

<p>1 (09.00am) 24 June 2016 2 Submissions by MR TROWER 3 MR JUSTICE HILDYARD: Good morning. I am so sorry to have 4 kept you waiting. I have read the extra bits, but 5 I must confess it was a slightly interesting evening. 6 MR TROWER: My Lord, indeed. Hopefully this morning's 7 submissions will distract your Lordship from the 8 momentous events that we are dealing with outside this 9 court. 10 My Lord, we're all of us, I think, slightly in your 11 Lordship's hands as to how it is that your Lordship 12 would like to play this. What we have done, or some of 13 us, I think have put in some submissions -- 14 MR JUSTICE HILDYARD: Yes. 15 MR TROWER: -- to deal with what we understood to be your 16 Lordship's questions. What I was going to do if it was 17 helpful was simply explain to your Lordship how it was 18 that the concept of accrual came to get into this. 19 Because at the end of the day we say that it's a bit of 20 a distraction and a bit of a red herring, the concept of 21 accrual, because what we're really looking for is the 22 concept of apply and application. 23 The way I thought it might be most convenient to do 24 that is to look at where it started and then how it got 25 picked up in the submissions and how it was developed.</p> <p style="text-align: center;">Page 1</p>	<p>1 Although my Lord will have seen that it's not actually a word 2 that's used by Mr Justice David Richards at all. 3 "...of the creditor to receive interest on the 4 relevant debt and not to merely contingent rights to 5 interest, ie rights the accrual of which were dependent 6 on one or more further steps being taken subsequent to 7 the commencement of the administration. A contingent 8 right to interest the accrual of which was dependent 9 upon some future step being taken would not constitute 10 a rate of interest in fact applicable to the debt as at 11 that date of the administration." 12 So that's where the concept of accrual first comes up. 13 We then in our submissions behind tab 2, 14 paragraph 30, made a submission on accrual, and if 15 my Lord will just read to the end of paragraph 30. 16 (Pause). Now, the critical point there is that we're 17 using the concept of accrue in the sense of becoming 18 binding on the parties. Now, that may have been 19 a misuse of the word "accrue", if you like, but we're 20 saying in that sort of sense, if you've got rights which 21 are binding on the parties which occur at the moment in 22 time which you enter into the contract, that is the 23 concept of accrual that we were focussing on. So we 24 made a submission that rights accrue under a contract in 25 the sense of becoming binding on the parties on entering into the contract. So that was our submission. And that was the only sense in which we referred to the concept of accrual, which in the sense of an obligation arising out of a contract that is in existence and</p> <p style="text-align: center;">Page 3</p>
<p>1 Where it really started was in Mr Justice David 2 Richards' IIA judgment at paragraph 181, which my Lord 3 will find in the bundle, hearing bundle A, tab 19, 4 page 204. And this is, if my Lord just looks at that, 5 what that paragraph says in terms is, his conclusion -- 6 MR JUSTICE HILDYARD: Sorry? 7 MR TROWER: Sorry, paragraph 181, page 204, tab 19 of 8 hearing bundle A. What we are looking at here is the 9 2(a) judgment. What Mr Justice David Richards is doing 10 is dealing with a submission that was made by 11 Mr Zacaroli for Wentworth and accepting it. He says: 12 "181. In my judgment, these grounds make a 13 compelling case for the proposition that the rate 14 applicable to the debt apart from the administration is 15 to be determined by reference to the rights of the 16 creditor as at the commencement of the administration." 17 Now, what then happened was that in paragraph 15 of its 18 submissions in relation to supplemental 1(a), York 19 picked up on that phrase. And if we can turn that up, 20 which is behind tab 5 of the same bundle. I think 21 I have the wrong reference, it should be tab 1. I'm so 22 sorry. Yes, but it is still paragraph 15. And what 23 York says is: 24 "It follows from this that the reference in 25 paragraphs 180 and 181 of the judgment to the rights of the creditors existing as at the date of the commencement of the administration were to present and accrued rights..." And that's where one finds the word "accrued" first arising.</p> <p style="text-align: center;">Page 2</p>	<p>1 binding. 2 York then in their reply submissions, which are 3 behind tab 5 at page 57, paragraph 14, then picked up 4 what we had said and applied Tael to the concept that we 5 had used. So what they did is, they pointed to the use 6 of the Supreme Court decision -- sorry, to the use by 7 the Supreme Court in Tael of the word "accrue" in 8 another context to support a submission that it can't be 9 said that a creditor has an accrued right to interest 10 when the contingency has not accrued. 11 Now, Tael is in the authorities bundle behind tab 6, 12 and we need to look at paragraph 42. So behind tab 6, 13 page 95. The passage in Tael that's referred to by York 14 is in 42 at the top of 95. And all that Lord Reed was 15 saying, he says: 16 "42. The word 'accrue' is generally used to describe 17 the coming into being of a right or an obligation so 18 that the person in question then has an accrued right, 19 or is subject to an accrued liability, as the case may 20 be. That is the meaning which accrual usually bears, in 21 particular, in relation to interest and other payments. 22 The amount to which there is an entitlement may not be 23 payable until a future date, but an entitlement may 24 nevertheless have accrued." 25 Now, there are three stages that seem to be built in here: the first is the stage at which you enter into an obligation; the second stage is the stage at which the contingency crystallises; and the third stage is the stage at which the amount becomes payable. Lord Reed</p> <p style="text-align: center;">Page 4</p>

