Wednesday, 25 November 2015
(10.00 am)
Closing submissions by MR ALLISON (continued)
MR ALLISON: My Lord, good morning.
MR JUSTICE HILDYARD: Good morning.
MR ALLISON: Subject to my Lord, Mr Dicker and I have spoken and what we have said we will do is guillotine ourselves, subject to my Lord, so that I do finish by midday and Mr Dicker has an hour to finish at lunchtime. So that's where we hope to go this morning.
Yesterday we were almost at the end of the section of our written submissions dealing with when the debt falls due for payment.
We'd just dealt with the immediately point on page 23. So it's page 24, my Lord, that we are up to.
Now, for my Lord's benefit, paragraphs 74 to 83 take my Lord through a summary of the key references to Judge Fischer's written and oral evidence on the interpretation of clauses 7 through 9. What they do, hopefully to assist my Lord when coming back to the transcript, is they place his oral evidence in its proper context. So my Lord can see that an attempt by the SCG to suggest that Judge Fischer has moved away from his written testimony is wrong on analysis. We say in fact his evidence is very clear as to how he would

construe the provisions if he were sitting as the judge, whilst recognising of course it's a matter for my Lord.
Due to time constraints I don't propose to walk my Lord through each of the passages. There is just one point though I wanted to highlight by way of further explanation and that's paragraph 79. It picks up on a question my Lord put to Mr Dicker at the start of closings yesterday morning, on Judge Fischer's distinction between when a claim exists and when a claim becomes enforceable. I don't know whether my Lord remembers that.
MR JUSTICE HILDYARD: Yes.
MR ALLISON: That came about because during cross-examination Mr Dicker put to Judge Fischer the passages in the Zerey textbook referred to within paragraph 79.
My Lord will recall that during re-examination Judge Fischer explained the difference between two German words used in those passages. First, "Entstehung", which is mentioned by Zerey in the context of the single compensation claim, which Judge Fischer says translates to "existence". The second is when the English translation of Zerey talks about maturity, Judge Fischer says that word "Falligkeit" is "enforceability".

So there's a distinction between when a claim becomes into existence and when it becomes due and enforceable for payment. That's the point to flag for my Lord at paragraph 79.
My Lord, that's all we propose to say in relation to when the claim fell due for payment without repeating what we said yesterday. We say that on a proper reading of clauses 7 through 9, in accordance with the principles of German law agreed by the experts, in particular because of the two-way nature of the closeout it cannot sensibly be said that someone has an obligation of which performance is due, namely as the experts agree the need to pay the debt, until one knows who is going to be the payer, who is going to be the payee and the amount of the payment.
My Lord, moving on, page 30, the next topic of our submissions. Assuming for the moment against ourselves that the compensation claim can be characterised as being due immediately, namely before the administration, then we need to consider the two additional arguments of the SCG under section 286 of which they must succeed on at least one. Those arguments at identified at paragraph 93.
The first is Professor Mulbert's contention that the filing of the proof of debt in LBIE's administration may

amount to the service of a warning notice. The second is the effect of the administration application by LBIE's directors, in particular whether that constitutes a serious and definitive refusal to perform by LBIE.
My Lord, by way of introduction what we say is the German materials and the evidence actually point one way on this. My Lord will see, when we come to it, that there's not a single authority Professor Mulbert is able to rely on following cross-examination. He recognised his authorities didn't stand for the propositions that he sought to put them forward for in his reports.
What we say in those circumstances is, when my Lord is considering absolutely the interface as a matter of German law between default and insolvency, that the expert evidence of Judge Fischer which was clear and in view of his considerable experience in the area is that which should be preferred by my Lord. We summarise the reasons for that at paragraphs 96 through 98.
MR JUSTICE HILDYARD: I've just got to weigh the compellability or conviction or consistency or my appreciation of what they say, not their relative backgrounds, haven't I? It was explained to me tactfully that a professor and a judge may have equal learning, but the professor may be more learned. So it is simply whether I -- which I think is a more

compelling argument, isn't it?
MR ALLISON: My Lord, yes, to a point. Two important points in that regard.
The first is that these issues arise at the crossroads of default and insolvency, they're both questions which are of general import as a matter of German insolvency law as well. Professor Mulbert very fairly recognised, on more than one occasion during his cross-examination, that he is not an expert in insolvency law. That's the first point. Judge Fischer very much is an expert in that area.
The second point is when one puts together with that the fact that Professor Mulbert was forced to acknowledge that there is no existing German authority which supports the fact the case that he seeks to make in relation to these two points, we say again that is an important factor which comes into my Lord's weighing exercise when the indications in the authority, the indications in the commentary, and the clear evidence from Judge Fischer all point in the other direction.
That's the key point by way of introduction which we respectfully say is very relevant in the weighing exercise my Lord needs to conduct.
My Lord, we were going to deal first with proof and the contention that the filing of the proof in LBIE's

administration could be a warning notice.
Three topics relevant to that are summarised at paragraph 102: first, the requirements for a warning notice; secondly the reasons why it doesn't constitute an effective warning notice in a German insolvency; and, third, well what about an English administration? What follows from the first two topics?
So looking first at the requirements for a warning notice, the joint statement my Lord sees is an agreed position, it must be a clear, definitive demand for payment of a sum that is due. That's the agreed position.
MR JUSTICE HILDYARD: But not, as we discussed yesterday, necessarily an ascertained sum which is due.
MR ALLISON: My Lord doesn't have any further evidence one way -- what the experts say is a sum that is due, that's the wording that's used.
In paragraph 104, the agreement by Professor Mulbert, during his cross-examination, that a warning notice does require an unequivocal demand for a payment as sum is due. So that's the point in relation to what a warning notice is as confirmed by the decision of the Bundesgerichtshof that we referred to for my Lord's benefit at paragraph 105.
So that's what a warning notice is as a matter of

German law.
The second topic is why, as the experts agree, a proof of debt does not amount to a warning notice in a German insolvency. They agree on that much.
Now, three key points were agreed to by Professor Mulbert which we summarise at paragraph 107. The first is that he agreed with the evidence of Judge Fischer that the filing of a proof of debt in a German insolvency is not considered to be a warning notice as it is not a request by the creditor to the debtor for payment of a debt. It is actually a request to participate in the insolvency. That's the first point he accepted and we give my Lord two passages where that happened.
The second point is he agreed that all the commentators speak with one voice on the issue in saying that a proof of debt does not constitute a warning notice as it doesn't include a request for payment.
Again, my Lord, we set out references to the commentators and the confirmation by Professor Mulbert during his cross-examination that he would agree with that, their view, that it doesn't contain a request for payment.
The third point is that Professor Mulbert again agreed that the most significant relevant authority that

we looked at with the experts, the decision of the Reichsgericht, decided that a proof of debt does not constitute a warning notice as it does not entail a demand for payment. My Lord sees where that was accepted during cross-examination as well.
So that's the first point and the second point, warning notice must be a clear demand for payment; a proof of debt in a German insolvency is not a warning notice because it does not contain a demand for payment.
Now, my Lord, looking at the English insolvency aspect, Professor Mulbert very fairly admitted at paragraph 108 of our submissions that the highest he felt able to put this point is that it may constitute a warning notice; that was his evidence.
Now, what my Lord has against that is the carefully reasoned reports of Judge Fischer and the oral evidence of Judge Fischer which consider the administration summary, that was agreed by the parties and that is in the bundle, and consider in that regard: what is the function of proof in an English insolvency, what are the effects of an English administration? He reaches the careful conclusion that a proof of debt in an English administration would not be a warning notice because again it's not a demand for payment of a sum due.
Now what we do at paragraphs 110 through to

paragraph 113 is explained to my Lord why that conclusion is correct. Without wishing to go through all of the points today in view of time, just drawing my Lord's attention perhaps to subparagraph (5), where we point my Lord to three authorities that are in the bundles, that we say on analysis make the point clear that what a proof is all about, unsurprisingly because it is only made in request to the administrators for people to prove for the purpose of participating in the assets of the insolvent estate -- what those cases make clear is proof is all about coming in so as to be entitled to share in the distribution of the insolvent estate. Those three passages, my Lord, we say make clear that's what a proof is all about.

So when one considers the nature of a proof in an English insolvency we say it's no different to the nature of a proof in a German insolvency, namely it is a demand which sets out your claim for the purpose of participating in a distribution of the insolvent estate according to the rules that govern the distribution of that insolvent estate. For that reason, my Lord, we say that the contention that a proof of debt should be seen as an unambiguous demand for payment is one which cannot be sustained.

MR JUSTICE HILDYARD: The cases you cite relate to

liquidation or bankruptcy but I suppose you say that since the expansion of an administration to enable distribution -- and since proof of debt only arises if it intends to go to that stage, they are equated.

MR ALLISON: My Lord, absolutely and two points in relation to that.

The first is that of course in an administration there is no requirement to file proofs until such time as the administrator calls for proofs. In this case that didn't happen until over two years after LBIE entered into administration, when the administrators gave notice of their intention to distribute following permission from the court and sought proofs from creditors. When that happens, my Lord is correct, we say it's absolutely no different. In fact in our written submissions we give my Lord the reference at paragraph 113, subparagraph (2) of our closing, we refer to two decisions of the Court of Appeal and a decision of Mr Justice Briggs in the Lehman case making clear that once a company is in administration the assets have to be dealt with in accordance with the statutory scheme. That's what they're there for and therefore once the proof process and the distribution process within an administration kicks in, after an intention of a notice to distribute, one is in precisely the same

situation as the three cases that we rely on in relation to what is a proof of debt.

MR JUSTICE HILDYARD: When I heard Professor Mulbert's reluctance to commit to a definitive answer, the "may" point that you make really is signifying some uncertainty as to whether the English process of administration could be equivilated to a German insolvency procedure in a relevant way so as to equate the two.

MR ALLISON: My Lord, my Lord may recall in that regard one point that he raised by way of potential distinction in his reports is the fact that in a German insolvency the proofs are submitted to the insolvency administrator and he thought it may be different in an English administration. My Lord will be well aware from part 2 of the rules that it is the administrator that calls for proofs and the proofs are submitted to the administrator as well within the administration. And proofs are payable from the assets of the insolvent estate in accordance with the statutory scheme, just as Judge Fischer informs my Lordship is the case within a German insolvency.

MR JUSTICE HILDYARD: I cannot remember whether Judge Fischer's reports explain the salient characteristics of a German insolvency process.

MR ALLISON: My Lord, they do. We've given my Lord the references at paragraph 110 of our written submissions, where he does explain the key features of the German process including a moratorium on claims, instead claims need to be established by way of proof and claims are to be discharged by participation in the payment of dividends within the insolvency. He explains that for my Lord's benefit within his evidence.

Those points were put to Professor Mulbert during cross-examination. Paragraph 111 of our written closing submissions, we put each of those propositions to Professor Mulbert and he agreed with each of them.

So there is no dispute between the experts before your Lordship as to what the key characteristics of a German insolvency are. In particular there is no dispute, as confirmed by Professor Mulbert, that in a German insolvency a proof is not seen as a warning notice because it doesn't constitute a demand for payment; it constitutes a request to participate in the insolvent estate.

So my Lord does have -- that was a rather long answer to my Lord's question -- the evidence as to what a German insolvency regime is.

My Lord also has, as summarised at paragraph 112 of our closing submissions, has Judge Fischer going on

looking at the administration summary put together by the parties which highlights the key aspects of an English insolvency including the proof process and says, well, in his view there's no qualitative difference between the two and he believes the same result would follow in an English insolvency as would follow in a German insolvency. So my Lord does have all that evidence.

I don't know whether my Lord would like to see that now or whether my Lord is content the references are there?

MR JUSTICE HILDYARD: No, thank you.

MR ALLISON: My Lord, that's the proof point, unless my Lord had any further questions on that.

Page 38, the alternative case of the SCG is there was an automatic and immediate default under one of the exceptions to the failure to comply with a warning notice that occurred prior to the making of the administration order. Perhaps trite but we say important, an application to commence insolvency proceedings is not, my Lord well be well aware by now, listed as an exception in 286, and indeed nor is the commencement of an insolvency proceeding.

What the SCG does though is to say that the administration application in this case triggered the

exception, and that is a very high burden we say because of the words "serious and definitive refusal to perform".

My Lord, I was going to skip over the introduction to the section and take my Lord to the meat of the submissions which start at paragraph 127 on page 40.

My Lord, the first point is Professor Mulbert agreed during cross-examination that he had not cited any German authority which supports his argument that an application to commence insolvency proceedings should be viewed as a serious and definitive refusal to perform by the debtor. That's the first point.

The second point that goes hand in hand with that and is equally important, and we say telling, is that he agreed that if it did constitute a serious and definitive refusal to perform it would be important generally in German insolvency proceedings because you can only get interest from the insolvent estate in Germany if you have your section 286 default before the commencement of insolvency. So he agreed it would be a generally important point in German insolvencies.

Now what we say by way of overview is, given the importance of that issue from a German perspective as well, given the absence of any authority supporting that proposition -- we do say that Judge Fischer's clear

evidence on the point, both as a matter of German law and considering the particular facts of this case, is both helpful and instructive to my Lord and consistent with the German literature which contains no suggestion that an application could trigger the exception and the German authorities which likewise contain no suggestion that an application could trigger the exception.

So, my Lord, that's the starting point.

With that background -- and we've referred in that context in the following paragraphs to the views of the commentators and the decision of the Reichsgericht at paragraph 131. With that background we were going to deal first with the key error made by Professor Mulbert in his expert evidence.

MR JUSTICE HILDYARD: Before you get there, one of the principal reasons which you deploy in support of your contention, that the proof of debt cannot constitute a demand -- a, whatever it's called -- a written notice demand, is that by then the debtor is not in a position to respond and it's not really a request of the debtor who no longer has any capability of answering in any materially relevant way.

Does it not follow, logically from that, that there is a refusal and it is the last word because, by parity of reasoning, the debtor has no ability to respond?

MR ALLISON: We say no and we say no actually based on the reasoning of the Reichsgericht in the case we looked at with both of the experts which my Lord will recall is at bundle 1, tab 37, where the Reichsgericht actually considered the question not serious and definitive refusal but whether a proof of debt was a warning notice. And said no because it's not --

MR JUSTICE HILDYARD: I accept that. But doesn't it follow from that, and one of the reasons why that is correct, that inevitably once an insolvency process has been commenced by the debtor, he is saying, "I no longer have the capability of paying what I owe", i.e. refusing to pay, and it's a last word?

