payment of an amount that is due. That's what my Lord has an agreement on.

My Lord also has an agreement, as we will see when we come to it in due course when looking at the proof, the confirmation of Professor Mulbert during his cross-examination that it has to be an unambiguous demand for payment of an amount that is due.

Now, we say perhaps unsurprising in that context, the natural position certainly in the context of this contract is that you can't have that proper demand unless and until you know what to pay.

Now, the reason --

MR JUSTICE HILDYARD: Because of the netting arrangement.

MR ALLISON: My Lord, absolutely.

So we primarily make that point for the reasons that we are now developing in the context of when does the claim become due, rather than in the context of what are

the formal requirements of a warning notice.

MR JUSTICE HILDYARD: The reason I was raising it in this context was lest it cast any light on any implicit requirement that the obligors should know how much it is that it must pay, and the German statutory provision should not appear to -- when read at first blush -- to insist that the obligor be told how much he needs to pay, but that may be for all sorts of reasons, I suppose, including the fact that you would then have the issue as to whether an inaccurate statement of the amount would invalidate the warning notice and stuff like that.

MR ALLISON: As my Lord is aware, we say the point is covered in the logically prior question of when performance becomes due.

MR JUSTICE HILDYARD: Yes.

MR ALLISON: My Lord, I was about to move on from section 271 to the application of the principles to clauses 7 to 9.

MR JUSTICE HILDYARD: Yes.

MR ALLISON: My Lord, I recognise that may be a convenient moment.

MR JUSTICE HILDYARD: We will take a break.

(3.24 pm)

(A short break)

(3.30 pm)

MR ALLISON: My Lord, I was going to turn now to the construction of clauses 7 to 9 in view of the principles we've just looked at and in view of the way that section 271 of the German civil code operates.

Before looking at Wentworth's case, I think it's probably useful as we do in the closing to highlight the key difference between the way in which the exercise is approached.

My Lord will have seen both from the way that the questions were posed to Judge Fischer, in particular the repeated use of the word "cause", and also the way in which Professor Mulbert relies on breach cases in support of his reasoning, we say the SCG seeks falsely to draw an analogy with the general law of damages. We say why this is wrong to do so, including the matters it seeks to rely on at paragraph 49.

Now, the short point as we explain at paragraph 52 is that analogy is not one which should be taken into account when my Lord is conducting the task of construing the German master agreement so as to ascertain the time at which performance is due. When doing so it's important that one should not place any overreliance on the general law of damages.

In particular, as we highlight at subparagraph 2,

this is not a case like a case for damages under the general law, which of course only permits the innocent party to claim damages for breach by way of a combination of sections 280 and 286.

What this is is a case in which there is a two-way close-out which may lead to one or other party being the paying party in an uncertain amount. We say it's a long way from the position where one enters into the breach of contract analogy, and therefore that really shouldn't form part of the backdrop against which the provisions are construed, which is what the SCG seeks to do and what Professor Mulbert sought to do.

We do, though, draw attention to the background of the German insolvency code which is something both experts touched on and which is something which is relevant to the construction of clauses 7 to 9.

MR JUSTICE HILDYARD: In paragraph 49(2) should it be "BGB" as the last word?

MR ALLISON: My Lord, it should, thank you very much.

My Lord, unless my Lord had anything further on why we say the analogy is a wrong one for the reasons we explain at paragraphs 47 through 53, I was then going to move on to what actually is part of the backdrop, which is the German insolvency code.

Now, my Lord will have seen from the expert evidence

given in particular by Judge Fischer, and the commentaries that Mr Dicker looked at as well as myself, the Zerey commentary, that on the opening of the insolvency proceedings, there is a provision which kicks in under section 104 of the insolvency code which is a mandatory close-out mechanism. That mandatory mechanism takes place two days after the opening of insolvency proceedings, unless the parties have agreed in their agreement to a different date which can be as late as the fifth working day after the opening of the insolvency proceedings.

So there's a mandatory close-out forced upon the parties by section 104 in those circumstances.

My Lord has at subparagraph 5 a reference to two of the underlying German materials I think that we looked at, which explain why section 104 is there and what it does.

Now --

MR JUSTICE HILDYARD: Section?