<p>1 actually appears to be focussing anyway in the second 2 bit of that passage on the difference between the time 3 of crystallisation and the time at which it becomes 4 payable; although, actually, in the first bit of the 5 passage he looks as if he's thinking about accrual in 6 the sense in which we had originally used it, which was 7 the accrual of the right rather than the accrual of the 8 actual entitlement to receive interest. So the right 9 under the contract.</p> <p>10 Now, ultimately, of course, we say none of this 11 terribly matters. It is a bit of a distraction because 12 neither rule 2.88(9), nor Mr Justice David Richards in 13 Waterfall IIA uses the concept of accrual in this 14 context. The word is "apply", not "accrue". So York is 15 wrong, we say in our submission, to simply to try and 16 elide those two concepts. That's really the core of our 17 answer to the first part of your Lordship's question in 18 relation to Tael. So I hope that's clear as to where 19 we're coming from on it.</p> <p>20 So far as the second part of your Lordship's 21 question is concerned, we deal with this in the 22 supplemental note that we produced for today's hearing 23 at paragraph 4 onwards. The core of our position is 24 that the moment it's possible to identify an existing 25 contractual right by which the parties are bound and</p> <p style="text-align: center;">Page 5</p>	<p>1 have happened had the contract just continued to subsist 2 without intervention of administration.</p> <p>3 Now, my Lord, I hope that helps as to the 4 administrator's position in relation to your Lordship's 5 questions 1 and 2. Question 3, I think, everyone is 6 agreed about, because as I understand it everyone agrees 7 that the rate applicable to the debt can include 8 a floating or variable rate, and so that question does 9 not arise. The only observation we make in relation to 10 that is that the fact that it can include a floating or 11 variable rate is an indication, we say, in support of 12 our position more generally in relation to this issue 13 because one can see that in some respects a floating 14 rate has elements of contingency built into it, because 15 you don't know at the time of the administration exactly 16 what the floating rate is going to be.</p> <p>17 MR JUSTICE HILDYARD: That third question was intended to 18 explore an issue which I had become confused about as to 19 whether you had to look to see what the available rate 20 of interest according to the right was at the specific 21 time.</p> <p>22 MR TROWER: Yes.</p> <p>23 MR JUSTICE HILDYARD: Do you see what I mean? And you 24 couldn't look backwards to see how events had turned 25 out; you had to say, "Right, at that time it was X".</p> <p style="text-align: center;">Page 7</p>
<p>1 which entitles a creditor to payment of interest on 2 a provable debt, the rate for which that contractual 3 right provides can be said to apply to the provable 4 debt. We then give an example in paragraph 5 of our 5 note as to how that would work from a quantification 6 perspective.</p> <p>7 Now, that leads into the second question which 8 flows, we say, from the answer to the first, your 9 Lordship's second question. It is necessary to ask the 10 question: what would the rate have been if the 11 contractual contingency had been fulfilled? That's 12 a helpful question to ask oneself. But it doesn't mean 13 that the quantification of the rate -- and we're talking 14 about quantification of the rate -- applicable for the 15 purposes of carrying out the comparison exercise 16 artificially assumes that the contingency had been 17 fulfilled. That's actually the issue with which 18 supplemental 1(c) is concerned and is dealt with in 19 paragraph 10 of our note.</p> <p>20 So our case is on that aspect, and my Lord I think 21 knows that, that when you're looking at quantification 22 as opposed to qualification, whether the rate actually 23 qualifies for the purposes of being treated, when you're 24 looking at quantification you don't go through 25 an artificial exercise, you simply look at what would</p> <p style="text-align: center;">Page 6</p>	<p>1 Supposing the floating rate was by reference to some 2 marker in the market.</p> <p>3 MR TROWER: LIBOR.</p> <p>4 MR JUSTICE HILDYARD: LIBOR at that time.</p> <p>5 MR TROWER: Yes.</p> <p>6 MR JUSTICE HILDYARD: Did you have to assume that that was 7 the right and that the rate conferred by the right was 8 to be assessed at that date; or could you simply look 9 backwards at the date when you're quantifying the amount 10 to see what in fact happened to the rate which the right 11 conferred?</p> <p>12 MR TROWER: Yes.</p> <p>13 MR JUSTICE HILDYARD: Has that --</p> <p>14 MR TROWER: I think so, my Lord. What's important in this 15 context is to distinguish between the question of 16 whether or not the relevant rate qualifies as a rate for 17 the purposes of the comparison exercise and the question 18 of how you then go about quantifying the entitlement 19 once you've satisfied yourself that the rate qualifies.</p> <p>20 Now, the quantification exercise is one that is being 21 dealt with in relation to supplemental issue 1(c).</p> <p>22 MR JUSTICE HILDYARD: I haven't quite cottoned on to 1(c) 23 properly. 1(c) is still being considered.</p> <p>24 MR TROWER: It's being considered, and that was one of the 25 things that we wanted to make sure my Lord was well</p> <p style="text-align: center;">Page 8</p>

2 (Pages 5 to 8)

<p>1 aware of. It's one of the questions which 2 Lord Justice David Richards is still considering, but it 3 does, in the sense that we have identified in our note, 4 bear on the issue in relation to 1(a); or certainly bear 5 in relation to my Lord's questions in relation to 1(a), 6 and also they're obviously very closely linked. I mean, 7 one of the points that has become apparent as a result 8 of my Lord's questions is that there is only quite 9 a narrow line between the consideration of these two 10 issues. 11 MR JUSTICE HILDYARD: Yes, you are right in surmising that 12 I had not cottoned on to 1(c), and I think possibly if 13 I had 1(c) and 1(a) might usefully have been taken 14 together. 15 MR TROWER: Well, it's funny your Lordship should say that: 16 some of us were beginning to think that might have been 17 a more sensible approach and is the way as it has panned 18 out. 19 MR JUSTICE HILDYARD: We are where we are, and you very 20 helpfully illuminated it for me. 21 MR TROWER: So, my Lord, that was all I was proposing to 22 say, but I'm very happy to try and deal with any other 23 questions my Lord has, and it may be the others have 24 some things they want to add. 25 MR JUSTICE HILDYARD: Do you want to add or clarify anything</p> <p style="text-align: center;">Page 9</p>	<p>1 in trouble. 2 MR TROWER: Yes, indeed. And we say that's a very clean way 3 of thinking about the distinction between the judgment 4 and the existing contract. 5 MR JUSTICE HILDYARD: And naturally York's target is, if 6 I may say so, is to explain to me why what a new sort of 7 source rule isn't ultimately a rather compelling answer. 8 MR TROWER: Yes. 9 MR JUSTICE HILDYARD: Let us see. 10 MR TROWER: Well, my Lord has the very core of the point 11 firmly in mind, obviously. 12 MR JUSTICE HILDYARD: Yes. Well, I am very grateful to you, 13 and I am also very grateful for you clarifying 1(c), 14 which I should have spotted. Thank you. 15 Yes. Who wants to go next? 16 Submissions by MR SMITH 17 MR SMITH: It may make sense for me, my Lord, on behalf of 18 York. 19 MR JUSTICE HILDYARD: Yes. 20 MR SMITH: In the sense that (Inaudible) made the running on 21 this issue. I am very much obviously in your Lordship's 22 hands as to what would be helpful. I was proposing to 23 make some general remarks about what our argument is 24 generally, focussing on what your Lordship has just 25 mentioned, obviously, and then I'll come to the Tael</p> <p style="text-align: center;">Page 11</p>
<p>1 with respect to a matter which I did not raise 2 a specific question about, but which in pondering how 3 I should respond I had another look at, which is the 4 financial collateral arrangement. Is there anything you 5 wish to say about that? If you don't, because it was 6 not pre-notified -- 7 MR TROWER: Can I think about that and talk to my team? 8 MR JUSTICE HILDYARD: Yes. 9 MR TROWER: My Lord, I'm just be asked something from my 10 left. Might I just find out what? (Pause). My Lord, 11 yes, I do not think there is anything else at the 12 moment. Can I think about the financial collateral 13 arrangements and come back to you? 14 MR JUSTICE HILDYARD: Yes, of course. Yes, just give me one 15 second. 16 York will add to this as they see fit, but in 17 a simplistic, I dare say too simplistic, sort of way, it 18 seemed to me that looking at the supplemental question 19 as a whole one always has to identify what the source of 20 the right relied on is. 21 MR TROWER: Yes. 22 MR JUSTICE HILDYARD: It is the source. 23 MR TROWER: Yes. 24 MR JUSTICE HILDYARD: Now, if the source is not an existing 25 contract but has subsequently obtained judgment, you are</p> <p style="text-align: center;">Page 10</p>	<p>1 case. 2 My Lord, just in terms of general approach, at the 3 outset we say yes, your Lordship is involved (Inaudible) 4 in approaching the issues on the footing that the 5 decision and the judgment that Lord Justice David 6 Richards on part 1(a) is correct and what one is 7 essentially doing is seeking to apply the reasoning and 8 logic in that judgment to this factual scenario which 9 has been identified in issue, the issue of 1(a). 10 Now, so far as the issue 1(a) is concerned, 11 obviously your Lordship appreciates that is concerned 12 with closeout sums and in particular the rates of 13 interest that begins to accrue on a closeout sum as 14 a result of action taken by the creditor. 15 MR JUSTICE HILDYARD: After the date of administration. 16 MR SMITH: And principally one is concerned if it is 17 (Inaudible) where there is a closeout sum, and that only 18 becomes due to the creditor sometime after the 19 commencement of the administration. Now, your Lordship 20 will appreciate of course that that may be something 21 that happens a number of years later, and indeed that 22 may be the case in this administration. My Lord, we say 23 the real question is whether the effect of rule 2.88(9) 24 lies with the decision of Lord Justice David Richards on 25 part 1(a) is that where you have a creditor whose claim</p> <p style="text-align: center;">Page 12</p>

