(09.00am) 24 June 2016
Submissions by MR TROWER
MR JUSTICE HILDYARD: Good morning. I am so sorry to have kept you waiting. I have read the extra bits, but I must confess it was a slightly interesting evening.
MR TROWER: My Lord, indeed. Hopefully this morning's submissions will distract your Lordship from the momentous events that we are dealing with outside this court.
My Lord, we're all of us, I think, slightly in your Lordship's hands as to how it is that your Lordship would like to play this. What we have done, or some of us, I think have put in some submissions --
MR JUSTICE HILDYARD: Yes.
MR TROWER: -- to deal with what we understood to be your Lordship's questions. What I was going to do if it was helpful was simply explain to your Lordship how it was that the concept of accrual came to get into this. Because at the end of the day we say that it's a bit of a distraction and a bit of a red herring, the concept of accrual, because what we're really looking for is the concept of apply and application.
The way I thought it might be most convenient to do that is to look at where it started and then how it got picked up in the submissions and how it was developed.

Where it really started was in Mr Justice David Richards' IIA judgment at paragraph 181, which my Lord will find in the bundle, hearing bundle A, tab 19, page 204. And this is, if my Lord just looks at that, what that paragraph says in terms is, his conclusion --
MR JUSTICE HILDYARD: Sorry?
MR TROWER: Sorry, paragraph 181, page 204, tab 19 of hearing bundle A. What we are looking at here is the 2(a) judgment. What Mr Justice David Richards is doing is dealing with a submission that was made by Mr Zacaroli for Wentworth and accepting it. He says:
"181. In my judgment, these grounds make a compelling case for the proposition that the rate applicable to the debt apart from the administration is to be determined by reference to the rights of the creditor as at the commencement of the administration."
Now, what then happened was that in paragraph 15 of its submissions in relation to supplemental 1(a), York picked up on that phrase. And if we can turn that up, which is behind tab 5 of the same bundle. I think I have the wrong reference, it should be tab 1. I'm so sorry. Yes, but it is still paragraph 15. And what York says is:
"It follows from this that the reference in 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.

Although my Lord will have seen that it's not actually a word that's used by Mr Justice David Richards at all.
"...of the creditor to receive interest on the relevant debt and not to merely contingent rights to interest, ie rights the accrual of which were dependent on one or more further steps being taken subsequent to the commencement of the administration. A contingent right to interest the accrual of which was dependent upon some future step being taken would not constitute a rate of interest in fact applicable to the debt as at that date of the administration."
So that's where the concept of accrual first comes up.
We then in our submissions behind tab 2, paragraph 30, made a submission on accrual, and if my Lord will just read to the end of paragraph 30. (Pause). Now, the critical point there is that we're using the concept of accrue in the sense of becoming binding on the parties. Now, that may have been a misuse of the word "accrue", if you like, but we're saying in that sort of sense, if you've got rights which are binding on the parties which occur at the moment in time which you enter into the contract, that is the concept of accrual that we were focussing on. So we made a submission that rights accrue under a contract in 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

binding.
York then in their reply submissions, which are behind tab 5 at page 57, paragraph 14, then picked up what we had said and applied Tael to the concept that we had used. So what they did is, they pointed to the use of the Supreme Court decision -- sorry, to the use by the Supreme Court in Tael of the word "accrue" in another context to support a submission that it can't be said that a creditor has an accrued right to interest when the contingency has not accrued.
Now, Tael is in the authorities bundle behind tab 6, and we need to look at paragraph 42. So behind tab 6, page 95. The passage in Tael that's referred to by York is in 42 at the top of 95. And all that Lord Reed was saying, he says:
"42. The word 'accrue' is generally used to describe the coming into being of a right or an obligation so that the person in question then has an accrued right, or is subject to an accrued liability, as the case may be. That is the meaning which accrual usually bears, in particular, in relation to interest and other payments. The amount to which there is an entitlement may not be payable until a future date, but an entitlement may nevertheless have accrued."
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

actually appears to be focussing anyway in the second bit of that passage on the difference between the time of crystallisation and the time at which it becomes payable; although, actually, in the first bit of the passage he looks as if he's thinking about accrual in the sense in which we had originally used it, which was the accrual of the right rather than the accrual of the actual entitlement to receive interest. So the right under the contract.