MR ALLISON: My Lord, no. If my Lord is referring to the serious and definitive refusal test --

MR JUSTICE HILDYARD: Yes.

MR ALLISON: -- that's obviously relevant and the case is made for its relevance at the administration application. We're considering whether that is triggered prior to the insolvency.

MR JUSTICE HILDYARD: Right.

MR ALLISON: That's the context in which that question arises so as to enable the SGC, say, to establish a default prior to the opening of insolvency proceedings.

MR JUSTICE HILDYARD: Isn't the application by a debtor, a definitive statement by him that he is going to put out of his abilities the ability to pay?
MR ALLISON: My Lord, no. We'll come to that in due course.
MR JUSTICE HILDYARD: Right, okay.
MR ALLISON: The evidence that my Lord received in that respect from the experts, in particular from Judge Fischer, is that there is a material difference between someone saying, "Well, look, I can't pay", and, "I will not pay."
MR JUSTICE HILDYARD: He is saying both, isn't he? I mean if -- take the example, which is quite close I would have thought, the analogy, of someone who parts forever with his property. And that is the only property whereby he can satisfy a debt. And he does so with particular relevance to the debt. Why is that not a refusal to pay the debt? What is the difference, if it is, between that and an application for an insolvency process?
MR ALLISON: Well, again, my Lord, foreshadowing what we'll come to in a moment.
MR JUSTICE HILDYARD: Right.
MR ALLISON: Key points in relation to that is one needs to determine, as at the making of the administration application, whether one can tell then that there has

been a serious and definitive refusal in the sense that the debtor has said, "I will not pay that debt."
MR JUSTICE HILDYARD: If he said at the very same time, "I intend to pay you, don't worry", everyone would laugh him out of court.
MR ALLISON: My Lord --
MR JUSTICE HILDYARD: You would say: you can't have your cake and eat it. Either you can pay, in which case you would pay, or you can't pay and that is the footing, amongst others, for your applying for this process.
MR ALLISON: Well, my Lord, I say again what that with respect conflates as a matter of German law is what is required for a serious and definitive refusal to perform as revealed by the commentary, the cases and the evidence of Judge Fischer and indeed also it omits the need for there to be the across the line communication.
So for all those reasons that is missing in the context of an administration application as we see.
MR JUSTICE HILDYARD: There may be other criteria which must be satisfied and you are going to come on to those, but all I am focusing on is whether it is consistent with an application for your own insolvency process to be able, at one and the same time, to say you are not refusing to pay.
MR ALLISON: My Lord, the short answer to that, we say, is

yes, both by reference to the German commentary and the German authorities that they are materially different questions as we will see; and as was made clear to my Lord both by Judge Fischer in his oral evidence and in his written reports.
MR JUSTICE HILDYARD: All right, you tell me which paragraphs those are. You tell me which paragraphs those are and then I can read them at my leisure.
MR ALLISON: My Lord, I don't know whether my Lord would like to do that now or whether I should come to that in the relevant order.
MR JUSTICE HILDYARD: I don't want to take you out of your sequence.
MR ALLISON: I can assure my Lord I am coming to that point.
MR JUSTICE HILDYARD: Yes.
MR ALLISON: The first point, though, which I think we can push to one side very quickly is page 41. My Lord will recall the framework of Professor Mulbert's argument, and my Lord will see this again when one revisits the evidence, was based on an analogy with section 323(4), the anticipatory breach provision, which conferred a right to withdraw from a contract where it is obvious that the other side will not perform.
My Lord will also recall it was agreed in that context that the court could as a matter of German law

consider the likelihood, the risk, of non-performance in the future. In other words, it was a probabilities test, it was different to the test one finds at section 286(2)(iii) which is: is it the final word of the debtor?
Now, my Lord, we say that analogy is inappropriate. What we do at paragraphs 132 to 142 is explain to my Lord step by step why Professor Mulbert's attempt was wrong, as he recognised when dealing with the relevant test for the two provisions and when being taken to the views of the commentators and the cases.
We do say though it's interesting to see that is the way that he felt in his written evidence he had to frame his case to be able to say that in this particular case there had been a serious and definitive refusal to perform.
Now my Lord will see, when you come to reviewing the SCG's closing submissions, that there's no real connection between the case they now put forward and Professor Mulbert's expert report. Indeed, the central plank of Professor Mulbert, which was this idea of anticipatory breach and the possible analogy that could be drawn, is not actually built on at all by the SCG.
Maybe just flagging to my Lord a couple of points within this section so my Lord can see the way we've

dealt with it. Paragraph 135 identifies the reasons why section 323(4) the anticipatory breach provision on which Professor Mulbert relies is materially different to the relevant provision for my Lord to consider in this case. It identifies the different nature of the test.

MR JUSTICE HILDYARD: The wording in 323(2)(i) and the wording in section 286(2)(iii) are the same, aren't they?

MR ALLISON: My Lord, the first exception, yes.

MR JUSTICE HILDYARD: Yes. It's only the anticipatory breach provision which is different.

MR ALLISON: My Lord will recall that the evidence of Professor Mulbert argues in relation to section 323(4) and he seeks to introduce based on that --

MR JUSTICE HILDYARD: I understand that. But the two sections, 323(2)(i) and 286(2)(iii), use the same language, don't they?

MR ALLISON: My Lord they do.

MR JUSTICE HILDYARD: Yes, and one would expect them to be construed the same.

MR ALLISON: That was precisely our point during cross-examination.

MR JUSTICE HILDYARD: That's the way you put it. And the contrary is to say that the anticipatory breach language

says that if it's virtually certain -- which I think is what the cases or commentary said "obvious" meant in the context. If it is virtually certain that the debtor will seriously and definitively refuse to perform, that suffices.

MR ALLISON: My Lord, yes. So in that context the commentators draw the distinction that section 323(4) is wider because it has those two distinct limbs wrapped up within it, whereas the provision we are considering in this case is only the serious and definitive refusal to perform which brings with it, we say, as we'll look at in a moment, it must be the last word and it must be a communicated last word. It's not a probability assessment --

MR JUSTICE HILDYARD: I accept that. But if in the anticipatory context virtual certainty will suffice to justify revocation, why does some more onerous standard apply in the context of real time, that is to say not anticipatory breach?

MR ALLISON: My Lord, that is dealing with the right to withdraw before performance is due. It's dealing with a factually different scenario to the question as to whether one can avoid the need to serve a warning notice under section 286 --

MR JUSTICE HILDYARD: I appreciate that and I'm sorry to

interrupt you. I know that Judge Fischer told me that section 323 does not relate to termination, only to withdrawal. Let us confine ourselves to 323 and let us try and work out what you have to establish to demonstrate satisfaction of 323(2)(i) and you have to show that the debtor seriously and definitively refuses to perform. But you can't help wandering down to 4 to see what the relevant criteria are for anticipatory breach which we all agree is what 4 covers.

Now, if a virtual certainty of serious and definitive refusal suffices in the context of anticipatory breach why does it not in the case of actual breach?

MR ALLISON: My Lord, with respect, that's where my Lord has gone wrong.

MR JUSTICE HILDYARD: Well, that's why I want to --

MR ALLISON: And that's what we explored with Professor Mulbert and that's what is made clear by the commentators. Perhaps taking my Lord straight to paragraph 138 of our written closing.

MR JUSTICE HILDYARD: But that's a comparison -- I am sorry to be rude -- I don't want to look at 286. I want to try and understand 323(2)(i) and 323(4) and I want to see the interrelationship. I don't want to get to 286, I want to understand what 323 means.

MR ALLISON: My Lord, the short point -- we can if necessary have a look at the underlying commentators. What the commentators tell my Lord is that when one is looking at section 323(4) and considering the question of whether something is obvious, two different things can satisfy that. One can be a serious and definitive refusal to perform, and the other can be a virtual certainty of non-performance. So they are different things. What I am saying to my Lord is that section 323.2(i) does not include the virtual certainty concept, that is outside of that concept when the word obvious is looked at.

MR JUSTICE HILDYARD: I understand your submission in that regard. But what I am trying to test is why the test should be different according to whether the breach is actual or anticipatory. That's my question.

MR ALLISON: My Lord I appreciate that and the answer to that is because -- without wishing to go back to section 286, the clear answer to that is section 286 does not incorporate the test of obvious that one finds within section 323 --

MR JUSTICE HILDYARD: I appreciate that too, but that's why I started my questions with saying: do you accept that the words in 323(2)(i) and the words in 286(2)(iii), which are the same, are to be interpreted likewise? And you said yes.

MR ALLISON: My Lord, yes.
MR JUSTICE HILDYARD: Therefore I am trying to find out what their meaning is in 323.
MR ALLISON: My Lord, I'm sorry if I've missed my Lord's --
MR JUSTICE HILDYARD: I am sorry, I am hectoring you, but do you see -- I am only hectoring you to promote clarity in my own mind.
MR ALLISON: My Lord, I absolutely do. In that regard what the commentators say is the test -- they frame it in the same way in relation to that provision, i.e. it's the final word. I don't know whether my Lord would like to see the references.
MR JUSTICE HILDYARD: No, I remember that. But I am just wondering if there's any definitive guidance on it or whether I must simply work out in my own mind whether the inclusion of the virtual certainty test flavours the interpretation of 323(2)(i).
MR ALLISON: Again I understand my Lord's question. The short answer is no it doesn't, because one sees that the obvious is wider which includes more than just a serious and definitive refusal to perform. It also includes virtual certainty. We took Professor Mulbert through the references. Just maybe to remind --
MR JUSTICE HILDYARD: No, I remember -- I'm sorry to be rude. I remember all that and I remember the virtual

certainty test. You are quite right in reminding me I must double-check and I shall. But what I am trying to straighten out in my mind is why there should be a different test according to whether the breach is actual or anticipatory. I am puzzling about that.
MR ALLISON: I can see my Lord is puzzling about that. The short answer -- perhaps not the most helpful answer, my Lord, but the short answer is it is made clear by the commentators that --
MR JUSTICE HILDYARD: That's the law --
MR ALLISON: -- the German civil code has decided to apply a different test in the context of anticipatory breach by the choice of the word "obvious" in that provision, which incorporates a broader test of virtual certainty which is not found within section 286.
That's the short answer to my Lord's question, that the German legislature has decided not to have the wider test and we looked --
MR JUSTICE HILDYARD: But how robust is that given that I must accept -- because no one challenged this -- Judge Fischer's insistence, which I fully understand, that 323 is dealing with revocation or withdrawal and 286 is dealing with termination. You wouldn't expect to find an anticipatory breach provision in the context of 286 but you are dealing with the same phrase.

MR ALLISON: Well, it's a different question in our submission as made clear, amongst other things, by the legislative materials that we looked at with the witnesses that my Lord finds at tab 87 in the bundle.
MR JUSTICE HILDYARD: Right.
MR ALLISON: Where it's focused on -- in section 286 you are focusing on what is the surrogate to a warning notice, what is the equivalent circumstance. My Lord will recall in the context of 286 it's performance plus service of a warning notice and failure to comply with that warning notice which triggers the default.
So something actually has to be received by way of a warning notice going from one party to the other, and then that party has to fail to comply with it.
That's what it's looking at, it's looking at the surrogates in that context. What it says in that regard is that the test of serious and definitive refusal should not be expanded by the way it's enacted in section 286.
MR JUSTICE HILDYARD: 323.
All right. So it may be that the same words have a slightly different nuance according to the section you are looking at; is that right?
MR ALLISON: My Lord, the answer to that is not if one is comparing the provision in section 323 that mirrors the

provision in section 286.
MR JUSTICE HILDYARD: Yes.
MR ALLISON: If one is doing, though, however, what Professor Mulbert does in his report, in particular at paragraphs 108 through 111, and relying on section 323(4) as the plank for his argument, it doesn't help my Lord because the test is a different one.
The virtual certainty test cannot be and shouldn't be imported into section 286.
MR JUSTICE HILDYARD: I'm sorry to beat on, but I think what you are saying is that, mine not to reason why, a different standard is approved in the case of anticipatory breach; and that's simply the German legislature have decided that and that's not for me to question.
MR ALLISON: My Lord, that is the long and the short of it. As my Lord will see from the views of the commentators we cite in the closing submissions and the way that those views were put to Professor Mulbert during his cross-examination, it is very clear that they are different tests, as seen in the wording of the statute and as recognised by the commentators.
MR JUSTICE HILDYARD: Thank you.
MR ALLISON: My Lord, paragraph 138 gives examples of both Ernst in the Muchener Kommentar and the views of

Judge Palandt which really flesh out the point which I have been making to my Lord about them being different tests, obvious being wider and including more than the serious and definitive refusal to perform. And indeed there being no commentary that suggests that the test should be seen in the same way. So there is that clear distinction drawn.

My Lord, just maybe one quick reference within that, at 138.1(c), Ernst opining that a serious and definitive refusal to perform is a distinct case.

Similar views are expressed by Judge Gruneberg in the Palandt commentary on the German civil code.

So, my Lord, that's why we say that you cannot as a matter of German law and should not draw the analogy that Professor Mulbert seeks to pursue in his reports, and acknowledged in fact during cross-examination that they were different things.

Paragraph 141 of our written submissions identifies for my Lord's benefit the cross-examination passages that are relevant to that point; Professor Mulbert accepting that the anticipatory breach test that we've just been looking at could be satisfied on grounds not amounting to a serious and definitive refusal to perform, but nonetheless grounds which satisfied the virtual certain non-performance test. So recognising

they are in fact different.

Paragraph 142 again helps my Lord in understanding Judge Fischer's view on the point and whether one paragraph of the German civil code can inform the other. My Lord will see clearly from those extracts that no is the answer, section 323(4) doesn't help you when construing what is meant by the serious and definitive refusal to perform within section 286(2)(iii).

MR JUSTICE HILDYARD: Can you think of any reference or any general proposition as to why there should be a different standard for anticipatory breach as actual breach? Just as a matter of logic.

MR ALLISON: I fear expressing myself on a matter of logic which is a matter of German law where the code clearly does take a different approach as confirmed by the commentators. But perhaps I can come back to my Lord on that point later on.

MR JUSTICE HILDYARD: Yes.

MR ALLISON: After looking at Judge Fischer's evidence on the point, my Lord, at page 46 we consider the need for communication of the refusal to perform.

MR JUSTICE HILDYARD: Yes.