<p>1 is not closed out until sometime after the commencement 2 of the administration, you only would have become 3 entitled to contractual interest on the closeout sum at 4 that stage would nevertheless by virtue of rule 2.88(9) 5 in effect allowed to claim that contractual interest 6 from the start of the administration. And, as your 7 Lordship appreciates, that may be a period of years. 8 Now, the SCG represented by Mr Dicker say that is 9 the effect. With respect to the SCG, we say, that would 10 be a very odd result indeed. It can't have been the 11 intention to handle(?) 2.88(9). For our part, we say 12 the reason why that is not the result can be found 13 simply by applying the reasoning of Mr Justice David 14 Richards in the part A judgment, and in particular the 15 answer is that there is no right under rule 2.88(9) for 16 the contractual rate of interest where that rate was not 17 in fact applicable to the debt as at the date of the 18 commencement of the administration. 19 Now, our position essentially again (Inaudible) 20 reasoning is the contractual rate only becomes 21 applicable as a result of action taken by the creditor 22 subsequent to the administration. In other words, where 23 the application of the rate depends on something which 24 the creditor does after the administration is not a rate 25 applicable to the debt after the administration. And,</p> <p style="text-align: center;">Page 13</p>	<p>1 commencement of the administration and to which 2 a contractual rate of interest would then apply at that 3 point. If I can just elaborate that. What we say in 4 essence is, where a creditor is suing on a contract, 5 then the judgment which he obtains as a result of 6 exercising those contractual rights is as much something 7 which springs from a contract as a closeout amount. In 8 fact, the two situations are rather similar, because in 9 both cases the creditor is relying on his existing 10 contractual rights as at the date of the administration 11 to obtain a set of further and different rights, post 12 administration. In the one case he's relying on his 13 existing contractual rights to get judgment, which is 14 a different set of rights; in the other case, he's 15 relying on his existing set of contractual rights to get 16 a closeout amount, which is also, as your Lordship will 17 appreciate, a different set of rights. It may be a sum 18 that is payable in a different currency, it may be a sum 19 that's calculated after taking account of netting. It's 20 a different set of rights and obligations. 21 My Lord, we say actually there is no real difference 22 between the two: in both cases one is relying on the 23 existing rights, it's a new set of rights, and it's 24 quite difficult, we would say, to identify a meaningful 25 distinction and as a matter of logic to why one if one</p> <p style="text-align: center;">Page 15</p>
<p>1 as your Lordship knows for these purposes, and we say 2 there is a very close analogy between the position of 3 a judgment obtained post administration and the position 4 of a closeout amount (Inaudible) post administration, 5 and essentially the foundation of our submission to your 6 Lordship is that there is a very close analogy between 7 the two, and indeed it is quite difficult to identify 8 what the points of distinction are. 9 Now, just so far as the foreign judgment is 10 concerned, obviously your Lordship appreciates what 11 Lord Justice David Richards decided on issue 4. He 12 decided that foreign judgment rate of interest is not 13 a rate applicable within rule 2.88(9) where the creditor 14 has not got that judgment at the date of the 15 commencement of the administration. So even if the 16 creditor subsequently in fact gets a judgment, and at 17 that point becomes entitled to the judgment rate of 18 interest on that judgment, his reasoning is that that 19 nonetheless can't be said to be a rate applicable to the 20 debt. And the reason why he says that is because he's 21 looking at the position as it exists as at the date of 22 the commencement of the administration. 23 Now, my Lord, we say there is, as I say, a very 24 close analogy between this situation and the situation 25 of a closeout amount which arises following the</p> <p style="text-align: center;">Page 14</p>	<p>1 draws a difference or distinction. Now, my Lord, in 2 this context we obviously rely on -- 3 MR JUSTICE HILDYARD: I am sorry to interrupt. Your 4 position is this, is it really: that there is no 5 meaningful distinction from the point of view of the 6 analysis required by supplemental question 1(a) between 7 the triggering of a right pursuant to an act taken after 8 the date of administration and the vindication of the 9 right by judgment subsequently? 10 MR SMITH: Yes. 11 MR JUSTICE HILDYARD: That's what you say. No difference 12 between triggering and indication. 13 MR SMITH: Yes. Exactly. We say in both cases what the 14 creditor is doing is relying on the rights he has at the 15 date of administration; he's taking those rights post 16 administration; he's using them to get something 17 different, either a closeout amount or a judgment. And 18 the fact it's a judgment rather than a closeout amount 19 we say doesn't make a difference. 20 MR JUSTICE HILDYARD: But again, rather simplistically, and 21 an analogy is always dangerous, particularly one chosen 22 by me, but let us have a think about it. Supposing you 23 regard the contractual rights as a blue suitcase and the 24 judgment rights as a red suitcase, you can't find in the 25 blue suitcase the interest rate which the judgment</p> <p style="text-align: center;">Page 16</p>

1 confers. Only in the red suitcase. Now, that analogy
 2 may not be helpful to you, but it goes to this question
 3 of source.
 4 MR SMITH: My Lord, well, we say that's not the correct way
 5 of analysing it. Rather than in the two different cases
 6 what one does have is a set of contractual rights as at
 7 the date of the administration, and then in both cases
 8 the creditor is then relying on those rights post
 9 administration with a different set of rights. My Lord,
 10 if one tests that and says that actually in the judgment
 11 case, let us say the contract did refer and say within
 12 it that if the creditor gets a judgment he will be
 13 entitled to judgments at interest on that judgment, let
 14 us say the contract does say that, one has to ask
 15 oneself well, why is it that should make all the
 16 difference, and in our submission it doesn't. One
 17 really can't draw the distinction between the two
 18 situations.
 19 MR JUSTICE HILDYARD: So, again, being simplistic, just so
 20 that I clarify my mind: you say the answer is that the
 21 contractual right in the blue suitcase is pregnant with
 22 the right to the judgment rate if the right is
 23 eventually vindicated in that way.
 24 MR SMITH: Yes. We would say that. Absolutely.
 25 MR JUSTICE HILDYARD: That is what you say.

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1 MR SMITH: Absolutely. Now, my Lord I was just going to
 2 show you very briefly particular parts of
 3 Lord Justice David Richards which we rely on. I'll do
 4 that very quickly because your Lordship has no doubt
 5 already looked at (Inaudible). It is in tab 19 of
 6 bundle A. First of all paragraph 177.
 7 MR JUSTICE HILDYARD: Can I just ask, is there a transcript
 8 or is my note going to be all I have got?
 9 UNKNOWN SPEAKER: My Lord, apparently it will be transcribed
 10 but I'm afraid only from the court's tapes, so we will
 11 get it done as soon as possible.
 12 MR SMITH: So, my Lord, I was just going to show you very
 13 quickly the relevant parts we say of the judgment of
 14 Mr Justice David Richards. Paragraph 177 on page 283
 15 first of all, where he starts to deal with the argument
 16 that has been put on issue 4. Really one sees the nub
 17 of his reasoning, we submit, in the very second sentence
 18 of paragraph 177:
 19 "The words 'the rate applicable to the debt apart
 20 from the administration' cannot be read as including a
 21 hypothetical rate which would be applicable to a debt if
 22 the creditor took certain steps."
 23 So in our submission he does envisage that a rate only
 24 becomes applicable as a result of steps taken post
 25 administration does not fall within 2.88(9). Then in
 the final sentence, having gone through some examples,