Now, ultimately, of course, we say none of this terribly matters. It is a bit of a distraction because neither rule 2.88(9), nor Mr Justice David Richards in Waterfall IIA uses the concept of accrual in this context. The word is "apply", not "accrue". So York is wrong, we say in our submission, to simply to try and elide those two concepts. That's really the core of our answer to the first part of your Lordship's question in relation to Tael. So I hope that's clear as to where we're coming from on it.

So far as the second part of your Lordship's question is concerned, we deal with this in the supplemental note that we produced for today's hearing at paragraph 4 onwards. The core of our position is that the moment it's possible to identify an existing contractual right by which the parties are bound and

which entitles a creditor to payment of interest on a provable debt, the rate for which that contractual right provides can be said to apply to the provable debt. We then give an example in paragraph 5 of our note as to how that would work from a quantification perspective.

Now, that leads into the second question which flows, we say, from the answer to the first, your Lordship's second question. It is necessary to ask the question: what would the rate have been if the contractual contingency had been fulfilled? That's a helpful question to ask oneself. But it doesn't mean that the quantification of the rate -- and we're talking about quantification of the rate -- applicable for the purposes of carrying out the comparison exercise artificially assumes that the contingency had been fulfilled. That's actually the issue with which supplemental 1(c) is concerned and is dealt with in paragraph 10 of our note.

So our case is on that aspect, and my Lord I think knows that, that when you're looking at quantification as opposed to qualification, whether the rate actually qualifies for the purposes of being treated, when you're looking at quantification you don't go through an artificial exercise, you simply look at what would

have happened had the contract just continued to subsist without intervention of administration.

Now, my Lord, I hope that helps as to the administrator's position in relation to your Lordship's questions 1 and 2. Question 3, I think, everyone is agreed about, because as I understand it everyone agrees that the rate applicable to the debt can include a floating or variable rate, and so that question does not arise. The only observation we make in relation to that is that the fact that it can include a floating or variable rate is an indication, we say, in support of our position more generally in relation to this issue because one can see that in some respects a floating rate has elements of contingency built into it, because you don't know at the time of the administration exactly what the floating rate is going to be.

MR JUSTICE HILDYARD: That third question was intended to explore an issue which I had become confused about as to whether you had to look to see what the available rate of interest according to the right was at the specific time.

MR TROWER: Yes.

MR JUSTICE HILDYARD: Do you see what I mean? And you couldn't look backwards to see how events had turned out; you had to say, "Right, at that time it was X".

Supposing the floating rate was by reference to some marker in the market.

MR TROWER: LIBOR.

MR JUSTICE HILDYARD: LIBOR at that time.

MR TROWER: Yes.

MR JUSTICE HILDYARD: Did you have to assume that that was the right and that the rate conferred by the right was to be assessed at that date; or could you simply look backwards at the date when you're quantifying the amount to see what in fact happened to the rate which the right conferred?

MR TROWER: Yes.

MR JUSTICE HILDYARD: Has that --

MR TROWER: I think so, my Lord. What's important in this context is to distinguish between the question of whether or not the relevant rate qualifies as a rate for the purposes of the comparison exercise and the question of how you then go about quantifying the entitlement once you've satisfied yourself that the rate qualifies. Now, the quantification exercise is one that is being dealt with in relation to supplemental issue 1(c).

MR JUSTICE HILDYARD: I haven't quite cottoned on to 1(c) properly. 1(c) is still being considered.

MR TROWER: It's being considered, and that was one of the things that we wanted to make sure my Lord was well

aware of. It's one of the questions which Lord Justice David Richards is still considering, but it does, in the sense that we have identified in our note, bear on the issue in relation to 1(a); or certainly bear in relation to my Lord's questions in relation to 1(a), and also they're obviously very closely linked. I mean, one of the points that has become apparent as a result of my Lord's questions is that there is only quite a narrow line between the consideration of these two issues.

MR JUSTICE HILDYARD: Yes, you are right in surmising that I had not cottoned on to 1(c), and I think possibly if I had 1(c) and 1(a) might usefully have been taken together.