MR ALLISON: My Lord, what we do there is we cite passages from Professor Mulbert's evidence. We also cite the passage in Stauginer which makes clear that the refusal

must be communicated. In fact, Professor Mulbert himself at various points suggesting that it needs to be understood to be a definitive refusal.

So the short point that we make is that there was no authority brought to my Lord's attention by Professor Mulbert, despite the view in the commentary that you did not need to make your final word known to your contractual counterparty.

Page 47, we look at the one authority that Professor Mulbert did seek in his report to rely on for that proposition. There is only one. I don't know whether my Lord would like to see that passage of his report or not. There was just the one authority that is relied upon. We explored that with him in cross-examination because his report gave that as authority for the proposition that you didn't need to communicate.

MR JUSTICE HILDYARD: It's in 5, is it?

MR ALLISON: The authority or the report, my Lord?

MR JUSTICE HILDYARD: The authority.

MR ALLISON: The authority is in 1, volume 1.

MR JUSTICE HILDYARD: Okay. Where is it?

MR ALLISON: 12.

MR JUSTICE HILDYARD: 1/12. Yes.

MR ALLISON: So, my Lord, what we summarise is it's not

a case concerned with section 286, serious and definitive refusal to perform, at all. It's not in fact even concerned with another statutory provision that has the same test. Moreover, actually, when one looks at the case, there was a communication, one party said to the other party, "I am no longer going to perform." Even in those circumstances the court said that wasn't final and unequivocal because the creditor had not, in the period after that statement, elected to seek compensation rather than the remedying of the defective works. Therefore the court said that subsequently if when the debtor said, "Well, actually I am going to perform now", the creditor could not say that there had been a refusal.

So the key points are it certainly is not authority for the fact that there is no need to communicate whether by words or the act being known to the counterparty as serious and definitive refusal to perform. The court doesn't even consider that question. In fact it's an example of a case where there was a clear communication across the line between the parties.

Professor Mulbert was forced to recognise during cross-examination that it wasn't actually authority for the proposition on which he sought to rely.

MR JUSTICE HILDYARD: I mean, I think it's possibly a question of perspective. If you focus on communication I understand entirely what you mean. But I think that Mr Dicker contended, submitted, that what you have to consider is whether there would be any point any longer in a requirement for a warning notice.

Now, if, even if only it had been known to himself, the debtor knows jolly well what he is doing, obviously, and is perfectly aware that he has to pay and makes arrangements to frustrate payment, why then would the legislature have required a warning notice to warn him about something he's already well aware of?

I mean, I think that's the way it's put.

MR ALLISON: My Lord, I think that is -- that is of course the way it's put. The short answer to that, on the German materials which my Lord has to evaluate that question, is the commentators suggest communication is required. Judge Fischer is clear in saying it is required, it needs to be known to the other party. Professor Mulbert was only able to bring one authority in support of what was seen to be a novel argument and it doesn't stand up to scrutiny on analysis.

Perhaps the best way to look at that is really to see how Judge Fischer answered those points when the point was explored with him. What we do at

paragraph 157, in the absence of this case being authority for Professor Mulbert's proposition -- and in circumstances where the commentators say it needs to be known, what has Judge Fischer told the court in his evidence in relation to it. He has made clear, as my Lord will see from the reference that we pick up, that it must be seen, it must be known, to the other party because if one is having a replacement of a warning notice and an opportunity to perform one needs to have a communication statement or an act known to the other party such that that party knows from that point that there has been the last word. There has been a definitive and serious refusal to perform by the debtor.

What he says is that it is only when one has that across the line communication that one can properly answer the question whether you have the final act for the purpose of working out under section 286 if there has been a default.

My Lord, we say that, when one looks at the evidence that we summarise within that paragraph, and when one puts it together with the authority and the commentators, to have the serious and definitive refusal to perform so as to be an exception to the need for warning notice plus the ability to perform, one does

actually need to have, even if one is looking at conduct, conduct which is first solely explicable as a refusal to perform. So solely explicable as a refusal to perform. And, secondly, that's communicated or at least known to the other party before one triggers a default for the purpose of section 286.

We say that that is the view which my Lord should reach on the basis of the German materials and the German evidence before my Lord.

MR JUSTICE HILDYARD: Well, that is helpful and clear. It raises, however, a question of approach which I would like just to touch base with you on. If there is a German decision then, although I am not clear as to what theory of precedent the German courts attach to prior decisions, for the moment I shall take it that that is German law and it's not for me to say otherwise.

If there is a commentary then, just as in England, the commentary is useful in the sense that all clearly and carefully expressed views are useful, but it is not necessarily an expression of German law.

Anything from the experts is intended to assist me as to their opinion as to the way I should go, but ultimately, armed with what I've been told as to the German approach to statutory and contractual interpretation, I must do the best I can to reach

a conclusion in default of German authority and the absence of German authority as to what the words mean.

In that context, in this specific context, is it not right for me to try and identify what the purpose of the counterfactual, that is to say no warning notice being required, is? If that is so, what is the purpose of giving a warning notice to someone who is already warned and is taking steps on the footing of it?

What I'm really saying is I haven't seen anything which causes me, as a matter of evidence or binding authority, to go one way or other and therefore I must -- in accordance with what I've been told by both experts as to the proper process of interpretation, I must follow, mustn't I?

MR ALLISON: My Lord, my Lord must of course weigh the evidence and the German materials and reach my Lord's own view on it. We would absolutely accept that and I've drawn to my Lord's attention the views of the --

MR JUSTICE HILDYARD: You have, but what I am trying to eke out, really, is whether you can see from the evidence or the cases, or from your own assessment, whether there is a purpose of serving a warning notice to a chap who is absolutely, you know, aware of the situation he's in.

MR ALLISON: My Lord, and our answer to that is it ties in really with the warning notice surrogate idea and the

last word. Until the facts or the communication across the line are known -- and this case is a good example of that -- it's very hard to take any real view as to whether something could possibly be the last word until the other party to the equation is aware of the facts as they are or is aware of the communication from the debtor such as to know that it is the final word so as to trigger the exception.

In that regard, as well as the points I've already mentioned to my Lord and the evidence that I've already mentioned to my Lord, we summarise at paragraphs 159, 160 and 161, a number of other additional matters, the legislative materials, the commentaries, which talk about the horizon of the obligee as the decisive factor, and the decisions of the court that talk about the need for the exceptions to be construed strictly, the exceptions to a warning notice to be construed strictly.

Then at paragraph 160, to talk about the case in the context of insolvency where there has actually been a finding that there is not, by reason of the commencement of insolvency, an inference of a serious and definitive refusal to perform. That's the Munich decision.

Then at paragraph 168, to also mention to my Lord that actually in the context also of section 323(4) the

commentators express the view there in the context of the anticipatory breach test that again an insolvency proceeding or application really shouldn't be seen as ticking the box because you're pre-empting what may happen afterwards within the insolvency.

So we say that when you stitch each of those pieces of the German materials, the German authorities and the German evidence, together, my Lord with respect we say should find that communication, whether by statement or act, is required as part and parcel of triggering what is said to be a narrow exception which only applies when something is the final word.

My Lord, with that backdrop, what about LBIE's particular facts? What about LBIE's administration?

My Lord, as I pointed out, has the evidence of Judge Fischer on that point. He's considered the administration summary, his paragraphs 169 and 170. He has considered the administration summary and he is of the view that an administration application would not trigger the exception.

Indeed, as we explain in the passages that follow at paragraphs 173 to 177, he remained absolutely clearly of that opinion during cross-examination. My Lord will recall he remained clear of that even though the way in which Mr Dicker put Mr Sherratt's evidence was, in our

submission, selective and inaccurate; and I think my Lord recognised that when intervening at one point. It doesn't say we will not perform. It does refer to continued trading.

What we've sought to do is to summarise that clear evidence from Judge Fischer at paragraph 177, where he draws the distinction between an insolvency filing as he does in his reports, is a debtor saying, "Look, I can't pay," which is different from what both experts agree is the test for a serious and definitive refusal to perform, namely, "I won't pay."

So my Lord sees that as a matter of German law the distinction is drawn there by him, not questioned by Professor Mulbert who agreed you have to have the final word that you will not pay, and he is drawing a distinction between an insolvency application which is an act of the court saying, "I'm over-indebted" or, "I've got a problem with my financial position", and an unequivocal final statement to a creditor that, "I will not pay your debt." He says that they are very different questions, and therefore one cannot make the inference, quite apart from the communication requirements, that an administration application is sufficient of itself to be a serious and definitive refusal to perform.

MR JUSTICE HILDYARD: I quite understand -- as I hope I have put -- there may be a difference between failure and refusal, in English phraseology you often see the two, to capture both inability and disinclination.

I must say, looking at it commercially, if I have obtained goods from someone and when confronted with a requirement to pay I say, "Look, I just can't pay," I would think that he would take that to be a refusal.

MR ALLISON: My Lord, not as made clear by Judge Fischer in his evidence as a matter of German law. Therefore a refusal to pay is very different to an inability to pay. That is the key distinction that's drawn by him both in his written evidence and his oral evidence.

MR JUSTICE HILDYARD: So take it out of the insolvency context and forget about an application. You have the position that the party who appears to be likely to be in default says to the other party, "I do not feel able to pay, I can't pay you." That would not be enough.

MR ALLISON: My Lord, no. It's not the last word of the debtor that they will not perform their obligations, no, it's not, and that --

MR JUSTICE HILDYARD: "I can't pay you and I never will be able to pay you."

MR ALLISON: It's not about the wishes of the person as to whether they are able to -- it's not about whether they

are able to do something or not, it's about whether they are refusing to do something so as to allow the dispensation of a warning notice telling them to do something. That's what the test serious and definitive refusal -- the word "refusal" is key in the test -- is all about. So absolutely not, my Lord, no.

That, my Lord will see, is clear from the extracts from the evidence that we have and also clear from the written evidence of German law, the difference between "I can't", "I just can't" and "I won't", and it's the latter that one needs.

My Lord, moving to the particular facts of LBIE, at paragraph 128 we identify a point which I think is important in view of the exchange that my Lord had with Mr Dicker yesterday. I don't know whether my Lord would like to just remind himself of the exchange, when it was suggested by Mr Dicker that termination was all he needed, the termination is enough, and it naturally flows from that that one would have a refusal to perform. I don't know whether my Lord recalls that distinction that was drawn and Mr Dicker said: well, yes that's all I need for my purposes, the termination is enough.

My Lord will find that at Day 9, page 63, line 18 to Day 9, page 73, line 4. The key point --

MR JUSTICE HILDYARD: I am sorry, I'm not sure that I can properly recall this.

MR ALLISON: My Lord, it is page 73. Actually probably best to pick it up at the bottom of 72 at line 22. And the exchange finishes at page 74, line 7.

MR JUSTICE HILDYARD: Yes, I remember it now. Yes, sorry.

MR ALLISON: My Lord, what we say in response is that's a false point.

The question here is not whether there has been a serious and definitive refusal by LBIE to perform its obligations under each of the underlying transactions, because we're in the assumed world, as we have to be, here that we're talking about the close-out amount because the SCG needs to establish that's immediately payable as part of its case. So the question that needs to be asked and answered in relation to serious and definitive refusal to perform is: has there been a serious and definitive refusal to perform the obligation to pay the compensation claim imposed under clauses 7 to 9 of the GMA? That's the right question.

The right question is not the underlying transactions. In that regard we say that question must be answered in the negative.

The first point we refer to at paragraph 181 is, as we looked at yesterday, one doesn't even know at the

time of the administration application whether LBIE is going to be the payer or the payee under that claim until it's calculated. One certainly doesn't know what if any other dealings LBIE has between the underlying creditors who have the GMA claims and any other claims they have against LBIE.

So what we say and what we summarise at paragraphs 182 and 183, in view of the evidence of Mr Sherratt, is LBIE could not have seriously and definitively refused to perform that obligation by filing the administration application because it doesn't know whose claim it's going to be at that stage. LBIE was, as Mr Sherratt's evidence revealed, balance sheet solvent to the tune of some USD 7 billion. LBIE did not say that it would not pay in its evidence. It said it was unable to pay due to liquidity issues because of the money not coming across from the US.

It was also clear from that evidence that it was to be a trading administration, i.e. it wasn't to be a shut-up shop. The administrators needed to have the opportunity after they were in office to work out what to do with the payment obligations when they knew what they were. They could of course decide which obligations to perform as they saw fit.

So against that factual backdrop and against the

relevant question which is, in relation to the single compensation claim, had there been the final word that LBIE would not pay, we say that's absolutely not something that one can get from a non-public application made on the basis of the evidence as set out within Mr Sherratt's statement. We say it would, quite to the contrary and we explain some reasons why in paragraphs 186 through 187, be a very surprising conclusion to say that had been the final word of LBIE that it wouldn't pay, in view of that evidence and in view of the fact that the administration is a non-terminal insolvency proceeding which contemplated further trading and needed to have flexibility for the administrators to decide what to do after the insolvency.

To the extent my Lord does gain assistance from it, we say that the position under English law in relation to repudiatory breach of contract and anticipatory breach, the cases that we have in our opening submissions make clear that the opening of an administration does not, as a matter of English law, entitle you to say that there has been an intention to abandon and refuse to perform your contract. So even as a matter of English spectacles it would be a very surprising conclusion to reach.

But more importantly we say against the backdrop of

the German test, as explained on the authorities and in the context of the obligation that one is considering, and in the context of what Mr Sherratt is telling the court in his evidence, that is not being told to any other party on notice, it would be in our view very much the wrong conclusion to say that the mere fact of the administration application gets one over the very high hurdle, the very narrow exceptions, as the court makes clear, to the need for a warning notice such that my Lord can be satisfied this was LBIE's final word in relation to the single compensation claim.

My Lord, they are our submissions in relation to serious and definitive refusal.

There was one further point in relation to timing of default that we mention at paragraphs 180 --

MR JUSTICE HILDYARD: Just a moment. Those points slightly elide the two separate points made by Mr Dicker, don't they? Mr Dicker wanted to convince me on both sides. He wanted to say: I win on the contract and I win on the message which an application for administration conveys. And I want to park the second.

What he says is that all that is necessary under the contract agreed under the GMA is the commencement of an insolvency process.

MR ALLISON: To terminate the underlying transactions.