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1 he said:
 2 "These examples do no more than demonstrate why the
 3 words 'the rate applicable to the debt apart from the
 4 administration' should be given their obvious meaning of
 5 the rate in fact applicable to the debt."
 6 Now, he then goes on to deal with points that were put by
 7 Mr Zacaroli on behalf of Wentworth, which he essentially
 8 accepted. Paragraph 180, in the final two sentences,
 9 makes an important point, in our submission. He draws
 10 the distinction between the judgment subsequently
 11 obtained and the contractual rights as they exist at the
 12 date of the administration. He makes the point that
 13 actually what you are not proving for is the judgment
 14 debt but rather the judgment debt quantifies the
 15 contractual rights, and it is those rights which are
 16 subject the of the proof. Again, we say that applies
 17 equally by analogy to a closeout amount obtained
 18 subsequently. It's exactly the same as with the
 19 judgment. What's happening in that situation is the
 20 creditor proves in respect of his right as exists at the
 21 commencement of the administration and the closeout
 22 amount simply quantifies those rights for the purposes
 23 of proof.
 24 Then paragraph 181, there is the sentence my learned
 25 friend Mr Trower I think took your Lordship to, where he
 endorses the proposition that the rate applicable to the

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1 debt apart from the administration is to be determined
 2 by reference to the rights of the creditor as at the
 3 commencement of the administration.
 4 Then, my Lord, also importantly we submit is
 5 paragraph 182, because what he went on to deal with in
 6 paragraph 182 was an argument based on an alleged
 7 contingent right to interest as at the date of the
 8 administration. The argument which was put in 182 was
 9 to say well actually, a creditor has got a contingent
 10 right to interest under the judgment, because he has
 11 always got the contingent right to go and get
 12 a judgment. You will see Lord Justice David Richards
 13 rejected that as a basis for saying that that would be
 14 a rate applicable to the debt for the purposes of
 15 rule 2.88(9). So one sees that actually he did address
 16 the contingent right to interest point. He did not in
 17 fact accept that in the basis saying that that would be
 18 a rate in fact applicable to the debt 2.88(9).
 19 So, my Lord, those are the signposts --
 20 MR JUSTICE HILDYARD: How does that fit with what
 21 I understood to be your acceptance that in the blue
 22 suitcase is the right to whatever you get under
 23 a judgment which you have obtained, albeit after the
 24 date of administration, pursuant to the vindication by
 25 judgment of the original right? What Lord Justice David

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1 Richards appears to be saying is that that is true in
2 an abstract or ethereal sense but not in a real enough
3 sense for it to qualify.
4 MR SMITH: That is right. So he says the fact you have got
5 that, if you like, contingent right is not enough to
6 qualify for the purposes of rule 2.88(9). Our
7 submission to your Lordship is accepting that reasoning
8 as being correct, one takes it across and applies it to
9 the analogous situation of the closeout amount and the
10 fact that as at the date of commencement of the
11 administration the creditor has a contingent right to
12 charge default interest on a closeout amount if and when
13 he obtains that subsequently. It is likewise, we would
14 say, a rather ethereal contingent right and does not
15 qualify for the purposes of rule 2.88(9).
16 So again, the exercise that we're undertaking is to
17 say, well, look at the reasoning of Mr Justice David
18 Richards in relation to the judgment apply that by
19 analogy to the question of a closeout.
20 Now, my Lord, I am going to very briefly just deal
21 with Tael. My learned friend Mr Trower showed you how
22 that point has arisen. As I say, the primary way we put
23 our argument is not by reference to the language of
24 accrued, we accept that does not appear within rule
25 2.88(9); we put our case by drawing the analogy with the

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1 foreign judgment position.
2 So far as Tael is concerned, the relevance of that
3 is that it does demonstrate, in my submission, that the
4 joint administrators' argument which they were running
5 in paragraph 30 of their submissions, the right becomes
6 accrued when you enter into the contract, is wrong.
7 I think my learned friend may accept that that is not --
8 MR JUSTICE HILDYARD: But they say that one amount that is
9 accrued is not other amounts, and they say "When we say
10 accrued, this is what we mean".
11 MR SMITH: Yes.
12 MR JUSTICE HILDYARD: And on the basis of what they say
13 "accrued" means, Tael has nothing to do with it. That
14 is the submission.
15 MR SMITH: Yes. I think what it boils down to, I think my
16 learned friend Mr Trower says, "Well, actually one can
17 forget about the use of the language accrued." He says
18 it is sufficient for the purposes of a rate to be
19 applicable.
20 MR JUSTICE HILDYARD: He says you have highjacked the word;
21 and, having highjacked the word, you have imposed the
22 case. You say no, the word was there because that's
23 what it looked like, and what it looks like also looks
24 like Tael.
25 MR SMITH: Yes. That's basically right. I think your

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1 Lordship put it much more succinctly than I would be
2 able to do it. So your Lordship sees how that arises,
3 and to take my learned friend Mr Trower's substantive
4 proposition, he says in his submission that you have
5 entered into a contract which provide for a rate
6 potentially become payable in the future under one of
7 the (Inaudible) of contract. We say, well, that isn't
8 sufficient, because look at the reasoning of
9 Lord Justice David Richards on the foreign judgment by
10 analogy, and that shows that that doesn't work.
11 So, my Lord, that was all I was going to say about
12 Tael, and Mr Trower has already shown your Lordship the
13 relevant paragraphs in any event. The other questions
14 I suspect were of less materiality. We have answered
15 those in paragraphs 14 and 15 of our submissions.
16 I think we are all agreed on question 3.
17 MR JUSTICE HILDYARD: The last one you are all agreed.
18 I can relax about that.
19 MR SMITH: Yes. Question 2 I think it follows really from
20 what we have been submitting on question 1, in the sense
21 that we say well, if the application of the rates is
22 dependent on contingencies then those contingencies do
23 in fact (Inaudible) satisfied as at the date of the
24 commencement of the administration.
25 MR JUSTICE HILDYARD: Contingencies under the control of the

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1 claimant.
2 MR SMITH: Yes. So, my Lord, those are our submissions.
3 Unless your Lordship has any --
4 MR JUSTICE HILDYARD: Can I just ask you about -- I mean,
5 you rely a lot on the phrase "in fact applicable", the
6 tail end of the paragraph you specifically referred me
7 to in Lord Justice David Richards' judgment.
8 MR SMITH: Yes.
9 MR JUSTICE HILDYARD: But you accept that a floating rate,
10 or a rate which is not presently in fact applicable
11 because it only arises according to a contingency not
12 then appreciated but which in fact arises, you accept
13 that that could apply if you are wrong as to the rest.
14 MR SMITH: Yes. Just on that, to be clear, on the floating
15 rate we say it applies because as at the date of the
16 commencement of the administration, the creditor has
17 an actual right to have that rate, whatever it may be,
18 applied to his debt. So where at the commencement of
19 the administration the creditor has an existing
20 contractual right to charge LIBOR on his debt as it is
21 at that time, that is sufficient.
22 MR JUSTICE HILDYARD: So if you are wrong, that follows.
23 MR SMITH: Yes.
24 MR JUSTICE HILDYARD: If you are wrong as to the original
25 point, that follows.