MR TROWER: Well, it's funny your Lordship should say that: some of us were beginning to think that might have been a more sensible approach and is the way as it has panned out.

MR JUSTICE HILDYARD: We are where we are, and you very helpfully illuminated it for me.

MR TROWER: So, my Lord, that was all I was proposing to say, but I'm very happy to try and deal with any other questions my Lord has, and it may be the others have some things they want to add.

MR JUSTICE HILDYARD: Do you want to add or clarify anything

with respect to a matter which I did not raise a specific question about, but which in pondering how I should respond I had another look at, which is the financial collateral arrangement. Is there anything you wish to say about that? If you don't, because it was not pre-notified --

MR TROWER: Can I think about that and talk to my team?

MR JUSTICE HILDYARD: Yes.

MR TROWER: My Lord, I'm just be asked something from my left. Might I just find out what? (Pause). My Lord, yes, I do not think there is anything else at the moment. Can I think about the financial collateral arrangements and come back to you?

MR JUSTICE HILDYARD: Yes, of course. Yes, just give me one second.

York will add to this as they see fit, but in a simplistic, I dare say too simplistic, sort of way, it seemed to me that looking at the supplemental question as a whole one always has to identify what the source of the right relied on is.

MR TROWER: Yes.

MR JUSTICE HILDYARD: It is the source.

MR TROWER: Yes.

MR JUSTICE HILDYARD: Now, if the source is not an existing contract but has subsequently obtained judgment, you are

in trouble.

MR TROWER: Yes, indeed. And we say that's a very clean way of thinking about the distinction between the judgment and the existing contract.

MR JUSTICE HILDYARD: And naturally York's target is, if I may say so, is to explain to me why what a new sort of source rule isn't ultimately a rather compelling answer.

MR TROWER: Yes.

MR JUSTICE HILDYARD: Let us see.

MR TROWER: Well, my Lord has the very core of the point firmly in mind, obviously.

MR JUSTICE HILDYARD: Yes. Well, I am very grateful to you, and I am also very grateful for you clarifying 1(c), which I should have spotted. Thank you.

Yes. Who wants to go next?

Submissions by MR SMITH

MR SMITH: It may make sense for me, my Lord, on behalf of York.

MR JUSTICE HILDYARD: Yes.

MR SMITH: In the sense that (Inaudible) made the running on this issue. I am very much obviously in your Lordship's hands as to what would be helpful. I was proposing to make some general remarks about what our argument is generally, focussing on what your Lordship has just mentioned, obviously, and then I'll come to the Tael

case.

My Lord, just in terms of general approach, at the outset we say yes, your Lordship is involved (Inaudible) in approaching the issues on the footing that the decision and the judgment that Lord Justice David Richards on part 1(a) is correct and what one is essentially doing is seeking to apply the reasoning and logic in that judgment to this factual scenario which has been identified in issue, the issue of 1(a).

Now, so far as the issue 1(a) is concerned, obviously your Lordship appreciates that is concerned with closeout sums and in particular the rates of interest that begins to accrue on a closeout sum as a result of action taken by the creditor.

MR JUSTICE HILDYARD: After the date of administration.

MR SMITH: And principally one is concerned if it is (Inaudible) where there is a closeout sum, and that only becomes due to the creditor sometime after the commencement of the administration. Now, your Lordship will appreciate of course that that may be something that happens a number of years later, and indeed that may be the case in this administration. My Lord, we say the real question is whether the effect of rule 2.88(9) lies with the decision of Lord Justice David Richards on part 1(a) is that where you have a creditor whose claim

is not closed out until sometime after the commencement of the administration, you only would have become entitled to contractual interest on the closeout sum at that stage would nevertheless by virtue of rule 2.88(9) in effect allowed to claim that contractual interest from the start of the administration. And, as your Lordship appreciates, that may be a period of years.

Now, the SCG represented by Mr Dicker say that is the effect. With respect to the SCG, we say, that would be a very odd result indeed. It can't have been the intention to handle(?) 2.88(9). For our part, we say the reason why that is not the result can be found simply by applying the reasoning of Mr Justice David Richards in the part A judgment, and in particular the answer is that there is no right under rule 2.88(9) for the contractual rate of interest where that rate was not in fact applicable to the debt as at the date of the commencement of the administration.