MR ALLISON: Paragraph 54(5), two commentaries mentioned at the top of the page.

MR JUSTICE HILDYARD: I don't think I have a 5.

MR ALLISON: I'm sorry, my Lord, you don't, you have a A and a B at the top of page 70. My mistake.

MR JUSTICE HILDYARD: Yes.

MR ALLISON: Those are two commentaries which explain section 104 and in particular the reason why it was amended to give up to five days for increased flexibility to parties.

Clause 7, as my Lord knows, operates in a different way. The purpose of clause 7 is not to get a claim immediately due and payable; the purpose of clause 7 is to give effect to an automatic termination of the agreement.

My Lord sees that under clause 7(2), all parties agree that the filing of the insolvency application gives rise to an automatic termination.

Now, the purpose of that is to contract out of section 104 of the insolvency code, and what I've given my Lord there is two references to the textbooks including the Zerey passage that I think Mr Dicker looked at that explained the context of the need for the automatic termination, and my Lord will have also seen in Judge Fischer's reports, in particular at paragraphs 45 to 62 of his first report, there is an explanation of why that automatic termination is important.

So what clause 7(2) does, seen against its proper factual matrix, is to operate as a contracting out of the mandatory provision which is otherwise imposed on the parties under the German insolvency code.

MR JUSTICE HILDYARD: Yes.

MR ALLISON: What it does instead of the two-day period or the five-day period, if the parties agreed to the longer period, it replaces that to give the parties greater flexibility, and the only requirement under the GMA as my Lord will have seen is that the calculation be performed without undue delay. That's clause 8.

So that's what the parties have agreed under the terms of the German master agreement instead of what would have been imposed otherwise under section 104 of the insolvency code.

MR JUSTICE HILDYARD: Was 104 the one that had to be changed in order to enable this?

MR ALLISON: My Lord, it was changed to expand it from two days up to five days if the parties elected for the five-day period.

MR JUSTICE HILDYARD: Right.

But did it have to accommodate the contracting out?

MR ALLISON: My Lord, yes, it also removed doubt in relation to the contracting out.

MR JUSTICE HILDYARD: Where does it do that?

MR ALLISON: My Lord, section 104(3) is the key provision.

(Pause)

My Lord, in addition to the Zerey passage that we cited, Judge Fischer considers the impact of section 104

of the insolvency code in his expert evidence; in particular the way in which it operates and the reasons why he doesn't believe on balance that there is an invalid contracting out from that provision by reason of clause 7, sub 2 of the German master agreement.
MR JUSTICE HILDYARD: So have I got it right that section 104 was changed in order to accommodate a longer period for working out the state of the account, as it were, two to five days, but there isn't an express carve-out to enable 7(2), is that right?
But Judge Fischer thinks it's all all right.
MR ALLISON: My Lord, yes, and the commentators say it was enacted in response to doubts in relation to the position under the old bankruptcy law and the cherrypicking issues --
MR JUSTICE HILDYARD: Section 104 was?
MR ALLISON: My Lord, yes.
MR JUSTICE HILDYARD: Right. okay. The way you say in 55 it operates so as to enable a contracting out, the permission to contract out is not expressed in this context, it's simply --
MR ALLISON: My Lord, no --
MR JUSTICE HILDYARD: -- assumed.
MR ALLISON: Absolutely.
MR JUSTICE HILDYARD: Thank you.

MR ALLISON: In the absence of clause 7(2) being an effective contracting out of section 104, there would otherwise be an automatic netting of all provisions under section 104 of the insolvency code.
MR JUSTICE HILDYARD: I haven't thought this through enough, but 104 of the Insolvency Act appears to contemplate claims and cross-claims rather than a 7(2), 8 and 9, regime. In any event that's not for me to wonder about because the experts agreed that it's -- it -- it's compatible.
MR ALLISON: My Lord, yes.
My Lord, perhaps I can maybe pick up the best reference for my Lord and add that as to the explanation as to precisely why it was introduced, and why it is said that clause 7(2) operates not in conflict with section 104 of the insolvency code, and gives the parties to the GMA increased flexibility beyond the five-day period.
MR JUSTICE HILDYARD: Yes. But you say the reason -- the reason I'm asking, it may be clear, is that you wish to -- you wish to emphasise the contractual nature of the exercise required, and the difference between such a contractual exercise and what might be called a claim.
MR ALLISON: My Lord, yes.
MR JUSTICE HILDYARD: In order to break the link with the