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<p>1 MR SMITH: Yes.</p> <p>2 MR JUSTICE HILDYARD: What about judgment rate, which you</p> <p>3 draw an analogy with? Supposing the judgment rate at</p> <p>4 the relevant date of administration is 8 per cent, to</p> <p>5 take an example, and has been for a long time, but it</p> <p>6 subsequently rises.</p> <p>7 MR SMITH: The specific provision on this in the rules,</p> <p>8 I think it is rule 2.88(6) from recollection, which</p> <p>9 fixed the judgments at rates by reference to the rate as</p> <p>10 the date of commencement of the administration.</p> <p>11 MR JUSTICE HILDYARD: So you say that that is simply dealt</p> <p>12 with by a specific sub-rule.</p> <p>13 MR SMITH: Yes. Indeed, we actually say that's supportive</p> <p>14 of our argument.</p> <p>15 MR JUSTICE HILDYARD: Yes, I know.</p> <p>16 MR SMITH: I think it is rule 2.88(6). I will be corrected</p> <p>17 if I'm wrong, but that's my recollection on that.</p> <p>18 Indeed, my recollection is Lord Justice David Richards</p> <p>19 mentioned this point in his judgment. He made the point</p> <p>20 that if the judgment rate does subsequently go up, it is</p> <p>21 still fixed with the rate as it was at the date of the</p> <p>22 commencement of the administration.</p> <p>23 MR JUSTICE HILDYARD: Yes, but he was thinking of a judgment</p> <p>24 rate pursuant to a judgment.</p> <p>25 MR SMITH: Yes, he was.</p> <p style="text-align: center;">Page 25</p>	<p>1 MR JUSTICE HILDYARD: But what do you say then, if it is</p> <p>2 that contractual right and you're wrong as to the first</p> <p>3 part, do you say that you are stuck with the judgment</p> <p>4 rate at the date of administration or what?</p> <p>5 MR SMITH: Yes. One does the comparison exercise between</p> <p>6 your existing right to contractual interest as at the</p> <p>7 administration and compare that with the Judgments Act</p> <p>8 rate at that moment, and one looks at which is the</p> <p>9 greater.</p> <p>10 MR JUSTICE HILDYARD: At that moment?</p> <p>11 MR SMITH: Yes.</p> <p>12 MR JUSTICE HILDYARD: And if it rolls up to 20 per cent, and</p> <p>13 so you would, pursuant to the contractual right, have</p> <p>14 been entitled to that rate, nevertheless you are stuck</p> <p>15 with what it was at the date of administration?</p> <p>16 MR SMITH: Yes. For the purposes of doing the comparison</p> <p>17 exercise, you take your starting point as the</p> <p>18 commencement of the administration, but I think one</p> <p>19 accepts, looking at the contractual rate which in fact</p> <p>20 applies as at that time, one can then calculate the</p> <p>21 total amount of interest (a) under the Judgments Act</p> <p>22 rate, (b) under the contractual rate over the relevant</p> <p>23 period, and one works out which gives you the greater</p> <p>24 sum. So if one has got a contractual right that says</p> <p>25 "I have got a right to have LIBOR applied to my debt,"</p> <p style="text-align: center;">Page 27</p>
<p>1 MR JUSTICE HILDYARD: The source of the right being the</p> <p>2 particular rules of the judgment.</p> <p>3 MR SMITH: Yes.</p> <p>4 MR JUSTICE HILDYARD: What I am positing is that, say there</p> <p>5 was a right in the contract which says "When we trigger</p> <p>6 this right, if there is any delay, the interest rate</p> <p>7 that we adopt is not LIBOR, it's judgment rate in</p> <p>8 Ruritania."</p> <p>9 MR SMITH: I see. So your Lordship is positing</p> <p>10 a contractual provision.</p> <p>11 MR JUSTICE HILDYARD: Yes. That is what is being posited in</p> <p>12 this case, although not in Lord Justice David Richards'</p> <p>13 case.</p> <p>14 MR SMITH: Yes. Well, we say that that wouldn't be a rate</p> <p>15 applicable to the debt because it's not applicable to</p> <p>16 the debt as at the commencement of the administration.</p> <p>17 It is dependent upon one or more contingencies</p> <p>18 (Inaudible).</p> <p>19 MR JUSTICE HILDYARD: Yes. That is your original argument.</p> <p>20 But does (6) apply even if the judgment rate simply</p> <p>21 happens to be the choice of the contractual parties as</p> <p>22 the rate they reckon they want?</p> <p>23 MR SMITH: No, I do not believe it would, no.</p> <p>24 MR JUSTICE HILDYARD: It doesn't really, does it?</p> <p>25 MR SMITH: No.</p> <p style="text-align: center;">Page 26</p>	<p>1 one can calculate --</p> <p>2 MR JUSTICE HILDYARD: That I appreciate, but supposing the</p> <p>3 contractual right is to a rate which is selected to be</p> <p>4 the judgment rate, maybe in Ruritania, maybe here, and</p> <p>5 that judgment rate, the future which we can't see yet</p> <p>6 discloses, varies over the course of time, and there is</p> <p>7 upwards, so it is in the interests of the creditor to,</p> <p>8 is it not, that he is entitled to the fluctuation in the</p> <p>9 rate over the course of time until he is paid out.</p> <p>10 MR SMITH: Yes.</p> <p>11 MR JUSTICE HILDYARD: Do you say that even if you lose on</p> <p>12 the first part you win on that part to exclude the</p> <p>13 upward fluctuation after the date of administration?</p> <p>14 MR SMITH: No, I don't say that because if your Lordship's</p> <p>15 positing a contractual provision which says creditor has</p> <p>16 an existing debt, he has an existing right as at the</p> <p>17 date of commencement of the administration to have the</p> <p>18 judgment rate as it is from time to time in Ruritania,</p> <p>19 applied to that debt, then we would accept that he has</p> <p>20 at the date of the commencement of the administration an</p> <p>21 existing right to have that rate as it is from time to</p> <p>22 time applied to his debt.</p> <p>23 MR JUSTICE HILDYARD: So if you lose on the first you lose</p> <p>24 on the second.</p> <p>25 MR SMITH: Yes, I am not saying there is a separate point.</p> <p style="text-align: center;">Page 28</p>

<p>1 MR JUSTICE HILDYARD: Supposing the right to the rate was 2 subject to some further act taken after the date of 3 administration by the creditor, so that the right says 4 you can have this extraordinary rate in Ruritania but 5 only if you take the following step which is a step 6 which cannot be taken prior to the date of 7 administration, then what? 8 MR SMITH: Then we say that would make the difference 9 because then you have a situation where he doesn't have 10 an ability to in fact have that rate applied to his debt 11 as at the date of commencement of administration but it 12 is dependent on subsequent action taken by him post 13 administration. That's where we would draw the line in 14 our submission. 15 So, my Lord, unless -- 16 MR JUSTICE HILDYARD: Do you wish to add anything about the 17 financial collateral arrangement number 2 regulations? 18 MR SMITH: I am not sure I do is the short answer. I think 19 we've dealt with that, did we not? 20 MR JUSTICE HILDYARD: I suppose they may be confined to 21 history, I don't know. 22 MR SMITH: Let me just have a look because I think we dealt 23 with that in our reply submission behind tab 5, page 61. 24 MR JUSTICE HILDYARD: Yes. 25 MR SMITH: I have to say it is not a point I specifically</p> <p style="text-align: center;">Page 29</p>	<p>1 MR SMITH: Yes, exactly. It is purely defensive and we say 2 it is not relevant and questions of calculation of 3 interest on any view are dealt with in effect solely by 4 2.88. 5 MR JUSTICE HILDYARD: Is there anything you want to add with 6 respect to 1(c) still under the care and control of 7 Lord Justice David Richards? 8 MR SMITH: No, I mean, on that our position is essentially 9 aligned with that taken by Wentworth, so I mean if we 10 were wrong on 1(a) we agree with the stance taken by 11 Wentworth on 1(c) and that one would look at how matters 12 actually developed during the course of administration 13 and we would disagree with the stance taken by the 14 senior credit agreement on 1(c). 15 But, as your Lordship knows, our primary position is 16 that one doesn't get into the 1(c) conundrum at all 17 because the actual answer to this is that it is simply 18 not a rate applicable in the first place. 19 So unless I can assist your Lordship any further. 20 MR JUSTICE HILDYARD: No, that is very helpful and thank you 21 also for the written submissions. Mr Dicker. 22 Submissions by MR DICKER 23 MR DICKER: My Lord, I can be very short. Your Lordship has 24 our written submissions. We agree with what my learned 25 friend Mr Trower said this morning. All I wanted to do</p> <p style="text-align: center;">Page 31</p>
<p>1 focus on again. 2 MR JUSTICE HILDYARD: Yes, I'm sorry, I should have -- it is 3 a danger of sort of mulling. 4 MR SMITH: No, not at all, my Lord. 5 MR JUSTICE HILDYARD: I should have alerted you. 6 MR SMITH: We dealt, I hope, with what the administrators 7 say about that in paragraphs 26 to 28. 8 MR JUSTICE HILDYARD: Yes. 9 MR SMITH: I mean, essentially we say it doesn't really 10 assist your Lordship. 11 MR JUSTICE HILDYARD: I think you say that if the 12 administrators were right that would override the 2.88 13 right, is that -- 14 MR SMITH: That is right. If they are right about the 15 financial collateral rate, I think they're saying that 16 would override 2.88 and we say that's unlikely and that 17 the financial collateral regulations don't tell your 18 Lordship anything about how interest should be 19 calculated. We say there is nothing in there which 20 bears on the calculation of interest. 21 MR JUSTICE HILDYARD: Your point is merely defensive. 22 MR SMITH: It is, absolutely. 23 MR JUSTICE HILDYARD: Insofar as you are relying on those we 24 can't accept that it can have been intended to have that 25 effect.</p> <p style="text-align: center;">Page 30</p>	<p>1 was emphasise six points and I think your Lordship 2 probably has at least five of them. 3 Firstly, the test is that set out in 2.889. It is 4 the rate applicable to the debt apart from the 5 administration. There is no reference to the concept of 6 accrual. 7 Secondly, it is not intended to be a complicated 8 test. It simply requires you to look at the creditor's 9 rights under his pre-existing contract. York confuses 10 matters, we say, by referring to issue 4. Your Lordship 11 has the point. The distinction between this case and 12 issue 4 is that where you have a subsequent foreign 13 judgment the source of the right to interest is regarded 14 as that foreign judgment. And that is regarded as 15 effectively a new right. 16 The third point is the rate doesn't have to be the 17 rate which was accruing at the date of administration. 18 Your Lordship has this point. The parties agree that 19 they are entitled to a floating rate, not merely 20 whatever the rate was which was accruing on the date of 21 administration. 22 Again, there is no difficulty in calculating the 23 amount to which the creditor is entitled. You can 24 terminate at the date you pay interest. Interest is 25 payable to the period for which the debt was outstanding</p> <p style="text-align: center;">Page 32</p>