Now, our position essentially again (Inaudible) reasoning is the contractual rate only becomes applicable as a result of action taken by the creditor subsequent to the administration. In other words, where the application of the rate depends on something which the creditor does after the administration is not a rate applicable to the debt after the administration. And,

as your Lordship knows for these purposes, and we say there is a very close analogy between the position of a judgment obtained post administration and the position of a closeout amount (Inaudible) post administration, and essentially the foundation of our submission to your Lordship is that there is a very close analogy between the two, and indeed it is quite difficult to identify what the points of distinction are.

Now, just so far as the foreign judgment is concerned, obviously your Lordship appreciates what Lord Justice David Richards decided on issue 4. He decided that foreign judgment rate of interest is not a rate applicable within rule 2.88(9) where the creditor has not got that judgment at the date of the commencement of the administration. So even if the creditor subsequently in fact gets a judgment, and at that point becomes entitled to the judgment rate of interest on that judgment, his reasoning is that that nonetheless can't be said to be a rate applicable to the debt. And the reason why he says that is because he's looking at the position as it exists as at the date of the commencement of the administration.

Now, my Lord, we say there is, as I say, a very close analogy between this situation and the situation of a closeout amount which arises following the

commencement of the administration and to which a contractual rate of interest would then apply at that point. If I can just elaborate that. What we say in essence is, where a creditor is suing on a contract, then the judgment which he obtains as a result of exercising those contractual rights is as much something which springs from a contract as a closeout amount. In fact, the two situations are rather similar, because in both cases the creditor is relying on his existing contractual rights as at the date of the administration to obtain a set of further and different rights, post administration. In the one case he's relying on his existing contractual rights to get judgment, which is a different set of rights; in the other case, he's relying on his existing set of contractual rights to get a closeout amount, which is also, as your Lordship will appreciate, a different set of rights. It may be a sum that is payable in a different currency, it may be a sum that's calculated after taking account of netting. It's a different set of rights and obligations.

My Lord, we say actually there is no real difference between the two: in both cases one is relying on the existing rights, it's a new set of rights, and it's quite difficult, we would say, to identify a meaningful distinction and as a matter of logic to why one if one

draws a difference or distinction. Now, my Lord, in this context we obviously rely on --

MR JUSTICE HILDYARD: I am sorry to interrupt. Your position is this, is it really: that there is no meaningful distinction from the point of view of the analysis required by supplemental question 1(a) between the triggering of a right pursuant to an act taken after the date of administration and the vindication of the right by judgment subsequently?

MR SMITH: Yes.

MR JUSTICE HILDYARD: That's what you say. No difference between triggering and indication.

MR SMITH: Yes. Exactly. We say in both cases what the creditor is doing is relying on the rights he has at the date of administration; he's taking those rights post administration; he's using them to get something different, either a closeout amount or a judgment. And the fact it's a judgment rather than a closeout amount we say doesn't make a difference.

MR JUSTICE HILDYARD: But again, rather simplistically, and an analogy is always dangerous, particularly one chosen by me, but let us have a think about it. Supposing you regard the contractual rights as a blue suitcase and the judgment rights as a red suitcase, you can't find in the blue suitcase the interest rate which the judgment

confers. Only in the red suitcase. Now, that analogy may not be helpful to you, but it goes to this question of source.

MR SMITH: My Lord, well, we say that's not the correct way of analysing it. Rather than in the two different cases what one does have is a set of contractual rights as at the date of the administration, and then in both cases the creditor is then relying on those rights post administration with a different set of rights. My Lord, if one tests that and says that actually in the judgment case, let us say the contract did refer and say within it that if the creditor gets a judgment he will be entitled to judgments at interest on that judgment, let us say the contract does say that, one has to ask oneself well, why is it that should make all the difference, and in our submission it doesn't. One really can't draw the distinction between the two situations.

MR JUSTICE HILDYARD: So, again, being simplistic, just so that I clarify my mind: you say the answer is that the contractual right in the blue suitcase is pregnant with the right to the judgment rate if the right is eventually vindicated in that way.

MR SMITH: Yes. We would say that. Absolutely.

MR JUSTICE HILDYARD: That is what you say.