cases relating to damage or causes --
MR ALLISON: Well, we say, for the reasons we looked at in relation to those cases a moment ago, that link is broken at an earlier stage, because one isn't in the realm of a breach of contract or a breach of a tortious duty as those cases were. One is instead in the realm of the heating case that we looked at, where one is actually engaged in a search for when the obligation does become due. I think the authorities that Professor Mulbert relies on assume -- I think everyone always assumes in the literature and in the cases -- that if one has a breach, one has an immediate claim.
But in this case one doesn't have a breach, one has an automatic termination plus a calculation procedure, and the question is when one has a calculation procedure, is the claim due immediately or only once one has conducted the calculation which is mandated by the contractual provisions?
That's the distinction that we seek to draw.
MR JUSTICE HILDYARD: So you say this isn't a claim for non-performance such as is contemplated by section 104. It's a permissible homespun contractual -- when I say homespun, separate from the general law?
MR ALLISON: My Lord, yes, it's a self-contained netting arrangement set out under the German master agreement.

MR JUSTICE HILDYARD: Okay.
MR ALLISON: Then, my Lord, paragraph 58, a shorter point, which is what is the relevance if any of the ISDA master agreement.
My Lord will recall that Professor Mulbert sought in his evidence to rely on an analogy with the ISDA master agreement, and said that he thought it would be surprising if you couldn't get interest under the German master agreement from the same time as one can under the ISDA master agreement.
Now it became immediately apparent during cross-examination that Professor Mulbert acknowledged that there were substantial differences between the two agreements, and really one doesn't provide assistance for the other in the context of the termination close-out payment mechanics.
The points are listed five points at paragraph 59 with which he agreed.
Really, the key points are the ISDA master agreement is not an automatic termination, very different from the German master agreement which is. Under the ISDA master agreement, it's clear under the contract actually that the payment is due on the service of the notice.
Under the ISDA master agreement, one has an express contractual right to interest, no express right in the

German master agreement at all save in relation to unpaid amounts during the currency of the agreement under clause 3. Nothing in relation to the compensation claim.

In relation to the ISDA master agreement, an express provision not only for interest but also that interest accrues from the date of the termination.

Again, nothing to that effect within the German master agreement.

So we say that one agreement doesn't inform the interpretation of the other at a general level, but to the extent that it would be suggested and was briefly suggested by Professor Mulbert that it would be surprising if one had different commercial conclusions, we say that point bites both ways on the question we're looking at at the moment, which is when the claim becomes due for performance, because under the ISDA master agreement, it becomes due once the calculation has been performed and the notice has been served.

Thereby, in accordance with what we say is the natural reading of clauses 7 to 9, which is until you know the product of the netting that you have to conduct under the contract, it doesn't make any real sense to talk about who is going to have to pay and how much they are going to have to pay.

My Lord, with those --

MR JUSTICE HILDYARD: Probably, save insofar as one might derive from the ISDA master agreement some definition of ordinary commercial expectation which must be fairly tenuous, one wouldn't imagine that the ISDA master agreement was going to be of great assistance interpreting another agreement under a different law, if admissible at all.

MR ALLISON: My Lord, that's why we asked the questions we did of Professor Mulbert, just to check he understood the very serious distinctions between the two agreements, and I think, with respect, we agreed with the way my Lord just put it. We do not see ourselves that there is any great assistance to be gained from the terms of the ISDA master agreement when construing the German master agreement.

My Lord, moving to the clauses 7 to 9 passage, paragraphs 60 onwards, I don't know whether my Lord would like to have the agreement open while we look --

MR JUSTICE HILDYARD: Yes, I have it open.

MR ALLISON: Clauses 7(1) and 7(2) by now well known and understood, the termination provisions; 7(2) being the relevant provision in the present case and automatic termination on insolvency.