<p>1 so you look back and you calculate how much is due. 2 And your Lordship I think has the point as well that 3 the movement in the floating rate may be as a result of 4 a number of different contingencies, either on the part 5 of a third party, say the Bank of England changing the 6 base rate, on the part of the debtor, failure to pay for 7 seven days, or on the part of the creditor serving 8 notice. We say none of that makes any difference at 9 all. 10 MR JUSTICE HILDYARD: So if the super rate, let us call it, 11 can only be triggered, the right in the contract to the 12 super rate can only be triggered by an act taken some 13 time, maybe a long time after the date of 14 administration, the creditor is nevertheless entitled to 15 that super rate. 16 MR DICKER: Yes, there is then a separate question of 17 quantification which I'll come on to, but, yes, the mere 18 fact that the rate only starts accruing on service of 19 a notice doesn't make any difference, we say. 20 The fourth point is this -- 21 MR JUSTICE HILDYARD: That is the source point? 22 MR DICKER: Yes. The fourth point is -- it an application 23 of the source point, your Lordship is quite right. 24 The fourth right is this: if the underlying debt is 25 a contingent debt it is important to appreciate that as</p> <p style="text-align: center;">Page 33</p>	<p>1 penultimate sentence where the learned judge says: 2 "If the creditor does not have a judgment at the 3 date of administration the debt proved by the creditor 4 is not a judgment subsequently obtained but the debt as 5 at the date of administration." 6 What my learned friend seeks to do is to say 7 effectively the same reasoning applies to a closeout 8 payment on termination of an ISDA master agreement. He 9 says although you subsequently closeout and are entitled 10 to a termination sum, what you have proved for is not 11 that termination sum but whatever your rights were prior 12 to closeout on the date of administration. 13 Now, we say that's, to the extent we respectfully 14 understand it, wrong. We deal with that at paragraphs 15 23 and 24 of our first round of submissions on 16 supplemental issue 1(a). 17 My Lord, the sixth and final point is this: again, 18 your Lordship remarked on the overlap between 19 supplemental issue 1(a) and 1(c) and there plainly is an 20 overlap. My Lord, there are undoubtedly potential 21 issues as to how you calculate the applicable rate of 22 interest where the contract only terminated, where the 23 contingency only occurred after the date of 24 administration. And on that essentially Wentworth and 25 the administrators as we understand it, say, well, all</p> <p style="text-align: center;">Page 35</p>
<p>1 we understand York's case when you get to Rule 2.889, 2 any contractual rate is effectively irrelevant because 3 there was no interest accruing as at the date of 4 administration. So if you have a contingent debt that 5 falls in the date before the date of administration, the 6 creditor is then entitled to interest in accordance with 7 the terms of the contract. If, however, the contingent 8 debt only falls in the date after the date of the 9 administration on York's case it is not. We say that 10 makes no sense at all and it is inconsistent with the 11 reasoning of Mr Justice Richards in relation to -- 12 MR JUSTICE HILDYARD: This is the early termination date 13 point. 14 MR DICKER: Yes. 15 MR JUSTICE HILDYARD: That is going to occur necessarily 16 some time after. 17 MR DICKER: Not in all cases because -- 18 MR JUSTICE HILDYARD: Is there an automatic provision? 19 MR DICKER: Correct. But subject to that your Lordship is 20 right. 21 The fifth point which your Lordship may or may not 22 have picked up on concerns what a creditor is proving 23 for. There is a subsidiary argument on the part of 24 York. My learned friend referred you to paragraph 180 25 of Mr Justice David Richard's judgment. It is the</p> <p style="text-align: center;">Page 34</p>	<p>1 you do is wait for the relevant event to occur and then 2 you work out how much interest -- 3 MR JUSTICE HILDYARD: The relevant event being? 4 MR DICKER: The post administration closeout -- 5 MR JUSTICE HILDYARD: Right. 6 MR DICKER: -- and determination. Then you work out what 7 rate of interest was applicable effectively from that 8 date in accordance with the contract. We say that 9 doesn't reflect the ISDA master agreement and it also 10 doesn't allow for the consequence of discounting 11 contingent debts back to the date of administration. 12 Now, your Lordship is not concerned with that. 13 Mr Justice David Richards is. Those complications have 14 no impact on the underlying question raised by 15 supplemental question 1(a). 16 MR JUSTICE HILDYARD: So one sees it is interesting but it 17 is not relevant. 18 MR DICKER: Absolutely. Certainly the latter views may 19 differ as to the former. 20 MR JUSTICE HILDYARD: Do you wish to say anything about the 21 point made that the relevant rate, as you call it, might 22 be a very long time after the date of administration, in 23 this case I understand in certain instances? 24 MR DICKER: No, my Lord. 25 MR JUSTICE HILDYARD: You say that is forensic.</p> <p style="text-align: center;">Page 36</p>