MR SMITH: Absolutely. Now, my Lord I was just going to show you very briefly particular parts of Lord Justice David Richards which we rely on. I'll do that very quickly because your Lordship has no doubt already looked at (Inaudible). It is in tab 19 of bundle A. First of all paragraph 177.

MR JUSTICE HILDYARD: Can I just ask, is there a transcript or is my note going to be all I have got?

UNKNOWN SPEAKER: My Lord, apparently it will be transcribed but I'm afraid only from the court's tapes, so we will get it done as soon as possible.

MR SMITH: So, my Lord, I was just going to show you very quickly the relevant parts we say of the judgment of Mr Justice David Richards. Paragraph 177 on page 283 first of all, where he starts to deal with the argument that has been put on issue 4. Really one sees the nub of his reasoning, we submit, in the very second sentence of paragraph 177:

"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 in our submission he does envisage that a rate only becomes applicable as a result of steps taken post administration does not fall within 2.88(9). Then in the final sentence, having gone through some examples,

he said:

"These examples do no more than demonstrate why the words 'the rate applicable to the debt apart from the administration' should be given their obvious meaning of the rate in fact applicable to the debt."

Now, he then goes on to deal with points that were put by Mr Zacaroli on behalf of Wentworth, which he essentially accepted. Paragraph 180, in the final two sentences, makes an important point, in our submission. He draws the distinction between the judgment subsequently obtained and the contractual rights as they exist at the date of the administration. He makes the point that actually what you are not proving for is the judgment debt but rather the judgment debt quantifies the contractual rights, and it is those rights which are subject the of the proof. Again, we say that applies equally by analogy to a closeout amount obtained subsequently. It's exactly the same as with the judgment. What's happening in that situation is the creditor proves in respect of his right as exists at the commencement of the administration and the closeout amount simply quantifies those rights for the purposes of proof.

Then paragraph 181, there is the sentence my learned friend Mr Trower I think took your Lordship to, where he endorses the proposition that the rate applicable to the

debt apart from the administration is to be determined by reference to the rights of the creditor as at the commencement of the administration.

Then, my Lord, also importantly we submit is paragraph 182, because what he went on to deal with in paragraph 182 was an argument based on an alleged contingent right to interest as at the date of the administration. The argument which was put in 182 was to say well actually, a creditor has got a contingent right to interest under the judgment, because he has always got the contingent right to go and get a judgment. You will see Lord Justice David Richards rejected that as a basis for saying that that would be a rate applicable to the debt for the purposes of rule 2.88(9). So one sees that actually he did address the contingent right to interest point. He did not in fact accept that in the basis saying that that would be a rate in fact applicable to the debt 2.88(9).

So, my Lord, those are the signposts --

MR JUSTICE HILDYARD: How does that fit with what I understood to be your acceptance that in the blue suitcase is the right to whatever you get under a judgment which you have obtained, albeit after the date of administration, pursuant to the vindication by judgment of the original right? What Lord Justice David

Richards appears to be saying is that that is true in an abstract or ethereal sense but not in a real enough sense for it to qualify.

MR SMITH: That is right. So he says the fact you have got that, if you like, contingent right is not enough to qualify for the purposes of rule 2.88(9). Our submission to your Lordship is accepting that reasoning as being correct, one takes it across and applies it to the analogous situation of the closeout amount and the fact that as at the date of commencement of the administration the creditor has a contingent right to charge default interest on a closeout amount if and when he obtains that subsequently. It is likewise, we would say, a rather ethereal contingent right and does not qualify for the purposes of rule 2.88(9).

So again, the exercise that we're undertaking is to say, well, look at the reasoning of Mr Justice David Richards in relation to the judgment apply that by analogy to the question of a closeout.

Now, my Lord, I am going to very briefly just deal with Tael. My learned friend Mr Trower showed you how that point has arisen. As I say, the primary way we put our argument is not by reference to the language of accrued, we accept that does not appear within rule 2.88(9); we put our case by drawing the analogy with the

foreign judgment position.

So far as Tael is concerned, the relevance of that is that it does demonstrate, in my submission, that the joint administrators' argument which they were running in paragraph 30 of their submissions, the right becomes accrued when you enter into the contract, is wrong. I think my learned friend may accept that that is not --

MR JUSTICE HILDYARD: But they say that one amount that is accrued is not other amounts, and they say "When we say accrued, this is what we mean".