The effect of termination is set out at 7(3). Now,

the important thing here to note is it discharges all unperformed prospective obligations and entitles there to be a single compensation claims under clauses 8 and 9 in substitution for those claims. So, my Lord, we'll see in due course, with respect, we say the question was wrongly framed in the context of a serious and definitive refusal this morning, because the question is: has there been a serious and definitive refusal in relation to the single compensation claim which arises? The underlying transactions by this point are irrelevant. One is looking at whether there has been a serious and definitive refusal, the last word that the company will not pay the single compensation claim.

What about unpaid amounts or accrued but unperformed obligations? They're not included within the clause 7(3) claim.

Now, instead they are preserved, and as we'll see in due course under clause 9(1), what happens to them is they are combined with the compensation claim that is the product of clause 8.

So they are added to the compensation claim calculated under clause 8.

Now in that regard, when one is looking at those obligations, we point out at paragraph 64 that it's important to note that the unpaid amounts to be combined

are not only limited to those owed by the insolvent party. The combination is to account for all unpaid amounts.

So it is unpaid amounts both ways, it's a two-way application of unpaid amounts.

My Lord gets that very clearly from clause 9(1) itself.

And also, as we say, from the contrast with the way that counterclaims is defined within clause 9(2) by reference to the party entitled to damages.

Clause 8 is the logically first step that occurs after the termination of the agreement automatically under clause 7(2), and it is the key provision for my Lord understanding when the claim can sensibly be said to fall due for performance. What it mandates someone to do, not immediately at all, it mandates someone without undue delay to calculate their damages by two different routes. There is a choice given to the party entitled to damages. They either make their calculation on the basis of actual transactions that they enter into, or they do so on the basis of hypothetical transactions.

So they have a genuine choice as to which way they go when calculating their claim.

The second important point on timing one also gets

from clause 8(1), which is: well, what's the reference time for that choice?

The reference time for the alternative basis of claim, the hypothetical basis of claim, my Lord sees over the page at the top of page 209. The reference time is the time at which the counterparty became aware of the insolvency. So it is not done as at the time or even the date of insolvency; it's done as at the time that the party entitled to damages actually becomes aware of the insolvency.

So clearly, we say, not something of which the party entitled to damages is aware until after the making of the administration order in the present case.

Now, what we say that in the context of the way that clause 8 is structured, in particular the two choices for the party entitled to damages and the timing provision in relation to the hypothetical basis of calculation, we say when one looks at those clauses in their proper context, it's very difficult to see how performance can be regarded in any way as immediately due from the time of automatic termination of the agreement because the two -- the key drivers to determining what the claim is, but before that, who actually is going to be paying the claim one way or the other, are dependent upon steps that are only undertaken

after the termination of the agreement.

My Lord, without repeating the point, it's important that clause 8 is a two-way street; it can lead to a claim in favour of the party entitled to damage or against the party.

MR JUSTICE HILDYARD: Again, the nomenclature "party entitled to damage" might throw one off the scent because he might not be the person entitled to any claim.

MR ALLISON: My Lord, absolutely. It can be a claim that goes --

MR JUSTICE HILDYARD: It may be a net obligor.

MR ALLISON: Absolutely, so again very different to the breach cases we looked at from which there is an immediate liability only subject to the question of assessment to pay the other party.

MR JUSTICE HILDYARD: As Mr Dicker said, it does -- to the English eye it becomes clearer substituting defaulting and non-defaulting party.

MR ALLISON: My Lord, yes, absolutely, yes, it does. When one makes those substitutes, it becomes clear that it is a proper two-way payment clause.

MR JUSTICE HILDYARD: Yes.

MR ALLISON: So what we say in view of that, when we summarise the points at paragraph 68 of our submissions,

the first point is: well, how does that operate alongside the law we looked at in relation to section 271 a little earlier? Now, we say the way that it operates is it's apparent here from the circumstances and the nature of the contractual obligation that someone cannot be seen as due to perform the payment obligation until one has actually undertaken the two-way calculation exercise, because you cannot work out if someone is liable at all, let alone the amount for which they would ultimately be liable.

MR JUSTICE HILDYARD: What's the magic in "in a reproducible manner"?