<p>1 MR DICKER: No, I would but to Mr Justice David Richards 2 because that effectively raises the question of 3 quantification. On the administrators' case it may 4 arise much much later but the only consequence of that 5 is that the applicable rate, as it were, doesn't come in 6 until the relevant event occurs. We say we may or may 7 not be right about this but that doesn't fully reflect 8 the operation of the proof process, the need to discount 9 back to the date of administration and the fact that 10 that debt is then treated as outstanding from that date 11 to rank pari passu with everyone else. 12 MR JUSTICE HILDYARD: No, I think I've got myself confused. 13 Does not the interest rate, whatever it may be, run from 14 the date of administration in any event? 15 MR DICKER: Well, that's an issue essentially for 16 Mr Justice David Richards. This issue arises under 17 2.889. What you are doing is essentially identifying 18 two different rates and working out which is the 19 greater. One is the judgment act rate for the period. 20 The second -- 21 MR JUSTICE HILDYARD: The period being? 22 MR DICKER: The period for which the debt is outstanding. 23 MR JUSTICE HILDYARD: From the date of administration until 24 payment. 25 MR DICKER: The second is the rate applicable to the debt</p> <p style="text-align: center;">Page 37</p>	<p>1 Wentworths' and the administrators' position is that in 2 that interregnum period there is effectively no rate 3 applicable to the debt, assuming that this higher rate 4 only clicks in as at the date that the contingency 5 occurs. So essentially when you make the comparison 6 required by 2.889 and you look at how much the creditor 7 would have received in respect of his contractual rate 8 for, this period the answer is zero. That's their 9 argument. We say, again, this is a matter for 10 Mr Justice David Richards on 1(c), that that doesn't 11 actually give the creditor the interest to which he is 12 effectively or should be entitled because of the 13 consequence of discounting the debt back to Day 1. 14 MR JUSTICE HILDYARD: I see. There are a number of possible 15 answers I say in a sort of jejune way. I mean, it might 16 be that between 1 and 387 and you get the default rate, 17 the judgment rate, or alternatively you get nothing. 18 Alternatively you discount back. 19 MR DICKER: Your Lordship is right in theory. I don't think 20 anyone -- 21 MR JUSTICE HILDYARD: Anyone is contending for that. 22 MR DICKER: -- was contending, as it were, for a mix and 23 match effect where they get the highest at any 24 particular point in time. 25 MR JUSTICE HILDYARD: Because that is a batty notion or</p> <p style="text-align: center;">Page 39</p>
<p>1 apart from the administration, and there are issues as 2 to how you calculate that. Are you simply looking, as 3 I said, Wentworth and the administrators say, are you 4 simply looking at how much interest you would in fact 5 have earned looking back for the relevant period? Or is 6 the calculation different given the way in which the 7 proof process works? That is not an issue for your 8 Lordship. That is a question of calculation only. And 9 that's the issue raised by supplemental issue 1(c). 10 MR JUSTICE HILDYARD: I think I am asking a very jejune 11 question, for which I apologise, which is take the case 12 where the date of administration is Day 1 and Day 380, 13 the closeout sum, the mechanic, is crystallised and 14 confers a right to interest greater than our judgment 15 rate. What is the position between Day 1, the date of 16 administration, and Day 380? 17 MR DICKER: Your Lordship has identified a real issue which 18 is precisely the issue raised in supplemental 19 issue 1(c). 20 MR JUSTICE HILDYARD: Right. 21 MR DICKER: And, my Lord, it may be that I haven't been 22 clear. 23 MR JUSTICE HILDYARD: No, I am sure you have, I'm sorry. 24 MR DICKER: I am trying to be clear. There is a difference 25 between the two parties. As I understand it,</p> <p style="text-align: center;">Page 38</p>	<p>1 because? 2 MR DICKER: For whatever reason. I think the choice 3 essentially came down to a global -- essentially when 4 you come to 2.889 and you look at the contractual 5 approach you are looking at it as a whole for the 6 relevant period and then you ask whether, taken as 7 a whole, the amount the creditor would receive is higher 8 than the judgment act rate in which case that is what he 9 is entitled to, or lower at which he gets the judgment 10 act rate. You don't salami slice it into periods. 11 MR JUSTICE HILDYARD: How beefy, long in other words, are 12 the 1(c) submissions? 13 MR DICKER: My Lord, we have put in submissions and your 14 Lordship has them in the bundle. You have them. 15 MR JUSTICE HILDYARD: Yes. I haven't read them but they are 16 there in this pile. 17 MR DICKER: They are there. How far Lord Justice David 18 Richards has got -- 19 MR JUSTICE HILDYARD: No, it is only that I will read them 20 with the warning you have given me which is however 21 interesting they don't help, but I would quite like to 22 know what their confine was so I don't trample on 23 anything or at least I don't unwittingly. 24 MR DICKER: Bundle B and your Lordship will see, for 25 example, tab 2 is the senior creditor group's</p> <p style="text-align: center;">Page 40</p>

<p>1 submissions on issue 1(c). 2 MR JUSTICE HILDYARD: Tab 2. 3 MR DICKER: Tab 2, tab 7. 4 MR JUSTICE HILDYARD: I am afraid I have not read B at all 5 but that is very helpful. Thank you. 6 MR DICKER: They are there only if your Lordship wanted to 7 look at them because obviously they are the submissions 8 we submitted to -- 9 MR JUSTICE HILDYARD: All I am worried about is (a) getting 10 any help I can but (b) I wouldn't unwittingly want to 11 tread on the daisies which Lord Justice David Richards 12 is tending. 13 MR DICKER: And in relation to that, your Lordship can look 14 at what is in bundle B. If it is in bundle B that's 15 a matter for Mr Justice David Richards. 16 MR JUSTICE HILDYARD: Yes. 17 MR DICKER: Unless I can help your Lordship further. 18 MR JUSTICE HILDYARD: No, I am very grateful to you. Does 19 anyone want to add any more? 20 MR ZACAROLI: I don't wish to add anything to the -- because 21 as your Lordship knows we have made substantive 22 submissions on 1(c) and those are in the bundle. 23 MR JUSTICE HILDYARD: Thank you very much. Good. 24 Mr Trower, do you want to? 25 MR TROWER: I don't think I do, my Lord. You asked me about</p> <p style="text-align: center;">Page 41</p>	<p>1 that if you wish to prescribe or recommend to me any 2 particular process. In his case I think he was away for 3 two weeks and so there was a more aggravated difficulty. 4 MR TROWER: Yes. 5 MR JUSTICE HILDYARD: But nevertheless there is bound to be 6 some considerable period because the judgment so far is 7 pretty long and will take a bit of processing and I will 8 also, as part of that process, if I do inadvertently 9 unwittingly step into areas which might be offensive to 10 the questions being dealt with by Mr Justice David 11 Richards, then obviously I would like to know that. 12 MR TROWER: Yes. 13 MR JUSTICE HILDYARD: But there is a problem about 14 sensitivity, market sensitivity obviously, so I would 15 like to begin to think about dissemination. 16 MR TROWER: Yes. Certainly for our part we'll take 17 instructions on that as to what the problems are and 18 make some proposals to the other parties and to your 19 Lordship. 20 MR JUSTICE HILDYARD: Thank you very much. 21 MR ALLISON: My Lord, there was one matter. I wanted to 22 wait until that debate was finished. My Lord mentioned 23 German issues a moment ago. 24 MR JUSTICE HILDYARD: Yes. 25</p> <p style="text-align: center;">Page 43</p>
<p>1 the financial collateral arrangements. 2 MR JUSTICE HILDYARD: Yes. 3 MR TROWER: I don't want to add anything to what is said. 4 MR JUSTICE HILDYARD: Thank you. 5 I am extremely grateful to all of you. I am sorry 6 to have called for your assistance but it has helped me 7 at your expense. I thought that actually the next, that 8 Waterfall III involved more of the same cast but 9 actually there is to be a change of some of the scenery. 10 MR TROWER: Yes. 11 MR JUSTICE HILDYARD: Quite a lot of the scenery. 12 I apologise for the fact that I have not yet sent you 13 a draft judgment. I will obviously take on board -- 14 I propose to hand it down as a composite judgment, 15 dealing with all the issues that we addressed, be they 16 under English, New York, German law or supplemental 17 1(a). 18 MR TROWER: Right. 19 MR JUSTICE HILDYARD: And I would hope that that will come 20 within the next fortnight at the latest. When I send it 21 around in draft I spied from little dabbings into some 22 of the transcripts on previous occasions that 23 Lord Justice David Richards was particularly careful 24 with respect to the dissemination of the draft and at 25 some point I would welcome your assistance in writing on</p> <p style="text-align: center;">Page 42</p>	<p>1 MR ALLISON: My Lord may have seen a letter. 2 MR JUSTICE HILDYARD: Yes, what is the attitude -- I had not 3 overnight had a look at the German position but 4 I understand that the case on 15 June impacts. 5 6 MR ALLISON: My Lord, that is our understanding. That is 7 certainly the understanding of our expert and those in 8 Germany. What we did on Wednesday was to write to your 9 Lordship and to the other parties bringing the decisions 10 to your Lordship's attention and the attention of the 11 other parties, highlighting why we say it's relevant to 12 the German issues. 13 MR JUSTICE HILDYARD: You say it vindicates your expert on 14 an issue. 15 MR ALLISON: On a key issue which was, my Lord -- and 16 I recognise now it may not be the moment -- one of the 17 key issues on which the experts were absolutely in 18 agreement was there had to be a defaulted payment 19 obligation for a right to further damage to even be on 20 the claims. 21 MR JUSTICE HILDYARD: That was the basis point. 22 MR ALLISON: Indeed. And what has happened in Germany's 23 highest court only earlier this month, indeed in the 24 LBIE insolvency, is that there has been a finding in 25 relation to the German master agreement, so the very</p> <p style="text-align: center;">Page 44</p>