MR SMITH: Yes.

MR JUSTICE HILDYARD: And on the basis of what they say "accrued" means, Tael has nothing to do with it. That is the submission.

MR SMITH: Yes. I think what it boils down to, I think my learned friend Mr Trower says, "Well, actually one can forget about the use of the language accrued." He says it is sufficient for the purposes of a rate to be applicable.

MR JUSTICE HILDYARD: He says you have highjacked the word; and, having highjacked the word, you have imposed the case. You say no, the word was there because that's what it looked like, and what it looks like also looks like Tael.

MR SMITH: Yes. That's basically right. I think your

Lordship put it much more succinctly than I would be able to do it. So your Lordship sees how that arises, and to take my learned friend Mr Trower's substantive proposition, he says in his submission that you have entered into a contract which provide for a rate potentially become payable in the future under one of the (Inaudible) of contract. We say, well, that isn't sufficient, because look at the reasoning of Lord Justice David Richards on the foreign judgment by analogy, and that shows that that doesn't work.

So, my Lord, that was all I was going to say about Tael, and Mr Trower has already shown your Lordship the relevant paragraphs in any event. The other questions I suspect were of less materiality. We have answered those in paragraphs 14 and 15 of our submissions. I think we are all agreed on question 3.

MR JUSTICE HILDYARD: The last one you are all agreed. I can relax about that.

MR SMITH: Yes. Question 2 I think it follows really from what we have been submitting on question 1, in the sense that we say well, if the application of the rates is dependent on contingencies then those contingencies do in fact (Inaudible) satisfied as at the date of the commencement of the administration.

MR JUSTICE HILDYARD: Contingencies under the control of the

claimant.

MR SMITH: Yes. So, my Lord, those are our submissions. Unless your Lordship has any --

MR JUSTICE HILDYARD: Can I just ask you about -- I mean, you rely a lot on the phrase "in fact applicable", the tail end of the paragraph you specifically referred me to in Lord Justice David Richards' judgment.

MR SMITH: Yes.

MR JUSTICE HILDYARD: But you accept that a floating rate, or a rate which is not presently in fact applicable because it only arises according to a contingency not then appreciated but which in fact arises, you accept that that could apply if you are wrong as to the rest.

MR SMITH: Yes. Just on that, to be clear, on the floating rate we say it applies because as at the date of the commencement of the administration, the creditor has an actual right to have that rate, whatever it may be, applied to his debt. So where at the commencement of the administration the creditor has an existing contractual right to charge LIBOR on his debt as it is at that time, that is sufficient.

MR JUSTICE HILDYARD: So if you are wrong, that follows.

MR SMITH: Yes.

MR JUSTICE HILDYARD: If you are wrong as to the original point, that follows.

MR SMITH: Yes.
MR JUSTICE HILDYARD: What about judgment rate, which you draw an analogy with? Supposing the judgment rate at the relevant date of administration is 8 per cent, to take an example, and has been for a long time, but it subsequently rises.
MR SMITH: The specific provision on this in the rules, I think it is rule 2.88(6) from recollection, which fixed the judgments at rates by reference to the rate as the date of commencement of the administration.
MR JUSTICE HILDYARD: So you say that that is simply dealt with by a specific sub-rule.
MR SMITH: Yes. Indeed, we actually say that's supportive of our argument.
MR JUSTICE HILDYARD: Yes, I know.
MR SMITH: I think it is rule 2.88(6). I will be corrected if I'm wrong, but that's my recollection on that. Indeed, my recollection is Lord Justice David Richards mentioned this point in his judgment. He made the point that if the judgment rate does subsequently go up, it is still fixed with the rate as it was at the date of the commencement of the administration.
MR JUSTICE HILDYARD: Yes, but he was thinking of a judgment rate pursuant to a judgment.
MR SMITH: Yes, he was.