MR ALLISON: My Lord, that's a phrase used by Judge Fischer in his expert reports in relation to the need to work out who is paying and how much is paying. I've summarised it in a more basic term. He says that in order to know -- in order for performance to be due, you have to know what you have to perform, so you have to go through the calculation process. It's in that context that he cites the landlord needing to ascertain its claims before working out what if any amount of the deposit has to be returned. Also picking up on what the Bundesgerichtshof said in the heating cost case, it has to be an ascertained sum, and that's what the commentators say as well, in particular Judge Gruneberg,

the need for an ascertained sum.

My Lord subparagraph 3 really developing why we say the heating case is the most natural case to assist my Lord in seeing how the German courts would conduct a construction of this provision, and therefore, looking at the circumstances, would find that there is no payment obligation due until you have the amount that has to be paid.

My Lord, also in that regard, with respect to my Lord's point made this morning, we say it doesn't really make sense to talk about the creditor being kept out of its money for the purpose of section 286 when performance is required until they know the amount of the claim that has to be discharged.

What about clause 9? Does clause 9 impact any way on what we say is the clear way in which clause 8 operates? Well, we say absolutely not when one looks at the detail of the provision. Clause 9(1) first. All that does is it tells my Lord that one has to add or subtract any accrued but unpaid amounts, or the value of accrued but unperformed obligations from the compensation claim as calculated under clause 8.

In other words, it tells us that the claims that are preserved under clause 7 need to be weighed one way in the balance under clause 9(1) when you've done the

calculation under clause 8.

Now, we explain why at paragraph 69(2) that the point that the SCG sought to develop in relation to a continuity of interest actually goes nowhere. My Lord will recall it was suggested to Judge Fischer that this should show you have a damages claim payable immediately on termination. We say no. What it tells you is you freeze the position for unpaid amounts or unperformed obligations. You can't have any more unpaid amounts or unperformed obligations because they're wrapped up in the compensation claim under clause 8.

In respect of those that are already overdue as at the date of termination, they have an express payment date under clause 3 of the German master agreement, and they continue to attract interest during the period of which the calculation under clause 8 is done. So as Judge Fischer said, what happens is your unpaid amounts continue to accrue interest, as they're entitled to do under clause 3, which expressly provides the right to interest in relation to obligations during the currency of the agreement prior to its termination, and what you do is you take into account those unpaid amounts plus interest when doing your calculation under clause 9(1).

It's no more magic than that.

We say therefore the fact that you have interest on

those amounts doesn't help one in any way to work out whether the single compensation claim should be payable immediately, or, as we say, on a natural reading of the framework at clauses 7 to 9, only once one has performed the necessary calculations.

So 9(1) doesn't assist the SCG; it's just the balancing in relation to the calculation one's already done under clause 8.

What about 9(2)? How does that play out in the debate as to when performance becomes due?

Again, we say it certainly doesn't imply that performance becomes due immediately in relation to the single compensation claim. What it does and does clearly is it confers a right on the solvent party, and so in this case, the notifying party, to postpone the compensation claim that it owes to the insolvent party in favour of any counterclaim. That's all it does. It certainly doesn't tell one that the compensation claim is immediately due on termination. It simply gives a right of postponement to the solvent party in those circumstances.

MR JUSTICE HILDYARD: I mean, you agree that the reference to a compensation claim in the first line is to a compensation claim under the GMA?

MR ALLISON: My Lord, we do.

MR JUSTICE HILDYARD: Yes.

MR ALLISON: My Lord, we do.

MR JUSTICE HILDYARD: The period, if you like, of a stay, by reference to the other claims, are any claims however based and whether in the agreement or not.

MR ALLISON: My Lord, that is our reading of the wording, yes.

MR JUSTICE HILDYARD: So as to that you're agreed.

MR ALLISON: My Lord, yes.

MR JUSTICE HILDYARD: Yes.

MR ALLISON: What we do say, though, is if not neutral, because this being a later stage in the process, if anything clause 9(2) assists Wentworth's construction. We give my Lord two points in support of that at the top of page 23 of the submissions.