MR JUSTICE HILDYARD: That is all that is necessary to terminate --

MR ALLISON: My Lord, agreed. We agree that that terminates the underlying transactions. What we don't agree with, and what he didn't explain to my Lord, is why that is relevant in any way when answering the key question for my Lord which is: how can it be said by filing the administration application there is the final word of LBIE that it will not perform in relation to the single compensation claim that's the product?

MR JUSTICE HILDYARD: I understand that the characterisation of the proper question is your answer in effect to part 1 of Mr Dicker's submissions. That is paragraph 180 of your written closing.

My uncertainty as to whether that characterisation is correct is simply this, that my understanding is that what -- you are looking at two possibilities. One is service of a warning notice and one is facts which make it unnecessary to serve a warning notice. The warning notice goes to the transaction, doesn't it? Not the final compensation sum.

MR ALLISON: My Lord, no, it doesn't. Because the obligation that we are considering under section 286, in relation to which they say there is the exception, is the single compensation claim. They recognise that in

order to win they need to establish that it's that claim that is due prior to the commencement of the application. So all the argument is absolutely focused on the single compensation claim.

MR JUSTICE HILDYARD: So the warning notice, although you have said, "We don't quite know whether it's to name a figure", the figure that it has in mind, albeit unexpressed, is the net figure?

MR ALLISON: My Lord, the figure after the performance of the computation required at clauses 7 through 9, yes.

MR JUSTICE HILDYARD: It isn't a call for payment under the transaction and a warning of the consequences if you don't?

MR ALLISON: My Lord, absolutely not. That's not their case and if it were, which it isn't, it would be wrong because the whole argument is about when the single compensation claim becomes due. Because on the automatic termination the GMA tells you that all of those prospective obligations --

MR JUSTICE HILDYARD: I understand that, but I am just trying to get what the warning notice is justified by. I must say that I got this wrong I think. I thought the warning notice was simply a warning notice by the person who has not been paid of the consequences of non-payment. I didn't take it to mean that it was

a pre-assessment by that party that he would have a net figure owed to him at the end of the day. The reason I didn't think that was -- I don't think that was said. But also because I'm not sure how you would do it.

MR ALLISON: My Lord, that comes back to construction and why we say you don't know what to pay first. But just answering my Lord's question in that regard, it's absolutely that which one is focused on because under section 286 for the question -- I don't know if my Lord wants to have look at that or not. Probably you know it all too well by now.

MR JUSTICE HILDYARD: I was just looking at it.

MR ALLISON: What --

MR JUSTICE HILDYARD: You see it's a warning notice from the creditor that made -- after performance is due, that was performance of the transaction, fails to perform that transaction.

That's one's natural reading of it but that may be wrong.

MR ALLISON: That is wrong. What section 286 is focused on in the context of this case, as fairly put by the SCG in its submissions, is that what one is looking at -- when seeing the performance that is due, one is looking at the compensation claim that arises as a result of the automatic termination of the GMA on the insolvency

application. So that is the performance that has to be due, and in those circumstances one needs a warning notice in respect of that performance or one needs an exception to the warning notice.

MR JUSTICE HILDYARD: Yes, I see. So you say it just follows from your identification of when it becomes due.

MR ALLISON: We do, but the secondary point -- my Lord, if it helps, it's clear from the SCG's written closing right upfront, paragraph 4 amongst other things, that the focus is on the single compensation claim.

MR JUSTICE HILDYARD: Right. Okay. Thank you. I'm glad I straightened myself on that.

MR ALLISON: What, my Lord, we say, without going over the construction debate as my Lord knows, is because of the calculation and computation you can't sensibly talk about knowing what you have to pay for the purpose of being able to give the warning notice until you've gone through the procedure. This point is a slightly different point which is one is now asking the question: has there been the final word on the issuing of the administration application for the purpose of the serious and definitive refusal of performance? Has my Lord had the final word of LBIE that it will not perform the obligation? The obligation that one is considering in that regard is the compensation claim and

naturally follows from that which is: if there is such a claim, can it constitute a part of the rate applicable to the administration for the purpose of rule 2.88(9)? Because it's no good to the SCG if they can't do that as well, they have to show it's a rate applicable to the debt proved.

Now, my Lord, we give in our opening submissions and in our closing three independent reasons why they can't do that and they have to win on each of these points. The first two reasons are based on the Waterfall IIA judgment. It may be quickest just to turn that up to frame the context of it. I was working off the copy -- I think my Lord was taken to volume 6 yesterday, I may be wrong.

MR JUSTICE HILDYARD: No, that's right.

MR ALLISON: Volume 6, tab 3.

The key issue is issue 4. The other issues, as we'll see, are not actually relevant to this debate. Issue 4 commences at paragraph 171 on page 186 of my Lord's bundle.

MR JUSTICE HILDYARD: Yes.

MR ALLISON: My Lord sees the question that was posed for the judge, which is whether the words "the rate applicable to the debt apart from administration" in rule 2.88(9) are apt to include and if so in what

one just doesn't know then is LBIE gonna be the payer, the payor.

MR JUSTICE HILDYARD: I understand.

MR ALLISON: Would it assist LBIE to pay that due to other dealings? What would it do? What would the administrators do when they're in office and they work out the position of LBIE and its contracts generally and work out how best to achieve the purpose of administration?

MR JUSTICE HILDYARD: Yes.

MR ALLISON: My Lord, that is the first issue, issue 21.

I don't know whether we should push on, I'm sorry my Lord, that took a little --

MR JUSTICE HILDYARD: If we had a sound clock I am sure that judge's questions have eaten at least 20 minutes of your time. So I am bearing that in mind. How are you doing on the transcript front?

(Pause).

MR ALLISON: My Lord, that is issue 21. As we know to get the default the SCG needs to establish payment is due on the administration application and either warning notice is a proof or serious and definitive refusal. So we're moving away from that. We're assuming, we say wrongly against ourselves, that they can do so.

Page 62 commences looking at the issue that

circumstances a foreign judgment rate of interest or other statutory interest rate.

The debate, as Mr Dicker indicated before his Lordship, ranged in relation to foreign judgment only. We now, for my Lord, raise the issue of a statutory rate under the German civil code.

My Lord sees from paragraph 173 that the SCG advanced two different arguments at the Part A trial. I don't know whether my Lord would just like to remind himself of paragraph 173.

MR JUSTICE HILDYARD: Yes, please.

(Pause).

Yes.

MR ALLISON: So they were looking in particular at whether a rate could be a rate for the purpose of the rule, if it would be applicable to the debt if certain things happened; in particular here a judgment obtained after the administration order.

The learned judge rejected both of those submissions. In doing so what he found is that a rate applicable to the debt apart from the administration was to be determined solely -- this is the important point for this case, solely by reference to the rights of the creditor at the commencement of the administration.

So one's not considering contingencies or anything

of that nature as we'll see in a moment. You're looking only after the rights they actually had at the date of the administration.

Paragraphs 177 through 183 are the analysis.

Picking up a few points for my Lord. Paragraph 177 my Lord sees the second sentence, that 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.

So that's the first proposition. That dealt with the situation where the creditor had a jurisdiction clause in favour of New York but had not obtained a judgment from the New York court.

My Lord will also note that what the judge did is distinguish that at the next sentence with the situation where someone actually did have a contractual right to interest, albeit a floating right to interest. So they had a present right under their contract at the date of administration. That's enough to get you through the gateway, but if you don't have the right as at the commencement of administration that's not enough to get you through the gateway.

My Lord will see that the submission of Wentworth at paragraph 179, that you focus on the rights of the

creditor as at the commencement of the administration.

My Lord will see the explanation of that in paragraphs 179 and 180 including the reference to the White Paper. I don't know whether my Lord would like to just have a quick look at those paragraphs before I move on to the key parts of the reasoning.

(Pause).

MR JUSTICE HILDYARD: So in theory your contingent rights don't count.

MR ALLISON: Precisely, my Lord. Mr Dicker brought that submission back to life yesterday when referring to cases such as Nortel and Glenister v Rowe in support of his submissions. What my Lord sees very clearly from the judgment is one freezes the position as at the commencement of the administration. You look at your rights as at that date. You do not, in relation to working out what the rate applicable to the debt is, conduct the same exercise that you conduct for the purpose of proof so as to work out whether someone has a provable claim. That's why the reference yesterday to the part of the judgment dealing with contingent debts was, with respect, a complete red herring for my Lord. The judge has said very clearly here when one is looking at the rate applicable to the debt it's not contingencies, it's the rights that you have.

My Lord, what we do at paragraphs 224 through to 237 of the written submissions, page 65, is explain why the case of the SCG on the German statutory provision is no different to the case they ran and failed on the New York judgment rate.

Now, two reasons. The first reason, my Lord, assumes they cannot establish a default before the administration order. In those circumstances, if they cannot establish a default before that date, the experts agree there can be no claim for further damage without a default.

Therefore, that is plainly still subject to contingencies as at the commencement of the administration, and it would not satisfy the clear finding in Waterfall IIA that it is only those rights you hold at the commencement of the administration that are relevant when determining what the rate is.

So that's the first point. If they can't establish their default case it's clearly not a rate because they don't have the right.

The second point, paragraph 228, we assume against ourselves for the moment that they can establish a default before the administration order. We still say they cannot satisfy the test laid out in the Waterfall IIA judgment. It's no different we say, to

a creditor who does actually have a right in their contract to sue in New York at the date of administration. It's no different to a tortious claim in respect of which you don't have the damage at the date of the administration. The reason for that is everyone agrees in this case that further damage is something which has to be proved to the satisfaction and in the discretion of the court according to the actual loss sustained by the creditor.

We make that clear, the acceptance of that, the contingencies by Professor Mulbert at paragraph 235 of our written submissions.

So it cannot be said, even if there is a pre-existing default, that a claim for further damage is a rate applicable to the debt at the time of administration in the way that a contractual interest rate of X per cent would be. Instead it is a claim which is subject to a large number of contingencies which still need to be satisfied, as made clear by the German experts. In those circumstances one cannot talk about the further damage, as subsequently proved, as being a rate which is applicable to the debt as at the commencement of the administration.

My Lord, they are the first two reasons. One assuming no default, one assuming default, still not

a rate applicable to the debt apart from the administration.

My Lord, we've sought to just put my Lord's mind at rest at paragraphs 238 and 239 about how different the York argument is because that's an argument in relation to a right that is actually already in the contract. My Lord saw that Mr Justice David Richards distinguished very clearly between something one did have as a result of your contract at the date of administration and something that you didn't actually have at the date of administration.

So my Lord may well of course wish to have written submissions on that point in due course, and may decide not to hand down judgment on the issues in relation to the German master agreement until my Lord has actually seen the interaction; but we say it is very different, the German master agreement has no contractual entitlement to interest. The experts agree that. It's just a question of discretionary damage under the German statute by reference to the period after the administration order.

The third reason why we say a claim for further damage is not a rate applicable to the debt proved is dealt with at paragraphs 240 to 249. This is not based on Waterfall IIA, unlike the first two reasons which we

say naturally follow from Waterfall IIA. This instead focuses on what is a rate, because it has to be a rate to be relevant for rule 2.88(9) of the insolvency rules.

My Lord will recall what the experts agreed is that whilst the German courts do sometimes express further damage as a rate but on other occasions express it as a lump sum, what they do when expressing it as a rate is they do so by reference to the funding gap suffered by the payee by reason of the delay in payment. Because one is looking at a damages claim for delay in payment. One's not looking at a fixed interest claim as one sees by contrast under section 288(1) of the German civil code.

In those circumstances we say that because one doesn't know whether one is going to have a rate applicable to the debt apart from the administration, it's something which is truly a damages claim to be assessed by reference to the real loss to the person by reason of what else they could have done with the money, the funding gaps they've sustained. My Lord will recall the example that was explored with Professor Mulbert about the 2 million euro debt where you only needed to borrow 1 million euros to plug the gap.

In those circumstances we say it's not sensible to talk about a further damage claim as giving rise to

a rate applicable to the debt apart from the administration.

At paragraph 246 we just remind my Lord that that's hardly unsurprising because it is a damages claim, the German statute uses the concept of damages, which it doesn't in section 288(1), where one gets a flat rate irrespective of one's loss.

So, my Lord, they are the submissions on issue 20(ii). We say three reasons that the SCG needs to win each of those in order to show that their further damage claim can be a rate applicable to the debt proved apart from the administration, and we say it cannot satisfy those.

My Lord, that takes us on to issue 21. We've broken that into three parts. The first part focuses on the impact of Waterfall IIA and whether it can be a rate applicable to the debt proved apart from the administration.

The second part focuses on whether there's a cap on further damage.

The third part focuses on the issues in relation to the burden of proof, in particular what banks can recover and whether other investors can make similar recoveries.

So my Lord page --

MR JUSTICE HILDYARD: How long do you think this section will take? Issue 21 section.

MR ALLISON: My Lord, relatively quickly. I'm proposing to finish at -- unless my Lord has a large number of questions -- at 12 o'clock, I would hope.

MR JUSTICE HILDYARD: Okay.

MR ALLISON: So looking first at the English question, not the German question, which is: can the assignees claim for further damage be a rate for the purpose of the insolvency rule? We say for the reasons we've already given as to why the assignor's claim would not be that we've just looked at, in view of the Waterfall IIA judgment the same conclusion must follow for the assignee. But we actually say that the conclusion is even clearer in relation to the assignee. We develop that in this section of the submissions.

Just to show my Lord the four steps in the analysis, my Lord, first, paragraph 257, we've seen rate means rate applicable to the proved debt as at the commencement of the administration. That's what we know from Waterfall IIA.

MR JUSTICE HILDYARD: Yes.

MR ALLISON: The second point is the rate applicable to the approved debt under the German master agreement at the commencement of the administration if indeed it can fall

within 2.88(9), which we say it can't, is of course determined by reference to the damages incurred by the assignor. Both experts agree before the assignment it's only the assignor that has a claim in respect of further damage.

The third point is that one then has an assignment after commencement of the administration. We say the short point is that any further damage incurred by the assignee after the assignment cannot be sensibly explained as a rate applicable to the proved debt at the commencement of the administration for the purpose of the Waterfall IIA judgment. We say that in view of the agreement of the experts, as we summarise as paragraph 160, that they only assert their claim for the period post-assignment.

Therefore, fourthly, we say that when you look at that agreed position, only the assignor before assignment, only the assignee after assignment, we say it does not make sense to talk about an assignee's claim for further damage constituting a rate applicable to the debt at the commencement of the administration.