MR JUSTICE HILDYARD: The source of the right being the particular rules of the judgment.
MR SMITH: Yes.
MR JUSTICE HILDYARD: What I am positing is that, say there was a right in the contract which says "When we trigger this right, if there is any delay, the interest rate that we adopt is not LIBOR, it's judgment rate in Ruritania."
MR SMITH: I see. So your Lordship is positing a contractual provision.
MR JUSTICE HILDYARD: Yes. That is what is being posited in this case, although not in Lord Justice David Richards' case.
MR SMITH: Yes. Well, we say that that wouldn't be a rate applicable to the debt because it's not applicable to the debt as at the commencement of the administration. It is dependent upon one or more contingencies (Inaudible).
MR JUSTICE HILDYARD: Yes. That is your original argument. But does (6) apply even if the judgment rate simply happens to be the choice of the contractual parties as the rate they reckon they want?
MR SMITH: No, I do not believe it would, no.
MR JUSTICE HILDYARD: It doesn't really, does it?
MR SMITH: No.

MR JUSTICE HILDYARD: But what do you say then, if it is that contractual right and you're wrong as to the first part, do you say that you are stuck with the judgment rate at the date of administration or what?
MR SMITH: Yes. One does the comparison exercise between your existing right to contractual interest as at the administration and compare that with the Judgments Act rate at that moment, and one looks at which is the greater.
MR JUSTICE HILDYARD: At that moment?
MR SMITH: Yes.
MR JUSTICE HILDYARD: And if it rolls up to 20 per cent, and so you would, pursuant to the contractual right, have been entitled to that rate, nevertheless you are stuck with what it was at the date of administration?
MR SMITH: Yes. For the purposes of doing the comparison exercise, you take your starting point as the commencement of the administration, but I think one accepts, looking at the contractual rate which in fact applies as at that time, one can then calculate the total amount of interest (a) under the Judgments Act rate, (b) under the contractual rate over the relevant period, and one works out which gives you the greater sum. So if one has got a contractual right that says "I have gor a right to have LIBOR applied to my debt,"

one can calculate --
MR JUSTICE HILDYARD: That I appreciate, but supposing the contractual right is to a rate which is selected to be the judgment rate, maybe in Ruritania, maybe here, and that judgment rate, the future which we can't see yet discloses, varies over the course of time, and there is upwards, so it is in the interests of the creditor to, is it not, that he is entitled to the fluctuation in the rate over the course of time until he is paid out.
MR SMITH: Yes.
MR JUSTICE HILDYARD: Do you say that even if you lose on the first part you win on that part to exclude the upward fluctuation after the date of administration?
MR SMITH: No, I don't say that because if your Lordship's positing a contractual provision which says creditor has an existing debt, he has an existing right as at the date of commencement of the administration to have the judgment rate as it is from time to time in Ruritania, applied to that debt, then we would accept that he has at the date of the commencement of the administration an existing right to have that rate as it is from time to time applied to his debt.
MR JUSTICE HILDYARD: So if you lose on the first you lose on the second.
MR SMITH: Yes, I am not saying there is a separate point.

MR JUSTICE HILDYARD: Supposing the right to the rate was subject to some further act taken after the date of administration by the creditor, so that the right says you can have this extraordinary rate in Ruritania but only if you take the following step which is a step which cannot be taken prior to the date of administration, then what?
MR SMITH: Then we say that would make the difference because then you have a situation where he doesn't have an ability to in fact have that rate applied to his debt as at the date of commencement of administration but it is dependent on subsequent action taken by him post administration. That's where we would draw the line in our submission.
So, my Lord, unless --
MR JUSTICE HILDYARD: Do you wish to add anything about the financial collateral arrangement number 2 regulations?
MR SMITH: I am not sure I do is the short answer. I think we've dealt with that, did we not?
MR JUSTICE HILDYARD: I suppose they may be confined to history, I don't know.
MR SMITH: Let me just have a look because I think we dealt with that in our reply submission behind tab 5, page 61.
MR JUSTICE HILDYARD: Yes.
MR SMITH: I have to say it is not a point I specifically