We say that the single compensation claim calculated under clause 9, if owed to the insolvent party, so once one has done the clause 8 process and the plus or minus under clause 9(1), if you owe that to the insolvent party, you only pay it if there are no counterclaims of the solvent party, or if the solvent party fails to use the wording four lines up from the bottom of the clause to deduct the counterclaims.

We say that the insolvent party on the other hand cannot know whether or not it's entitled to be paid

anything by the solvent party without the cooperation of the solvent party in telling them whether they do in fact have any other claims which need to be deducted from the sum owed to the insolvent party.

So it's a further stage in the process of not actually knowing what if anything needs to be paid until one has gone through the necessary steps.

My Lord, subparagraphs 5 and 6, we say that's why Judge Fischer placed reliance on the landlord and deposit cases by way of analogy to try and assist my Lord in the way that he thought a German court would look for analogies. We reproduced two of the key passages of the evidence there, which essentially make key the fact that you need cooperation to work out what the claim is and, as set out elsewhere in his evidence, until one has been through that hoop and until one has your single reproducible claim, as he says, you don't actually know who is paying and what they are paying.

My Lord, that's the wording of clauses 7 to 9 and the reasons why we say the payment obligation must be after the administration rather than on the automatic termination.

MR JUSTICE HILDYARD: Just run me past the reason for an implicit obligation of cooperation.

MR ALLISON: My Lord, it's in relation to 9(2).

MR JUSTICE HILDYARD: Yes.
MR ALLISON: What happens, even if one has been through the steps under clause 8 to work out who has a claim and in which direction, and one has been under the step at least 9(1) to plus or minus any unpaid amounts on to that, there is still then the additional right at 9(2).
MR JUSTICE HILDYARD: Yes.
MR ALLISON: In those circumstances the insolvent party doesn't know if it's going to get the amount produced by clauses 8 and 9(1), unless and until one has the cooperation of the solvent party in detailing what other counterclaims it has, just as a landlord has to do to make deductions from a deposit to work out what, if anything, the balance is.
That's the analogy that is made.
MR JUSTICE HILDYARD: I think Mr Dicker says it's all really under the control of the party entitled to damages and that there's no particular reason for cooperation. There's a sting in the tail of an uncertain sort at the end, which is if the party entitled to damages doesn't get his act in gear, if I can put it that way, at some point there will be a repercussion, but beyond that there's not much need for any input of a cooperative kind. I think that's what Mr Dicker says.
MR ALLISON: What my Lord saw in the context, the use of the

word "cooperation" and the way that Judge Fischer uses the word "cooperation", that's what I'm focusing on. I think he uses the word in the sense of the other party needs to set out its claims to work out in the landlord and deposit case if anything actually remains payable, that's the analogy he draws.
He uses the word "cooperation" in that context.
Maybe not the same way -- maybe not the same word we would necessarily use.
MR JUSTICE HILDYARD: I see. I think Mr Dicker's point is at least in part -- he'll correct me if I'm wrong -- the party entitled to damages is sort of held temporarily harmless against claims against it for so long as claims of which it, the party entitled to damages, has knowledge are floating about. And doesn't really -- doesn't really engage the other -- the other party. It's all really for the protection of the party entitled to damages so that it doesn't have to participate in the insolvency process. It can simply say, "I'm jolly well not going to pay you anything until I know jolly well, I don't have claims over and above that".
MR ALLISON: My Lord, unless it fails to do so within --
MR JUSTICE HILDYARD: There's a sting in the tail, yes, that it's got to -- within a period which is unspecified and not clarified, but which Mr Dicker assures me I need not

stick my head over the parapet about, subject to that sting in the tail, everything seems to be for the protection of the party entitled to damages and all the information in effect comes from him. That's I think the way it's put and -- and given that that's the way it's put, why does the duty of cooperation arise?
MR ALLISON: My Lord, that's why I started at the way we did in paragraph 69(3) by saying, actually, my Lord may find that 9(2) doesn't really help one way or the other. All it does is entitle a right of postponement. That's all it gives you.
MR JUSTICE HILDYARD: I mean what your case really comes down to -- is this right? -- is the more general point that there's nothing in these provisions which detracts from what you say in a sense is the -- the natural expectation that you shouldn't be required to pay interest until you know the principal sum?
MR ALLISON: My Lord --
MR JUSTICE HILDYARD: So it all comes back to that, doesn't it?
MR ALLISON: My Lord, yes, and I suppose layering on top of that, it's even more important than an agreement of this nature where one doesn't even know at the time of automatic termination who will be required to make a payment, let alone how much it's required --