<p>1 same master agreement, that the claim arises by 2 reference to the German insolvency provisions, which 3 my Lord may recall, the points are summarised in the 4 letter that Judge Fischer said were directly relevant 5 and that is how the claim would be calculated. He said 6 that is why in his opinion there could be no claim in 7 existence before the insolvency so there could be no 8 question of default prior to the insolvency.</p> <p>9 In contrast Professor Mülbart said the German 10 insolvency code in his opinion was totally irrelevant 11 because LBIE was not the insolvency in Germany.</p> <p>12 Now Germany's highest court has looked at that point 13 and has considered that the fact it is governed by 14 German law means that it very much is in play in, the 15 German insolvency code is the relevant provision for 16 working out what the claim is.</p> <p>17 I am not for a moment expecting people to make 18 substantive submissions on the point today but that is 19 why it is brought to my Lord's attention. We have given 20 an English translation to my Lord as well. It may be 21 my Lord would like to hear very short further 22 submissions from the parties as to how this is best 23 dealt with but we thought this was clearly something 24 that should be brought to my Lord's attention because in 25 our submission it is directly on point and is something</p> <p style="text-align: center;">Page 45</p>	<p>1 MR DICKER: Yes, and I can't help your Lordship any further 2 in relation to that today.</p> <p>3 MR JUSTICE HILDYARD: No.</p> <p>4 MR DICKER: I don't know how quickly an agreed translation 5 can be obtained, my Lord. Obviously some of the working 6 out how to respond to it can be done while that's going 7 on.</p> <p>8 MR JUSTICE HILDYARD: Yes.</p> <p>9 MR DICKER: I wonder whether the sensible course isn't to 10 try and produce both that and any brief response on our 11 part similar to the letter from Kirklands as soon as we 12 can, and then the parties take stock with your Lordship 13 and decide what's appropriate. It may be that's 14 sufficient but it may be that one or other of the 15 parties or your Lordship thinks that more would be 16 required.</p> <p>17 MR JUSTICE HILDYARD: Yes, I have a case restarting for 18 closing submissions on somewhere around 7 July and 19 presently I'm enjoying the first tranche of a skeleton 20 argument of slightly over 800 pages, so I'm sort of 21 enjoying other things, but at some point if you could 22 let me know what you propose and if it were necessary to 23 have a short oral hearing then it would have to be 24 arranged for your convenience and mine which would 25 I think be another 9 o'clock start in all probability.</p> <p style="text-align: center;">Page 47</p>
<p>1 which was covered by the expert evidence and indeed is 2 a decision in LBIE's insolvency in relation to the very 3 same master agreement.</p> <p>4 MR JUSTICE HILDYARD: Yes. What are the contestants' 5 position on this?</p> <p>6 MR DICKER: My Lord, ours is simply first of all we haven't 7 had an opportunity to consider it. Secondly, there 8 plainly needs to be an agreed official translation. 9 There isn't at present. Thirdly, we would obviously 10 want an opportunity if my learned friend is going to 11 seek to rely on it to respond. Subject to that, we have 12 no objection in principle.</p> <p>13 MR JUSTICE HILDYARD: And is it premature to determine the 14 form of the responses? Will it be in writing? Are you 15 envisaging an oral hearing? Is there any possibility of 16 acquiring any comment from the German experts? Is it 17 too early is that?</p> <p>18 MR DICKER: It is simply too early to say.</p> <p>19 MR JUSTICE HILDYARD: In that case the two weeks might go 20 back a bit but I would like to know as soon as practical 21 what your prescription is as to how we should deal with. 22 I take it you are acceding to the fact that I really 23 must focus on this and have it before me given the 24 dearth of German explanation on the point until now, if 25 this is relevant at all.</p> <p style="text-align: center;">Page 46</p>	<p>1 MR DICKER: Yes, that's fully understood.</p> <p>2 MR TROWER: My Lord, can I just make this observation and as 3 your Lordship will recall we didn't really participate 4 in the German law points.</p> <p>5 MR JUSTICE HILDYARD: No.</p> <p>6 MR TROWER: If this does begin to develop into an issue of 7 some complexity, difficulty and time taking, would your 8 Lordship consider thinking about hiving off the German 9 law issues and dealing with them in a separate judgment? 10 That's all -- we raise that as a possibility. What 11 might be unfortunate is if my Lord had reached 12 conclusions in relation to everything else and we had to 13 wait on what became a complicated German law issue. 14 I just raise that.</p> <p>15 MR JUSTICE HILDYARD: I think it is a good point but I would 16 like to deal with it incrementally. The purpose of 17 giving a composite judgment was so that if there were 18 thoughts that arose, albeit in a very different context, 19 that they fed into the mix. As you probably know 20 there's an issue of accrual in a different Lehman matter 21 which makes one particularly sensitive to the accrual 22 point.</p> <p>23 MR TROWER: Yes. Tax.</p> <p>24 MR JUSTICE HILDYARD: Which you say doesn't exist. 25 Yes, very good. Will you keep me informed?</p> <p style="text-align: center;">Page 48</p>

1 Obviously I appreciate the urgency and anything I can do
2 notwithstanding this other case which I hope will be
3 finished by mid July, I will, and if it becomes
4 necessary and safe to compartmentalise it into two
5 judgments, which after all can be brought together in
6 the long run, then I will do that.

7 MR TROWER: Yes, I am grateful.

8 My Lord, if that's all that's required on one
9 area --

10 MR JUSTICE HILDYARD: I think I am going to -- if we are
11 finished on 1(a) I am going to rise a little bit so that
12 everyone can, well, those who wish to disappear
13 disappear and also to make some enquiries having regard
14 to the letter I received this morning with respect to
15 timetabling because whilst it can't dictate the result
16 I think we have to be fairly pragmatic as to
17 availabilities.

18 MR TROWER: My Lord, I am grateful. That was a point I was
19 going to raise to make sure your Lordship had actually
20 received that letter and it sounds as if my Lord has.

21 MR JUSTICE HILDYARD: Yes, thank you all very much.
22 (10.20 am)

23 (The Court adjourned)

24

25

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