My Lord, in the rest of the section of the submissions which, subject to my Lord I wasn't going to go through now due to time constraints, we take my Lord through the relevant evidence that makes good the four

building blocks that I've just taken my Lord through.

(Pause).

My Lord, issue 21(ii), the cap issue, which my Lord heard expert evidence on.

We identify at paragraph 271 the agreed position of the experts based on the joint statement of which my Lord will by now be well aware. The parting of company is of course on the issue of a cap. We remind my Lord, at paragraph 273, there is only one German authority that considers it, the decision of the Bundesgerichtshof, but it expressly leaves the point open. Both experts agree that it was expressly left open by the Bundesgerchtshof and the decision of the court cites commentary on both sides of the argument without expressing a view one way or the other.

What we say, as supported by the evidence of Judge Fischer and the commentators we mention at paragraph 276, is that there should not be a worsening of the position of the debtor by reason of the assignment. What we do at paragraphs 277 and 278 is highlight the key points that can be taken both from the written evidence and the authorities, and also the points that my Lord will see in due course when re-visiting the cross-examination.

The key points in that regard for my Lord to note,

are that when taken to the decision of the Bundesgerchtshof that Judge Fischer relies on to show that there is a wider principle of debtor protection -- and that principle is to avoid the debtor having an increased liability as a result of an assignment. Professor Mulbert fairly acknowledged that that judgment did not draw any distinction between legal or factual on the one hand, which is the way he seeks to explain the distinction.

Again, no such distinction suggested by the judgment that left the point open.

MR JUSTICE HILDYARD: The point really is, isn't it, the difference between on the one hand a legal right which travels under the assignment subject to any qualifications or restrictions and, on the other hand, the vindication of that right and its consequences? Now, where is there a limit on the vindication of the right that is transferred and, in particular, where is the restriction on the amount of damages which may be recovered pursuant to its vindication?

MR ALLISON: My Lord sees, as referenced in Judge Fischer's expert evidence, the sections of the civil code that are dealing with the former position. My Lord also sees the evidence of Judge Fischer that the German courts -- in particular the most recent decision, the 2006 decision

of the Bundesgerchtshof, that he discusses, suggests a broader principle of debtor protection which is not limited to the restricted circumstances in the German civil code. Therefore, what he said during cross-examination is that that principle identified in the case law is not restricted to the legal position, it actually is broader; and what the court would look at in his view, is that one looks at a worsening of the position in general. Amongst other things, he relied on a number of provisions of the German man civil code by analogy. He relied on the principle that a contract should not impose obligations on a third party, by way of analogy that it shouldn't be able to extend the obligations of a debtor by way of an assignment. In those circumstances what he said is he believed there were strong policy reasons why it would be appropriate to limit the claim of the assignee to the further damage that could have been recovered by the assignor.

My Lord will recall one example he gave in his evidence was the risk of debt trafficking and in those circumstances whether one could lead to inflated loss claims against assignors.

He fairly recognised that the position hadn't been decided by the German courts and the commentators want both ways, as did Professor Mulbert.

MR JUSTICE HILDYARD: What you are looking at is further damage in respect of non-payment of the compensation sum after netting.
MR ALLISON: My Lord, yes.
MR JUSTICE HILDYARD: On your theory of the case.
So the cap, which you have to look at before gauging the transferee's claim, is what the compensation sum would have been for which damages would have been claimed in the case of the assignor.
MR ALLISON: My Lord, yes.
MR JUSTICE HILDYARD: So the exercise that you have to first accomplish is to identify not only what the assignor might have done with the money and the return that he would have obtained, but also whether, in the case of the assignor, the netting procedure would have resulted in a plus or minus, and if a plus that plus.
MR ALLISON: My Lord, I'm agreeing with the first point but not the second because one will have already had the plus and minus in relation to the actual single compensation claim on my Lord's example being assigned. One will know what the claim is that is being assigned. So that will have been done. There's the distinction between stepping into the shoes by way of something equivalent to novation and becoming the contractual party before termination on the one hand, which isn't

this case, or the assignment of the single compensation claim under the GMA that is this case. So one knows the second part.
MR JUSTICE HILDYARD: Well does one? The assignee says, "Look, I have a claim", and the other party says -- no, which is it? The assignee seeks to claim more than the assignor could have claimed. What the assignor could have claimed is damages in respect of the non-payment of the compensation sum. Yes?
MR ALLISON: My Lord, yes. The compensation claim, yes.
MR JUSTICE HILDYARD: Can you take into account, for those purposes, the counterclaims that the assignor would have had? The counterclaims which would have been levied by the party to whom payment is due against the assignor?
MR ALLISON: By the party to whom payment is due or by the debtor, my Lord?
MR JUSTICE HILDYARD: Well, don't call him the debtor -- no, sorry, the person to whom the obligation is due.
MR ALLISON: No, because the claim has been assigned. The payment claim has been assigned. One is not in that realm because one is not looking at whether a counterclaim can reduce an amount payable by the debtor there, because one has actually assigned the claim. The assignor is not relying on the counterclaim suspensory provision within 9(2) because it actually has

a claim. When working out what the single compensation claim is, the GMA makes clear that in order to work out the single compensation claim one does take into account the obligations going both ways in relation to the transactions.
MR JUSTICE HILDYARD: I am muddled about this bit. Before the assignment the would-be assignor would have had a claim which could have been reduced by other claims against him.
MR ALLISON: My Lord, I think that's where we may be parting company in relation to --
MR JUSTICE HILDYARD: Right, because nothing has happened to trigger the termination or what?
MR ALLISON: My Lord, in relation to the retention right which my Lord is thinking of in relation to counterclaims, being able to rely on those, that comes into being at the end of clause 9(2) if the assignor actually owes something to the debtor rather than the other way round.
MR JUSTICE HILDYARD: Right.
MR ALLISON: I think that --
MR JUSTICE HILDYARD: So what is the inquiry by reference to which the assignee's claims are going to be limited?
MR ALLISON: The first point, my Lord, is both experts agree that for the period prior to the assignment the further

damage can only be claimed by reference to --
MR JUSTICE HILDYARD: The assignor.
MR ALLISON: -- the compensation claim of the assignor. So that inquiry has to take place in any event for that period. That's an inquiry that has to be done.
In relation to the time afterwards, what we say, relying on Judge Fischer's evidence, is that the way the cap operates is, if the debtor can show that the further damage that would have been sustained by the assignor after the date of the assignment, by reference to how it says its further damage was sustained before the assignment, would be less than that that the assignee is now claiming, that's when the cap comes into being.
MR JUSTICE HILDYARD: Do you have to enquire what the assignor would have done in respect of the post period? I.e. in respect of the period in respect of which the assignee is claiming? Do you have to say, "Well, I the assignor, in that period after the assignment, had done something completely different actually. By then my debt had exploded." Or, "My ambitions had imploded or expanded, whatever it is." Do you have to look at that?
MR ALLISON: My Lord, I think in theory, if it is said that they would have done something different rather than placing their claim for further damage on the same basis they did before the assignment, the court has to

consider in any event -- I think yes, I would accept that.
MR JUSTICE HILDYARD: How is that to be adjudicated given that the assignor is, as I understand it, off the hook and no longer a party?
MR ALLISON: I think in those circumstances, as I think the evidence of Judge Fischer was, that's why the burden is placed on the debtor to demonstrate it. The debtor is going to have to be the one that gets the evidence together as part and parcel of saying --
MR JUSTICE HILDYARD: How can he? He's no longer got any contractual nexus with the assignor. The assignor would say "Oh, push off, I'm bored of this contract. I've assigned my rights. Go away, I don't want to help you. That's quite enough. Thanks very much, bye."
MR ALLISON: My Lord, there may be those practical problems in the event that the debtor runs the argument in relation to the cap. What we say though is that when one has to have an inquiry into the assignor's damages in any event, that doesn't answer the question of principle --
MR JUSTICE HILDYARD: That's a temporal inquiry.
MR ALLISON: My Lord, yes.
MR JUSTICE HILDYARD: Yes.
MR ALLISON: As it necessary is in relation to the period

after the assignment until the claim.
MR JUSTICE HILDYARD: Yes. So what you are saying is, well, the cap may not be a particularly effective cap because of the difficulties of establishing it but worry not?
MR ALLISON: It may or it may not depending on the facts. If the other counterparty was, for example, a well known bank that could be said to have a well known rate at which they borrowed funds or at which they used their funds to receive interest on, it may be in those circumstances the debtor can say, "Well, that is the basis upon which we should be descending into the inquiry as to whether there is a cap and whether you've gone over the cap." In other cases it may be more difficult, yes.
MR JUSTICE HILDYARD: And the debtor has no right to intervention or prior to the assignment extract terms from the assignor?
MR ALLISON: My Lord, there is no suggestion under the contract that the debtor --
MR JUSTICE HILDYARD: Or under German law? Because this theory is an organic product of German law, not under the contract.
MR ALLISON: In that regard Judge Fischer recognised that one would possibly need the involvement of the assignor and that was something that the debtor would need to be

concerned with in seeking to establish the cap. So recognising there may be practical problems I am just concerned that those potential practical problems in an individual case do not answer the question, which was put as a question of legal principle, which is: is there a cap by reference to the German civil code, the decision of the Bundesgerchtshof, making the principle of debtor protection being important? Should in those circumstances there be a cap in relation to the amount of recovery?
MR JUSTICE HILDYARD: That's why I mean, even accepting that the burden of proof is on the debtor, the principle which grows out of German law it is said is for the protection of the debtor. It's so odd to have a principle which the debtor is going to find difficult to take advantage of.
MR ALLISON: Again the debtor may or it may not -- I think it depends who the assignor is and a number of the factual matters, including whether there would be cooperation or whether the debtor could involve the assignor in German court proceedings in relation to that issue.
MR JUSTICE HILDYARD: In the case of multiple assignments is it the previous one or is it a cumulative cap?
MR ALLISON: My Lord, it's the original because that is the

contracting party and that is the cap. That actually makes the cap question in some ways a purer question if my Lord is concerned with factual difficulties than multiple assignments, where in any event there's going to be a need, on Mr Dicker's case, to establish the rate for each separate period as part of the ultimate assignee claiming its further damage.
MR JUSTICE HILDYARD: But in the case of multiple assignments surely the debtor would say, "Look, I dealt with that nice chap Mr Allison and his claim was going to be pretty small. Since then there have been multiple assignments."
MR ALLISON: My Lord, that's my point, the point made by Judge Fischer. I apologise if I didn't express it clearly. That sort of concern, multiple assignments, debt trafficking, worsening the position of the debtor in that way, that's exactly what Judge Fischer relies on. What I am saying to my Lord is actually in that context the cap question is more straightforward because it's by reference to number 1, whereas on the alternative case, which is no cap, one has to have the inquiry on the assignee's ultimate claim in relation to the further damage for each period of the assignment. So that's why I say the difficulty is actually swings and roundabouts and may actually be a lot more difficult

in terms of forensic --
MR JUSTICE HILDYARD: Why is that? Surely the ultimate assignee says, "Right, well since the date of assignment, which is the only claim that I have, I would have done this with the compensation amount.
MR ALLISON: My Lord, that would be I think insofar as the debtor is concerned save exceptional circumstances -- perhaps a happy one if the assignment takes place a number of years after the event. That's not what the case we're meeting is. The case that we're meeting is that the assignee doesn't just get further damage from that point, they also recover from the further damage claims held by people down the chain who held the claim in earlier periods after the termination of the contract.
So it's not that clean a question which is: what about the assignee's further damage just from the time it acquired the claim? One will have to look in any event, on the assignee's case, at what further damage was sustained in each of the periods where different people --
MR JUSTICE HILDYARD: Maybe I have misunderstood, I will have to contemplate that further. I thought all experts were agreed that the only claim an assignee has is a claim in respect of the loss to the assignee for the

period after assignment.
MR ALLISON: My Lord, they're agreed that that is the assignee's claim.
MR JUSTICE HILDYARD: Yes.
MR ALLISON: But they also agree that the assignor's claim for further damage is capable of being assigned. In those circumstances I think more likely than not that that claim will have travelled anyway. So the --
MR JUSTICE HILDYARD: That's a different question I think. But anyway, yes. I'm right in thinking that everyone is agreed that the assignee in his own right, pursuant to the contractual bundle of rights he obtains rather than some transfer of an amount won by the assignor -- leave that aside, that's separate. That isn't a rights contract that's for a claim.
Everyone is agreed that the assignee only has a right to further damages in respect of the amounts and periods arising after the assignment. Everyone's agreed on that.
MR ALLISON: My Lord, yes, save quickly for saying we wouldn't -- I think my Lord talked about a bundle of rights under a contract transferring. We wouldn't agree with that characterisation because the experts say the assignee has the claim -- it's under a German statutory provision from that date, from the date at which they

acquire the other claim. But we are agreed that they can only claim further damage from the moment they --
MR JUSTICE HILDYARD: You are quite right, Mr Allison. What I was trying to distinguish is the distinction between the rights that the assignee has by virtue of becoming an assignee and the rights the assignor might have additionally have transferred in respect of what it, the assignor, had achieved.
MR ALLISON: My Lord --
MR JUSTICE HILDYARD: Those are different, aren't they?
MR ALLISON: Yes, the assignee has its own claim for further damage from --
MR JUSTICE HILDYARD: And we're really looking at the second.
MR ALLISON: My Lord, yes. I just made the practical difficulties point could arise though because they will also seek to recover in respect of the earlier periods if those claims have been assigned. That was my point.
MR JUSTICE HILDYARD: Right.
MR ALLISON: My Lord, I recognise that I've gone slightly over.
MR JUSTICE HILDYARD: No, no, I said I've taken at least 20 minutes of your time. I apologise for it but it helps me.
Do you need to take me to the rest? I don't want to

unduly hurry you.
MR ALLISON: My Lord, I don't think I do. The issue that remains is the burden of proof, the simplified method and whether it's available only to banks or to others. I think the points were clear from the cross-examination and from the German materials that my Lord saw and from the recognition that the only decision, looking at it, has said banks only. The decisions where it's been applied are in the context of banks alone. Judge Gruneberg says banks alone. Professor Mulbert agreed that that's based on publicly-available rates and there are not publicly-available rates for others. They are the key points.
I don't know whether my Lord had anything in particular in relation to it --
MR JUSTICE HILDYARD: Do I need to worry myself as to what the notion of a bank is under German law?
MR ALLISON: I don't believe you do because there's no suggestion --
MR JUSTICE HILDYARD: A term of art.
MR ALLISON: No, the cases talk about banks who have -- we've seen them, lending businesses. When you have published statistics by the Federal Bank of Germany in relation to the aspects of the business and that happens to banks as we know them.