MR JUSTICE HILDYARD: There may not be evidence for sum in this case. It may be the other way.
MR ALLISON: Precisely. Therefore in our submission it's very difficult to speak of performance being due, as it has to be, payment has to be due, the experts agree on that.
MR JUSTICE HILDYARD: Yes.
MR ALLISON: It's very hard to talk of a payment obligation that is due before one knows the answer to that question.
My Lord, that's the key point.
MR JUSTICE HILDYARD: Yes.
MR ALLISON: My Lord, the other point that I foreshadowed earlier which is even if -- we say not for the reasons I've developed in relation to the way that the clauses hang together -- but even if section 271(1) does apply so as to make something immediately payable, Professor Mulbert agreed with the academic writings that we looked at, that "immediately" means objective immediately, so as to include a necessary amount of preparation time.
Now, in that context --
MR JUSTICE HILDYARD: I am being silly about this, not sure how this fits in.
MR DICKER: My Lord, the other thing to bear in mind, I'll

deal with this in reply, but Professor Mulbert didn't agree on a preparation time. I think he on two occasions at least said no.
MR JUSTICE HILDYARD: Well, perhaps someone could look that up for me. But -- I am so sorry, I am getting a bit muddled here, the termination event is defined in 7(ii)?
MR ALLISON: Absolutely, that's termination.
MR JUSTICE HILDYARD: Yes.
MR ALLISON: Separate question, when it becomes due.
MR JUSTICE HILDYARD: Yes.
MR ALLISON: Everyone of course agrees termination occurred on the application. The separate question is when did the payment obligation become due for performance.
MR JUSTICE HILDYARD: I see. And the answer is immediately and the question is what does that mean?
MR ALLISON: Of course our primary case is not immediately, for the reasons we've already been looking at.
MR JUSTICE HILDYARD: Yes, but you say it all has to await the netting process and the determination of which way the obligation actually in economic terms flows.
MR ALLISON: My Lord, absolutely.
MR JUSTICE HILDYARD: Yes.
MR ALLISON: But we say even if "immediately", and, my Lord, we'll check the references before tomorrow morning and check the academic passage, but what the writers say is

that even "immediately" means objective immediately; it doesn't mean now. It includes a necessary amount of preparation time to perform, that's what's said.
So in those circumstances what we say as an alternative case, even if Mr Dicker is correct, which we say he's not, on the time at which performance was due, "immediately" here does not mean, as he wishes to contend, between the filing, the commencement of the administration hearing at around 7.30 on a Monday morning and the making of the administration order, a matter of some 25 or so minutes later.
So even in those circumstances, we say that one doesn't have, as they need and they accept they need to have, a performance obligation that fell due prior to the administration order.
MR JUSTICE HILDYARD: You say there is what might be grandly called a locus poenitentiae, do you, whilst you get yourself in -- you clothe yourself with the ability to effect the transfer or to collect the cash or whatever it is?
MR ALLISON: My Lord, yes. The time --
MR JUSTICE HILDYARD: Rather an elastic concept, isn't it? You accept there's an objective standard for that, and just because you are rather slow at getting cash together doesn't help you.

MR ALLISON: My Lord, absolutely, and the commentator does make clear that it is an objective standard.
MR JUSTICE HILDYARD: Yes. But you say that the actual enforcement is not capable of -- is not made complete -- enforcement rights is not made complete until some time after the event, being the time which is in effect necessary objectively for the obligor to do his stuff?
MR ALLISON: My Lord, yes. Obviously the importance --
MR JUSTICE HILDYARD: Why would they bother about that? Why wouldn't they just say immediate means immediate; it's true, you are not going to be held to account if you only take the standard time, it is not going to make a bit of difference, but why should they get into that?
MR ALLISON: My Lord, what --
MR JUSTICE HILDYARD: Why shouldn't immediate mean, as it were, immediate?
MR ALLISON: Because of the effect of a payment obligation being immediately due within the default rule -- this is the application of the default rule -- what is said in the context of that default rule is immediate means objectively immediately, taking into account preparation time and we say in that context, it must at least take into account preparation time to make a payment. We say we're in a very unreal world in any event, because one doesn't even know at the moment who is going to be the

party receiving the payment and what the amount is.
MR JUSTICE HILDYARD: Where is the preparation time language? Sorry.
MR ALLISON: My Lord, it is Kruger, which is at tab 58, I think, of my Lord's authorities.
MR JUSTICE HILDYARD: That says immediate means ...
MR ALLISON: My Lord, it is paragraph 32 of Kruger which is the prepenultimate page of that tab.
(Pause)
I think we looked at it.
MR JUSTICE HILDYARD: We did, we did. (Pause)
Yes, thank you.
MR ALLISON: The evidence passage that we cited is that of Professor Mulbert in relation to the objective meaning. He said:
"I still think that the necessary preparations ... whether which amount of time is required in order to make necessary preparations and whether there was required adequate time for ... depends on the specific situation."
He said he wouldn't be surprised if the German courts would hold "immediate" means right after, and he said:
"Immediately after the termination notice, in the case of a termination notice, immediately after the

termination has been served."
He didn't answer in relation to automatic termination where the other party wasn't aware that it occurred. He spoke about a termination notice being received.
My Lord, I am mindful of the time.
MR JUSTICE HILDYARD: Yes. Is that a good time to break off?
MR ALLISON: My Lord, yes.
MR DICKER: My Lord, I wonder whether I might just ask my learned friend, not wishing to put any pressure on him, but ask him how much longer? I only ask him because I think he is running at 10 pages an hour and he has 60 pages still to cover.
MR JUSTICE HILDYARD: He's got a difficult judge! How much longer?
MR ALLISON: My Lord, I think I have been going for considerably less time than Mr Dicker took --
MR JUSTICE HILDYARD: No, it's not a competition but --
MR ALLISON: I will do my very best to get through it as quickly as possible --
MR JUSTICE HILDYARD: I don't doubt that, but I think probably the implicit question is do you want to start at 10.00, in order to ensure that we're finished by -- I mean from my point of view, I've promised you

tomorrow, so from my point of view it's only tidiness before the short adjournment. From your point of view, you may be in the Supreme Court or something, I don't know.
MR ALLISON: I don't know whether Mr Dicker would require any more than half an hour in reply. If not I would imagine we would be absolutely fine starting at 10.30.
MR JUSTICE HILDYARD: He is slated to have a bit longer than that. You've all been very, very quick, but according to your timetable, he had an hour and a half. That seems a little bit expansive.
MR DICKER: On the rate my learned friend is going at the moment, I will not need an hour and a half. My learned friend indicated that if I was half an hour, that would be fine. My Lord, I may be slightly longer than that but if your Lordship was happy to start at 10.00, my learned friend finishes at 12.00, then I can't see any difficulty finishing by the short adjournment.
MR JUSTICE HILDYARD: Well, as I say, I have promised you tomorrow. Consistently with that, I will leave it to you. I know the stresses and strains of a case like this and that 10 o'clock can rush up at you. Equally, you know, I will rather meekly follow your prescription.
MR ALLISON: I am in my Lord's hands and very happy to take it more quickly if that would assist my Lord.

MR JUSTICE HILDYARD: I like going a bit slow so I can catch up.
MR DICKER: I am in your Lordship's hands entirely as to the start time.
MR JUSTICE HILDYARD: Back to the original question: if we start at 10.30, do you reckon you would finish by ...
MR ALLISON: My best guess is I think two more hours, which would be, I think, just under the three-and-three-quarter hours I was allocated.
MR JUSTICE HILDYARD: Would you feel pressurised if we did start at 10.00?
MR ALLISON: My Lord, no, not at all.
MR JUSTICE HILDYARD: Shall we start at 10.00 just for comfort's sake?
MR DICKER: My Lord, yes.
MR JUSTICE HILDYARD: 10 o'clock then.
(4.20 pm)
(The court adjourned until Wednesday, 25 November 2015 at 10.00 am)

I N D E X

T