MR JUSTICE HILDYARD: You say that the circle is round simply institutions whose rates are thus published.
MR ALLISON: My Lord, yes.
My Lord has the views of Judge Gruneberg, Judge Fischer and the only the case looking at it saying banks and no one else.
MR JUSTICE HILDYARD: Yes. Thank you.
Very good.
MR ALLISON: My Lord, one final reference.
MR JUSTICE HILDYARD: Yes, of course.
MR ALLISON: Paragraphs 4(i) and 6(i) of the Senior Creditor Group's closing do make clear that we're talking about a default in respect of the single compensation claim. That's the obligation.
MR JUSTICE HILDYARD: Yes. Was there something which you wanted to --
MR ALLISON: There was. I was going to confer with those behind me. My Lord asked I think -- there was a question in relation to German law and the different test for anticipatory breach.
MR JUSTICE HILDYARD: Yes.
MR ALLISON: And serious and definitive refusal.
MR JUSTICE HILDYARD: Yes.
MR ALLISON: My Lord, I don't know whether I can confer now or whilst there's a short break.

MR JUSTICE HILDYARD: Yes. Shall we have a short break?
(12.10 pm)
(A short break)
(12.20 pm)
MR ALLISON: My Lord, the answer to my Lord's question in relation to the difference. Professor Mulbert actually introduces it, for my Lord's note, at paragraph 111 of his consolidated report where he talks about the enactment of the anticipatory breach provision and that it enacted two different streams of law: one, the risk of failure to perform; and, two, serious and definitive refusal to perform. Then my Lord sees from paragraph 138 of our skeleton that the commentators think serious and definitive refusal still means just that and doesn't mean a probability test which one sees for anticipatory breach.
MR JUSTICE HILDYARD: Thank you very much. Very helpful. Thank you.
Now, Mr Dicker, at 1.00 you can tell me whether you wish to canter to the finish line before any break or whether we should break. Shall we see what happens?
MR DICKER: And your Lordship could no doubt can do the same.
MR JUSTICE HILDYARD: Yes. I shall be shy.
Reply submissions by MR DICKER

MR DICKER: Shall I start with the question of due?
There really are two parts to my reply submissions. The first is that there's a characterisation issue here. That arises because my learned friend accepted that where you have a claim for damages on termination for cause, under German law there is an immediate right to assert a damages claim. So that's common ground.
My learned friend's responses are: yes, but that's not this case, this case is different. Put starkly, his submission appeared to be that clause 9 effectively gives the debtor an alternative mode of performance. It's as if the debtor could say, "Right, I'll either perform the underlying transactions or there's an alternative way I can perform and that's by paying a single compensation amount."
The first question for your Lordship is which more closely fits the operation of clauses 7 to 9. Now, what my learned friend said was, well, the best case he had and the most useful one was the heating case. Your Lordship will remember what that case was about. That case was about whether the tenant was obliged to make a payment to the landlord to reimburse the landlord for the costs of heating and hot water. The tenant pays sums on account to the landlord, the landlord incurs costs providing hot water and heating; and the question

is whether there's a sum due and if it is owed by the tenant on what date that's payable. There's also in the context of -- Professor Mulbert said landlord and tenant law, as one can see from the report and in the context of limitation as well.
So that case did not involve the payment following termination, it did not involve a payment following termination for breach for cause however one wants to refer to it. We say whatever may be the position in relation to cases like that, in the context of landlord and tenant, absent a termination for cause, it's some way removed from the effect of clauses 7 to 9.
Now, if your Lordship is looking for an analogous case we say that closest the experts have been able to identify is the prepayment case that Professor Mulbert referred to. That did involve a termination and did involve a right on the part of the lender to a prepayment which needed to be calculated. The question arose, one of the points was: when does that payment become due? The answer was on termination, not on the date when the prepayment amount had been calculated.
That's the first point, characterisation.
We say it's unreal at a general level for my learned friend to say this isn't really a case about damages on

termination; in substance it's really about the debtor being given an alternative mode of performance and you're really asking when his obligation to perform under clause 9 became due. We say that's not really in substance what's going on here.

The second part concerns his approach to the construction of clauses 7 to 9 and we say his approach ran into three difficulties. The first is this. Your Lordship will remember clause 3 dealt with underlying obligations. There could be an underlying obligation which fell due for payment before termination and on which interest was already accruing.

The point I discussed with Judge Fischer during the course of cross-examination was: is there a gap in the period over which interest runs, so far as those unpaid amounts are concerned? He said no, there isn't. That is everyone's view, it simply wouldn't make sense.

Now, that raises this difficulty for my learned friend. My learned friend's case is essentially, well, what we're really concerned with is not clause 3 payments, we are concerned with clause 9. Clause 9 wraps everything up into one composite payment of a net balance. He says the real problem is when you have that sort of netting provision you don't know who owes who, you don't know how much is owed either way. When you

have that sort of provision, he says, it can't become due until you've done the calculation, you know who owes who and you know how much.

If that's right, given that clause 3 payments are wrapped up into the netting exercise on clause 9, one can't say interest continues to run in some way without break in relation to the clause 3 payments because, as my learned friend says, we're concerned here with the single compensation claim and on his analysis of the effect of a netting provision like clause 9 you've got to wait until the outcome of that process before anything can be said to be due. So that's the first point. We say the logic of his approach is there must be a gap in the period for which interest runs so far as clause 3 type payments are concerned.

MR JUSTICE HILDYARD: Is that right? I think he says anyway that this point is exaggerated because of the provision which one can see for there to be no undue delay. I think that's what he says.

Backtracking to your first point, I had understood him to say that in both contexts of termination for cause or insolvency, although a claim arose, an enforceable claim did not arise until the process had been completed under section 9. That's my understanding.

MR DICKER: That's right, and that's why he says, if you focus on clause 9, the effect of clause 9 is that interest can't run until the calculation has been done because the payment only becomes due when the calculation is done.

MR JUSTICE HILDYARD: Yes, but presumably if there had been a prior failure of performance, such as to trigger clause 3, when the balance is struck it will include any interest accrued and accruing in respect of the clause 3 default.

MR DICKER: Well, no, because, on his case, clause 3 is essentially swallowed up by, replaced by, the netting process in clause 9.

MR JUSTICE HILDYARD: It will be finally concluded by the netting process, but so long as it isn't concluded the interest rates will continue to accrue.

MR DICKER: Well, no, because, if one takes it in stages, 7.3 says no party has to perform prospective obligations. So everything to the extent --

MR JUSTICE HILDYARD: That's on the same day or later, but if there's a prior breach the interest in respect of the prior breach is accruing.

MR DICKER: But interest is a prospective liability like every other, you don't have to -- it's not as if under clause 7(3) you are nevertheless still liable to pay as

a separate matter interest on accruing debt. What happens is sums at the date of termination are unpaid amounts and they are payable. Every future obligation, anything which might arise in the future, you don't have to perform. What then happens is there's a calculation under clause 8 and the unpaid amounts and the damages claim are wrapped up in clause 9.

MR JUSTICE HILDYARD: This is quite important. I may have misunderstood it. My understanding is any delivery or payment obligations under clause 3 were brought to an end by termination, but that did not include accruing interest on some failure of delivery or payment prior to that time.

MR ALLISON: My Lord, if it helps, we made that clear both orally and in paragraph 63 and 69 of our closing.

MR JUSTICE HILDYARD: I think that's what they say. So I don't think they accept that termination brings an end to the accrual of interest in respect of a prior failing.

MR DICKER: If one tries to put the two parts of his argument together, his argument is essentially when you see a netting provision the amount that you owe pursuant to the netting provision, the clause 9 payment --

MR JUSTICE HILDYARD: Yes.

MR DICKER: -- can't become due unless it's been calculated

because you don't know who owes it and you don't know how much.

Now, that's a general point apparently applicable to obligations like those in clause 9(1). Now our point is simply, however one puts it, that cannot be the long and the short of it for the simple reason that even on their own case that isn't the effect of clause 9. I mean the way your Lordship has just put it isn't the effect of clause 9 because somewhere in clause 9 is a payment obligation in respect of interest which is due.

If you take clause 3, those obligations effectively are having to be replaced. As my learned friend says what we're concerned with now is the single compensation claim under clause 9. All we're saying at this stage is he can't be right in saying that if you have a netting provision like clause 9, any sum wrapped up into it can only become due, interest can only run on it, from the date that the netting calculation has been performed, because that just simply doesn't fit with the parties' approach in relation to clause 3 payments.

My Lord, that's the first point.

The second point is we say equally it doesn't make sense either so far as the damages claim under clause 8 is concerned -- this is simply the point about putting the creditor in the same economic position as he would

have been in had the contract been performed. Because on their case there is -- even if not under clause 3, there is, so far as clause 8 is concerned, a gap between the date by reference to which you measure the loss and the date from which interest runs which isn't filled. We say that simply doesn't make sense in terms of the intended operation of clause 8.

So that's the first aspect we say presents my learned friend's case with difficulties.

My Lord, the second point is this. It concerned Dr Fischer's point about cooperation. As your Lordship observed, clauses 9(1) and 9(2) require things to be done by the party entitled to damages. It doesn't require cooperation on the part of the defaulting party.

My learned friend tried to explain what he said Dr Fischer meant by cooperation, and the way he put it in the closing submissions was that the notified or insolvent party cannot know whether or not it is entitled to be paid anything without the cooperation of the notifying solvent party.

My Lord, in our respectful submission that doesn't make sense, that's not cooperation. That's simply the debtor wanting to know how much he may have to pay or how much he may be entitled to be paid. Nor actually was it what Dr Fischer had in mind when he talked about

cooperation. Dr Fischer wasn't referring simply to the debtor knowing what his position was, Dr Fischer's point was that, as he read 9(1) and 9(2), the defaulting party needed to be involved in the preferences.

My Lord, can I just show your Lordship one reference in relation to that. If your Lordship goes to bundle 4. It's his final reply report, bundle 4, tab 16. It's paragraphs 3, 4 and 5. Picking it up at the end of 3, Dr Fischer says:

"In this respect there are special features that differ distinctly from other damages claims that proceed from contracts."

Then he explains why this is different from other damages claims that proceed from contracts.

In 4 he says, in the first sentence:

"Well its all to be combined into a single item. However the compensation claim formed in this way does not refer yet to the claim which the non-insolvent party is entitled, rather account must be taken of the insolvent debtor's counterclaims. According to 9(2) GMA the party that is not insolvent is entitled to duck the other side's claims. The consequence is that it's entitled only to the single compensation claim."

This is where Dr Fischer, with respect to him, misread 9(2).

MR JUSTICE HILDYARD: But this is your arrows point.

MR DICKER: Yes, absolutely. Then he goes on in 5 to draw his conclusion from that misunderstanding, we say. He says in 5:

"The performance of the procedure provided under clauses 8 and 9 GMA in which both parties cooperate is therefore necessary in order to determine whether and to what extent the party entitled to compensation is even entitled to a single compensation claim."

MR JUSTICE HILDYARD: You say the reason he has gone wrong in this, according to you, is that he has mistaken the party who owns the counterclaim?

MR DICKER: My Lord, with great respect to him in a sense an easy mistake to make.

MR JUSTICE HILDYARD: Yes.

MR DICKER: Particularly given the way in which the non-defaulting party is defined as the party entitled to damages. One needs to take care to make sure one gets the arrows pointing in the right way. If one does -- we say he's wrong here and that led him wrongly to conclude that 9(1) and 9(2) are essentially part of a unified whole and that their operation required the cooperation of both parties. In our submission that is simply incorrect.

MR JUSTICE HILDYARD: Because the person who owns the

counterclaim is the person who will have within his knowledge the relevant information without having to call on anyone else.
MR DICKER: Correct.
Now, that ties into the third point. As your Lordship knows Dr Fischer placed considerable emphasis on 9(2) in his analysis of why the single compensation claim under 9(1) could not become due on termination. Just before your Lordship puts that bundle away, can I just remind you of two other passages? Tab 8, page 139 -- oh, I'm sorry, it's not page 139.
Tab 8, it's paragraph 78. So 78, clause 9(2) lays out the way in which the counterclaims by the insolvent party are to be taken into consideration. Their value is to be deducted from the claim calculated according to subsection (1).
So that's the same misunderstanding of the way clause 9 operates.
My Lord, similarly, if your Lordship goes on to tab 12, it's paragraph 36 -- I am not sure your Lordship needs that, I am not sure it adds ... I mean, the sentence, just so your Lordship has it, in 36, is at the bottom of page 320:
"Readily evident from the provision on calculating the compensation claim in clauses 8 and 9, the claim is

not already firmly established at the end of the contract but rather cannot be determined until the creditor has decided whether to calculate it concretely or in the abstract and has taken the necessary actions under that decision and has performed the set-off against counterclaims under clause 9(2) GMA."
My Lord, he doesn't, in fairness to him, here explain what he is referring to when he talks about the counterclaims. But presumably it's the same.
Now, where does this leave my learned friend? Dr Fischer's approach is that that's how he understood 9(1) and 9(2). That led him to the conclusion he reached. We say it's based on a misunderstanding. Where my learned friend got to in his submissions was he said your Lordship might conclude clause 9(2) does not help one way or the other. That's what he said yesterday at page 163, line 7 to 11 of the transcript.
We say that that's not right. 9(2) plainly does help and it helps for this reason, which is you find language of postponement in 9(2) but you don't find similar language of postponement in 9(1). If the draftsman really had intended that the sums payable one way or another under 9(1) and 9(2) were payable, fell due, on the same date, why, one asks, did he draft them in the way that he did? Why did he only include

postponement language in 9(2)? Why didn't he deal with timing in a way that was applicable to 9(1) and 9(2)?
We say the conclusion is straightforward: 9(1) is essentially damages for breach on termination, the normal rules apply. As my learned friend accepts, if the normal rules do apply it's due immediately. That's 9(1).
9(2), the draftsman didn't want that to be the case, a little like the heating case or any of the other cases. So he dealt with it and he dealt with it expressly by postponing it.
MR JUSTICE HILDYARD: So 9(1), you say, is outward claims, as it were, by the party entitled to damages but 9(2) is any other matters?
MR DICKER: 9(1) is essentially the claim for damages.
MR JUSTICE HILDYARD: Yes.
MR DICKER: It's where the non-defaulting party has suffered a loss, he calculates it essentially as he would in any breach of contract case arising on termination.
MR JUSTICE HILDYARD: 9(2) is the equivalent of the deposit, it's the stay against other claims.
MR DICKER: Yes, and perfectly sensible. It's the defaulting party who says, "Well, actually this agreement contains a two-way payment mechanism. If you made a benefit on termination [so you don't have

a damages claim, we're not in a damages context] you may be liable to account to me." To which the draftsman said, "Yes but it really wouldn't be fair to make that sum payable without entitling a non-defaulting party to set off any other claims he may have and to be entitled to do that before the balance of the gain he has made becomes due."
Now, my learned friend had --
MR JUSTICE HILDYARD: I'm so sorry, Mr Dicker. The single compensation claim on that footing is simply the outward claim by the party entitled to damages?
MR DICKER: The single compensation claim is the amount that the defaulting party owes to the non-defaulting party.
MR JUSTICE HILDYARD: Yes, that's it.
MR DICKER: That's it.
MR JUSTICE HILDYARD: Yes.
MR DICKER: That's it.
MR JUSTICE HILDYARD: Denominated in euros.
MR DICKER: Yes. That's the damages claim subject to the normal rule for damages on termination of a contract, we say.
MR JUSTICE HILDYARD: So you say that eradicates any difficulty as regards what the warning notice refers to because the warning notice is always referring to the amount payable to the non-defaulting party.

MR DICKER: Yes.
MR JUSTICE HILDYARD: Without taking into account any set-off or netting.
MR DICKER: Yes. This is just like -- if we are in the territory as I said of essentially -- this is a contractual damages clause arising on termination for cause, we say. My learned friend accepts that if that is the case that the German rule is it becomes due immediately. So when one gets on to the stage of default we say we have at least this part of the argument to establish the first building block, namely it's due on termination, when the application for administration was made. Obviously I have to deal with the other requirement for default, namely serious and definitive refusal or a warning notice. But that's obviously the second topic.

Now, my learned friend had a further point in relation to section 271 which was the gap-filling section. He focused on the word "immediately". He made a submission to your Lordship yesterday that Professor Mulbert accepted that immediately included the necessary amount of preparation time. I think I stood up and said that wasn't Professor Mulbert's evidence.

Can I just show your Lordship his evidence on that. It's in the transcripts, if your Lordship has them, for

Day 6. It's page 45.
MR JUSTICE HILDYARD: Yes.
MR DICKER: Just picking it up at line 21 on page 45, he starts out by saying:

"My Lord, the answer to that is that immediately, as Kruger states, has to be understood objectively given the interpretation following the rules of interpretation of German statutory provisions. I still think that the necessary preparations, that the question whether which amount of time is required in order to make necessary preparations and whether there is required adequate time for -- whether it is necessary to have adequate preparation time for the payment or for payments to be made depends on the specific situation."

My Lord, you can't stop the quotation at that point, one needs to read on. What Professor Mulbert then said was:

"Therefore I still -- I would be surprised if German courts in a case like this would not -- I'd be surprised if German courts would not hold that immediate means right after immediately after the termination notice in a case of a termination notice, immediately after the notice has been served."

Now, my Lord, the next point is a short point in relation to the German insolvency code. My learned

friend says that the German master agreement should be construed in the light of section 104 of the insolvency code. Your Lordship asked, I think, whether there is an express carve out in section 104 preserving the effect of the netting provisions in the German master agreement.

My Lord, I wasn't sure if your Lordship had the answer to that but can I just show your Lordship section 104, sentence 3. If your Lordship goes to bundle 2 of the authorities, tab 84.
MR JUSTICE HILDYARD: E?
MR DICKER: It's E, yes, and it's sentence 3 which is the last paragraph:

"If transactions on financial services are combined in a framework contract for which agreement has been reached that if grounds for insolvency exist it may only be terminated uniformly a totality of these transactions shall be regarded as a mutual contract in the meaning of sections 103 and 104."

The short point is the GMA is a framework contract that satisfies sentence 3. The consequence of that is that the netting provision is effectively protected, it's not invalidated by the insolvency provisions.
MR JUSTICE HILDYARD: So I mean, in the old days, the sort of British Eagle principle.

MR DICKER: Yes, absolutely.
MR JUSTICE HILDYARD: Yes.
MR DICKER: Similar problems no doubt addressed, at least in this case, in a broadly similar way.
MR JUSTICE HILDYARD: Yes.
MR DICKER: And responses by the draftsman in a similar way. I don't know if your Lordship noted one of the academic references I referred your Lordship to referred to Anglo-American experts helping to draft the termination provisions.
MR JUSTICE HILDYARD: Yes.
MR DICKER: Essentially to try and ensure the contractual agreement worked in the same way that they did in relation to the ISDA master agreement.

My Lord, that's all in relation to due.

Turning to default.
MR JUSTICE HILDYARD: Yes.
MR DICKER: My Lord, my learned friend's characterisation of the position here was that -- I think he said, well, Professor Mulbert was forced to acknowledge in cross-examination that --
MR JUSTICE HILDYARD: Driven.
MR ALLISON: Yes, as a result of the eviscerating cross-examination of my learned friend.

The short position, as Professor Mulbert and

Dr Fischer both accepted, is that there's no authority on this point. There's no authority particularly in relation to the position in relation to a foreign insolvency proceeding, which is what we're dealing with here.

So far as the German law position is concerned, what we say is that your Lordship needs to bear in mind, firstly, that the German approach to warning notices and serious and definitive refusal has to take account of German policies in relation to insolvency. One of which, as your Lordship knows, is that the shutter comes down immediately. A debtor cannot improve his position post-insolvency by doing anything. One might say, if that's right, not surprising if a German insolvency court holds a warning notice -- a proof of debt, for example, cannot constitute a warning notice because that would then cut across that bringing down the shutters policy.

Your Lordship can't therefore simply transpose the approach under German insolvency law and assume it applies equally in the context of an English administration without asking if we have a similar shutter: is a creditor entitled to improve his position post commencement of the administration? We say if ask you that question plainly the answer is it's not the

(1) in German law it's procedural; (2) the petition doesn't contain a statement referring to the intent to perform; and, (3) the point about it potentially cutting across the policy of the insolvency or order.

So no authority so far as foreign insolvency proceedings are concerned, and German insolvency law obviously in part dependent on policies and structure of the German insolvency regime.

The next point is this. My learned friend referred to Professor Mulbert's analogy with section 323(4), anticipatory breach. Professor Mulbert in his report said, well, there isn't any authority on this point. So let's see if there's anything else which gives us some guidance. He said, well, section 323 does give you some guidance. It's a case of anticipatory breach. 323(4) says that if it's obvious that the requirements for revocation are satisfied then you're entitled, as Dr Fischer said, to withdraw from the contract; in other words, not necessarily terminate but you no longer have to perform.

Professor Mulbert was simply saying, if you look at the requirements for an anticipatory breach, one of the things that you're entitled to establish is that there's been a serious and definitive refusal. If you do that and it's obvious that there has been a serious and

same as it is in Germany.

That's equally true in relation to the effect of the insolvency petition itself. Can I just remind your Lordship what we said in paragraph 99 of our closing submissions, if your Lordship has those.

Dr Fischer made various points in relation to a petition as it would be regarded by a German court. His first point was, well, they regard an insolvency application being addressed solely to the court. Secondly, while the German procedural rules might mean that a German insolvency application -- oh, I'm sorry. His point in relation to a petition was that a German insolvency position will only refer to a risk or possibility of insolvency and obviously, if that's all it does, it doesn't amount to a serious and definitive refusal.

MR JUSTICE HILDYARD: Sorry, where are you reading?

MR DICKER: My Lord, I'm sorry, my learned friend is quite right. I am taking your Lordship to the different points.

Can I go back to paragraph 96.

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 procedures and policies relating to the application:

definitive refusal you're entitled to withdraw, to say "I'm not going to perform."

His next stage in his argument was saying, well, serious and definitive refusal means the same in 323 and section 286. His final point was simply that you can therefore test the question on a fairly common sense level by asking: are the facts such that they would entitled the party to withdraw from the contract?

If one asks that question, the answer is obvious. Indeed the GMA goes even further than that. It doesn't merely say you're entitled to withdraw. In a case of insolvency clause 7(2) says it terminates automatically. We say if that's right, in other words if you're entitled to withdraw on insolvency, then Professor Mulbert's logic would suggest that you've satisfied the requirements of 323(4) and therefore you're also entitled to say, for the purposes of section 286, equally, there's been a serious and definitive refusal.

In relation to serious and definitive refusal, we do adopt your Lordship's approach. This is essentially asking whether the circumstances are such that serving a warning notice would be an empty formality.

MR JUSTICE HILDYARD: Just for clarity, I was testing your approach.

MR DICKER: We would say your Lordship was quite right to test my learned friend in that respect, and that is the submission we are making to your Lordship.

My learned friend's response is to say, well, as a matter of law, although it's quite difficult to -- he didn't manage to find any material that really supported this. It's not enough to say I can't you have to go further and say I won't.

My Lord, in the real world it's rather difficult to imagine a situation in which you would ever get to that second stage. If the debtor said, "I can't and I never will be able to", it's in our submission fatuous to require the creditor to go on and say, "I know you've said you can't and you never will be able to. I just want to check, do you really mean that you won't?" It's a question that doesn't really make sense in that context. "Can't" and "never will be able to" is, in substance, a statement that the debtor is not going to perform the contract and at that point --

MR JUSTICE HILDYARD: The trouble is with this is that the linguistic differentiation is not easy to be sure of in all the circumstances. "I can't pay" may connote "bear with me." "I shan't pay" definitely does not connote "bear with me", it connotes "push off."

MR DICKER: If the "can't pay" simply means "I'm presently

unable to but will", and if the "will" falls within what is contractually permitted so far as performance is concerned, then just a question of fact that it's unlikely to amount to a serious and definitive refusal.

MR JUSTICE HILDYARD: Yes.

MR DICKER: One point that obviously is important, it's not enough for the debtor to say, "I can't pay today, I can pay in 10-years' time." That's still a serious and definitive refusal.

MR JUSTICE HILDYARD: It seems unlikely that the test is bloody mindedness, as it were. It seems more likely that the test is "You're never going to get your money."

MR DICKER: We say absolutely. In a sense, picking up your Lordship's point, the best guide, we say, is essentially to ask: what's the purpose of this exception? The purpose of this exception is when serving a warning notice would be an empty formality.

If that is the test and one asks it in respect of a creditor under a German master agreement, when LBIE has made an application for an administration order -- if one asks whether service of a warning notice really is an empty formality, the answer, we say, is plain. That's obviously true in relation to the performance of the underlying contracts. We say the position is no different. The position isn't improved by saying,

"Well, I entirely accept I can't perform the underlying contracts but I may be able to pay you damages." That's not what this doctrine is getting at. That's our first point.

Our second point is that, so far as the facts are concerned, although again this comes on to the second question, whatever period was permitted for payment of the single compensation claim, it's perfectly clear, we say, that following the making of the administration order, LBIE would not be complying with that obligation either. Now, we say you don't get to that because, in substance, it's just a damages claim; but, even if you adopt my learned friend's approach, and regard it as an alternative means of performance, it was a sum which, even on his case, required to be paid when the calculation was done and the reality is following the administration order just wouldn't happen.

MR JUSTICE HILDYARD: I mean, one of the problems in this is, for the purpose of analysis and for the purpose of educating me, you have to deal separately with a number of points which ultimately you have to take together. If Wentworth are right that the issue really is as to payment of the netted-off amount, the expression of a debtor that "I can't pay" may refer to the transaction amount or it may refer to the ultimate netting amount.

At that point Judge Fischer might say, well, that's equivocal, and unless he says definitely "I'm never going to pay you any amount", it remains equivocal.

MR DICKER: Well, when one says "can't pay", just to repeat, if your Lordship will forgive me, the submission I made a couple of moments ago.

MR JUSTICE HILDYARD: Yes.

MR DICKER: It's can't pay in the sense of can't pay within the time you're required to pay.

MR JUSTICE HILDYARD: Yes.

MR DICKER: What we are concerned with is whether the debtor is refusing to perform. He can't avoid that just by saying, "Well, I may pay but I'll pay 100 years late." It's a point we deal with in our closing submissions, paragraph 82.4.

MR JUSTICE HILDYARD: I think I was on a different point and I may be muddled. In the context of section 3 obviously there's an amount you must pay within a given time or you're not complying with your obligations. But, as I understand Wentworth's submissions, they say, as regards termination, that the payment that ultimately has to be made is the compensation amount which takes into account all netting. So if you say "I can't pay the transaction amount" that does not necessarily signify that you won't pay the compensation amount.

MR DICKER: To which we have two responses. First of all, that's concerned essentially with -- that's not concerned with performance, but --
MR JUSTICE HILDYARD: It doesn't arise on your case because you say that the compensation amount is only a delaying process.
MR TROWER: Correct.
MR DICKER: Correct.
MR JUSTICE HILDYARD: It doesn't arise on your case.
MR DICKER: That's the first point.
The second point is, even if you would put yourself in my learned friend's world and say we're concerned with the compensation claim, there is still a date by which that compensation claim requires to be paid as a matter of contract, i.e. after the calculation has been done. If the facts are such that the debtor is essentially saying, "You're not going to get paid", in that event, that is also a serious and definitive refusal. It was a point Professor Mulbert made, we pick up in 82(4) of our closing:
"A refusal is a serious and definitive refusal 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."

Professor Mulbert he accepted that a proof of debt in a German insolvency didn't amount to a warning notice, but he did so because of this point. His evidence was that, so far as the debtor is concerned, it doesn't follow that you wouldn't be able to give the debtor a warning notice, it's just that by filing a proof of debt you're not actually providing a warning notice to the debtor at all, you're providing it to someone different.
Now, going back to my learned friend's point, which is, well, a proof is merely a request to participate in a statutory scheme; in other words, if you look at it, it's not the making a claim, it's not putting the debtor on notice that he should perform. My Lord, again we say that really is form over substance. What you are doing when you are filing a proof of debt in an English administration is saying, "I have a claim against you, I want it paid and for those purposes I want it admitted to proof and share in the dividends."
One can tell that in part because, if you don't assert a proof, you get shut out of the process. As a matter of English law, so far as the administration is concerned, it's true that you submit your proof to the administrator but the debtor retains extant. The administrator is acting as agent of the debtor. There

So it's not good enough to say "We can pay you, but years late".
My Lord, a couple of submissions by way of reply in relation to proof of debt. My learned friend said as a matter of German law a proof of debt does not constitute a warning notice. That's true so far as German insolvency law is concerned. Both experts state that in their reports.
But my learned friend went on to say that the reason why it doesn't constitute a warning notice is because it doesn't constitute -- it doesn't contain a request for payment of a debt.
Now, that's not, with respect to my learned friend, the reasoning in the German cases. The reasoning in the German cases is that a proof of debt cannot be a warning notice because it's not addressed to the debtor. It's not that it doesn't contain a request for a claim, it's simply addressed to the wrong person. The reason why they analyse it as being addressed to the wrong person is because, rather like a bankruptcy, all the assets are effectively held in a separate estate --
MR JUSTICE HILDYARD: There isn't a statutory trust -- there's a chance of right to the bankrupt -- to the trustee. Or -- yes.
MR DICKER: Quite. Your Lordship may recall from

isn't the same distinction that arises --
MR JUSTICE HILDYARD: It's hard that, isn't it? I mean, really a proof of debt is you must justify your entitlement by reference to a claim, but your request is to share -- is for an adequate share in whatever is the subject of the insolvency process.
MR ALLISON: But test it this way, by reference to the point of a warning notice. Is the debtor on notice that there is a claim that he should pay? Now, in a sense it almost goes without saying that that is the starting point. Yes, the creditor goes on and says, "And I want it admitted to proof", but the idea that an administrator who receives a proof of debt could turn round and say, "Well, I didn't actually know a claim was being made" --
MR JUSTICE HILDYARD: That's your point on what the comparator is really. I mean, I take the addressee point, i.e the German view is that the right in the property is transferred, as I understand it, to the office holder, as in a bankruptcy here. I take that point. And I take the point that no one is in much doubt that payment is required.
MR DICKER: Yes. And that, we say, is sufficient.
MR JUSTICE HILDYARD: Yes.
MR DICKER: My Lord, that's all on default.

I wanted to say a few things in relation to question 20.2, the rate applicable to the debt.
MR JUSTICE HILDYARD: How long will a few things take?
MR DICKER: I think I'll be done in five minutes.
MR JUSTICE HILDYARD: Then you've finished?
MR DICKER: Then I'm finished.
MR JUSTICE HILDYARD: Well, I think the vote will be to continue!
MR DICKER: My Lord, rate applicable.
My learned friend focused -- well, the first point is there is a question of whether or not your Lordship tries to decide this before having heard York and dealing with the other issues. We say that wouldn't be the sensible course. So in a sense my submissions at this stage, if your Lordship were to take that course, are interim submissions.
But what we would say is this. My learned friend focused solely on issue 4. He said that Mr Justice David Richards required you to ignore contingent rights, in effect if the claim to interest is contingent that isn't good enough. That's what he said was the effect of the judgment so far as issue 4 is concerned.
My Lord, we say that cannot possibly be right because if one looks at issue 7 you have an underlying claim which is contingent. So it's not going to be

payable, due and payable, for some years unless and until something happens. Interest will only run on that debt if and when the contingency happens some date in the future. On my learned friend's case that interest could never form part of the rate applicable to the debt. If that were right, Mr Justice David Richards could not have reached the conclusion he did in relation to issue 7, because in relation to issue 7 he said, no, the interest does form part of the rate applicable to the debt. Indeed, it runs from the date of the administration.
MR JUSTICE HILDYARD: But if you have not, by the commencement of the administration, established the right to which will be appended the interest, you certainly can't have it.
MR DICKER: The critical issue is what is the dividing line? What did Mr Justice David Richards have in mind when he talked about the situation in which you did have an existing right and a situation in which you didn't?
Now, we say a contingency of the type I've just been talking about is not a problem. The problem he identified was that he said if the situation is that you don't have a judgment, indeed you never got a judgment, you can't sensibly say you had a right. Conversely -- well, and that covers it; essentially the judgment at

rate to which you're entitled is a right you get on judgment, not before. If you don't have a judgment by the date of the administration he held that's not good enough.
Now, he may or may not have been, we say, right in that respect, that's something which the Court of Appeal will in due course decide; but, assuming he is, we say that doesn't affect the position in relation to interest under the German master agreement.
There is a statutory right. It's as if it was read down into the contract. The fact that the running of interest may depend on the contingency of a warning notice or an exception doesn't matter.
Now, as I say, on our primary case your Lordship doesn't need to get into this because the events on which we rely predated the administration order.
MR JUSTICE HILDYARD: I mean, as regards the question of York, although I think Mr Allison thought it was quite open to me to decide it as a discrete issue, I think he acknowledged that safety first might suggest that I should know what they would say lest unwittingly I say something which undermines their arguments.
I must say, subject to any guidance from the administrators, I would be likely to take the safety first in a difficult area where I may say something

I didn't mean or say something I did mean which was just wrong.
MR DICKER: My Lord, two final relatively short points.
My learned friend said interest in respect of the German master agreement isn't interest applicable to the debt, he said it's a damages claim, it's applicable to the money you've effectively borrowed. My Lord, we say that's not what the German evidence says. We deal with this in paragraph 5.2 of our closing. Just so your Lordship can see:
"Such compensation can be expressed as a rate which will be applied to the amount for which the debtor is in default."
We give references both Dr Fischer and to Professor Mulbert.
MR JUSTICE HILDYARD: But that doesn't really deal with the possibility that either not all of the -- the default sum would have been invested in the same way.
MR DICKER: By an assignee, does your Lordship have in mind? Or ... My learned friend's point was essentially it's almost a semantic point.
MR JUSTICE HILDYARD: Yes.
MR DICKER: 2.88 says "the rate applicable to the debt", and he says, well, this isn't really applicable to the debt, it's applicable to the sum you've borrowed.

MR JUSTICE HILDYARD: It's applicable to the claim, either on the hypothetical or on the actual basis.
MR DICKER: Yes. What you -- absolutely. Adopting the approach under question 11, either what you did borrow and paid or what you would have borrowed and paid. We say that's not what the experts say, they say it's an interest rate, it's applicable to the underlying debt.
My Lord, I think, unless your Lordship has any questions, that's all I was proposing to say by way of reply.
Housekeeping
MR JUSTICE HILDYARD: I am very grateful.
I sure that questions I had in mind will only come to my mind in about two hours' time, but I am very grateful to you all.
Obviously I will reserve.
I do not know whether I will produce separate judgments on the aspects of New York and English law on the one hand and German law on the other hand. That may in part depend on when we can have any further hearing, if any is required. We need, I think, to reach some indicative view at any rate as to when any written submissions will be appropriate.
MR DICKER: I think Mr Trower was hoping to be able to

detain your Lordship for a moment.
MR TROWER: Yes. Just to bring my Lord up-to-date with what is going on on the York issue, if I can.
My Lord, the position is that the parties had got to a stage where they had agreed anyway in principle for submissions to be produced on the York issue during the course of December. It now rather looks as if it may have to go back a bit from then. The latest proposal, I think from the Senior Creditor Group, is that the respondent should put submissions in before Christmas. Then the administrators in January and then the respondents finally in reply by the end of January. So what the parties seem to be looking at now is a situation where my Lord would have written submissions on that issue out of the way by the end of January, unless my Lord felt that you needed them quicker than that. Bearing in mind that, I think my Lord has indicated and we quite understand why you have, that it might be appropriate to look at the written submissions before reaching a concluded view in relation to some of the points that have been argued on German law.
So we're slightly in my Lord's hands on that as to how you would like the timetable and you would find the timetable most helpful on that point.
My Lord, that was --

MR JUSTICE HILDYARD: Can I share with you a personal difficulty?
MR TROWER: Yes.
MR JUSTICE HILDYARD: Notwithstanding the guarantee which is meant to follow fixed-end trials I have not been afforded judgment writing time. So I can make no promises until I am. A problem is that I'm due to judge from 4 January and then in a case which is due to last for eight to ten weeks starting on 11th January.
MR TROWER: Yes.
MR JUSTICE HILDYARD: So part of me is for postponement; part of me, and the better part of me, is for trying to get these submissions in earlier rather than later (a) while I remember it, (b) just in case I can get the thing done before 4 January.
MR TROWER: Yes. I mean, my Lord, the timetable we were on before the latest suggestion was for the respondents' initial submissions on this to be in by 7 December, the joint administrators by the 14th and then reply submissions by the 21st. I understand there may be difficulties in relation to that, certainly from some of the parties, but I think I am not quite sure where they are on that. I quite understand why my Lord might want these before Christmas, if possible.
MR ALLISON: My Lord, just from Wentworth's perspective, we

can make the earlier timetable of the 7th, the 14th and 21st, if that would benefit my Lord.
MR DICKER: My Lord, I think we may have some difficulty on this side. I have a hearing in a significant matter at the end of December and I have been booked out essentially to prepare for that from now. I think my learned friend Mr Fisher may actually be abroad, if I'm not wrong, for part of the period. So it may not be entirely straightforward for us.
MR JUSTICE HILDYARD: Do we know what York say?
MR FISHER: My Lord, I think the current position is that the issue hasn't been agreed and we haven't heard back from York for timing, but I do know that Mr Smith is in Cayman with myself that Friday week.
MR MORRISON: My Lord, lest Goldman Sachs be forgotten on this, this is a new issue that directly concerns the English law ISDA master agreement issues. We are keen to at least have the option of putting in submissions but we are also keen to avoid duplication.
MR JUSTICE HILDYARD: Does the permission so far given extent to this point? I suppose it all depends what the point is.
MR MORRISON: The issue hasn't actually yet been finalised so I am not sure there is permission for anyone as yet. Now, Wentworth and the SCG I think are on the same side

on this point. We are conscious that we may therefore have little to add. What I would suggest, subject to my learned friends' views and your Lordship's views, is that we see what Wentworth and SCG put in. If we have anything to add we could put in very short submissions after them. That may or may not be a point for us to say anything, or it may be we don't have to say very much.

MR TROWER: My Lord, so far as Goldman Sachs were concerned, I think we weren't aware until just now that they were hoping to put submissions in. They weren't actually parties at the time these issues were originally being ventilated, but it's obviously a matter for my Lord as to whether you would wish to hear a yet further party putting submissions on the point. We would faintly anyway discourage that, but if my Lord is going to be assisted by other creditors so be it.

My Lord, so really the option is that -- and my learned friend Mr Dicker and Mr Fisher are right that the precise wording of the issue has not yet been finalised. Although I don't think anyone is in any doubt as to what the issue actually is. The wording is -- or the two forms of wording that have been debated between the two parties, between the parties, essentially raise the same point. Although one quite

accepts that the issue must be finalised before the submissions are prepared. That must be right.

MR JUSTICE HILDYARD: Well, it seems a bit fluid, the situation.

MR TROWER: It is, I'm afraid.

MR JUSTICE HILDYARD: I mean, I think you've identified as the first step necessary the agreed definition of the issue.

MR TROWER: Yes.

MR JUSTICE HILDYARD: I would rather -- I think that should be done sooner rather than later in any event. Whatever may be, I'm afraid the other commitments of counsel -- I think we just need that done.

MR TROWER: Yes.

MR JUSTICE HILDYARD: I do have a preference for earlier rather than later for the reasons implicit in what I've shared with you as to my diary and the obvious point that, as time goes by, it becomes more difficult to remember all the nuances that have been put before me.

MR TROWER: Yes.

MR JUSTICE HILDYARD: I think I am going to leave it fluid as a matter of necessity at the moment, and just ask the parties to try and work towards a timetable which would furnish these matters before Christmas, if at all possible. If it is not possible then you must explain

to me why it isn't possible, but my firm steer is that I am unlikely to get a chance before March, unless they come in in December.

It is as grim as that, I'm afraid.

MR TROWER: Well, my Lord, that's very helpful, and we will come back to my Lord if we need to, if we may, through the usual channels if we need a little bit more of a steer.

MR JUSTICE HILDYARD: Please.

As to Goldman Sachs, I don't presently understand why its particular perspective is going to provide a fresh and illuminating light on the issue, but if Goldman Sachs consider that to be an uninformed assessment then I think they must explain to me, circulated to all parties, what particularly light which cannot be shed on existing parties would be shed by them.

MR TROWER: My Lord, that would be helpful and that could be done through the usual channels.

My Lord, before I sit down, there were three very mundane points arising out of the submissions that I just ought to raise.

MR JUSTICE HILDYARD: Yes. I'm sorry, Mr Trower.

MR TROWER: No, not at all, I was not intending to make submissions of any substance at all.

The first relates to the application for the administration order. There was quite a lot of debate during the submissions before my Lord about what actually happened. I think my Lord ought to know it's apparent from the face of the order that the Financial Services Authority was present at the hearing having been notified. Because at one stage it was described as an ex parte application. I think at one point in Wentworth's submissions, paragraph 71, they said that the hearing was made without notice to anyone. That's not right, it was made with notice to the FSA and they were present. They were actually the only people entitled to be present at the hearing. So that's the first point. And they're entitled because they have specific rights under the FSMA to be there.

The second point was that in Wentworth's submissions, just for my Lord's note, really, in paragraph 182 they talk about the administration becoming a distributing of administration in December 2010. In fact, it was December 2009 that it became the distributing administration.

The final point related to translations. My Lord asked about the translations of the BGB. The translation that was taken started from the website of Federal Ministry of Justice and Consumer Protection.

There were some short or minor amendments made. The only ones of any significance were that where the word "debtor" appears throughout the translations that my Lord has, the word "obligor" was used on the website and ditto "creditor" and "obligee", but there were no other changes of substance. The particular phrase "stepped into the shoes of" that I think started this discussion does appear on the Federal Ministry of Justice website.

My Lord, those were the three very mundane points I wanted to raise with you, unless there's anything else.

MR JUSTICE HILDYARD: No. You will notify me when I can expect the list of -- the defined issue. You will notify me what timetable you all feel you can achieve. If Goldman Sachs wishes to join the party they must explain why that is so.

You have the steer that I've given you.

Mr Allison, I am conscious of being rather fierce with you this morning. I apologise for that. It is simply trying to straighten my own tortured mind. But I am grateful to you all, I don't think I could possibly have been assisted better and I am extremely grateful.

(1.30 pm)

(The hearing concluded)

I N D E X