focus on again.
MR JUSTICE HILDYARD: Yes, I'm sorry, I should have -- it is a danger of sort of mulling.
MR SMITH: No, not at all, my Lord.
MR JUSTICE HILDYARD: I should have alerted you.
MR SMITH: We dealt, I hope, with what the administrators say about that in paragraphs 26 to 28.
MR JUSTICE HILDYARD: Yes.
MR SMITH: I mean, essentially we say it doesn't really assist your Lordship.
MR JUSTICE HILDYARD: I think you say that if the administrators were right that would override the 2.88 right, is that --
MR SMITH: That is right. If they are right about the financial collateral rate, I think they're saying that would override 2.88 and we say that's unlikely and that the financial collateral regulations don't tell your Lordship anything about how interest should be calculated. We say there is nothing in there which bears on the calculation of interest.
MR JUSTICE HILDYARD: Your point is merely defensive.
MR SMITH: It is, absolutely.
MR JUSTICE HILDYARD: Insofar as you are relying on those we can't accept that it can have been intended to have that effect.

MR SMITH: Yes, exactly. It is purely defensive and we say it is not relevant and questions of calculation of interest on any view are dealt with in effect solely by 2.88.
MR JUSTICE HILDYARD: Is there anything you want to add with respect to 1(c) still under the care and control of Lord Justice David Richards?
MR SMITH: No, I mean, on that our position is essentially aligned with that taken by Wentworth, so I mean if we were wrong on 1(a) we agree with the stance taken by Wentworth on 1(c) and that one would look at how matters actually developed during the course of administration and we would disagree with the stance taken by the senior credit agreement on 1(c).
But, as your Lordship knows, our primary position is that one doesn't get into the 1(c) conundrum at all because the actual answer to this is that it is simply not a rate applicable in the first place.
So unless I can assist your Lordship any further.
MR JUSTICE HILDYARD: No, that is very helpful and thank you also for the written submissions. Mr Dicker.
Submissions by MR DICKER
MR DICKER: My Lord, I can be very short. Your Lordship has our written submissions. We agree with what my learned friend Mr Trower said this morning. All I wanted to do

was emphasise six points and I think your Lordship probably has at least five of them.
Firstly, the test is that set out in 2.889. It is the rate applicable to the debt apart from the administration. There is no reference to the concept of accrual.
Secondly, it is not intended to be a complicated test. It simply requires you to look at the creditor's rights under his pre-existing contract. York confuses matters, we say, by referring to issue 4. Your Lordship has the point. The distinction between this case and issue 4 is that where you have a subsequent foreign judgment the source of the right to interest is regarded as that foreign judgment. And that is regarded as effectively a new right.
The third point is the rate doesn't have to be the rate which was accruing at the date of administration. Your Lordship has this point. The parties agree that they are entitled to a floating rate, not merely whatever the rate was which was accruing on the date of administration.
Again, there is no difficulty in calculating the amount to which the creditor is entitled. You can terminate at the date you pay interest. Interest is payable to the period for which the debt was outstanding

so you look back and you calculate how much is due.
And your Lordship I think has the point as well that the movement in the floating rate may be as a result of a number of different contingencies, either on the part of a third party, say the Bank of England changing the base rate, on the part of the debtor, failure to pay for seven days, or on the part of the creditor serving notice. We say none of that makes any difference at all.
MR JUSTICE HILDYARD: So if the super rate, let us call it, can only be triggered, the right in the contract to the super rate can only be triggered by an act taken some time, maybe a long time after the date of administration, the creditor is nevertheless entitled to that super rate.
MR DICKER: Yes, there is then a separate question of quantification which I'll come on to, but, yes, the mere fact that the rate only starts accruing on service of a notice doesn't make any difference, we say.
The fourth point is this --
MR JUSTICE HILDYARD: That is the source point?
MR DICKER: Yes. The fourth point is -- it an application of the source point, your Lordship is quite right.
The fourth right is this: if the underlying debt is a contingent debt it is important to appreciate that as

we understand York's case when you get to Rule 2.889, any contractual rate is effectively irrelevant because there was no interest accruing as at the date of administration. So if you have a contingent debt that falls in the date before the date of administration, the creditor is then entitled to interest in accordance with the terms of the contract. If, however, the contingent debt only falls in the date after the date of the administration on York's case it is not. We say that makes no sense at all and it is inconsistent with the reasoning of Mr Justice Richards in relation to --
MR JUSTICE HILDYARD: This is the early termination date point.
MR DICKER: Yes.
MR JUSTICE HILDYARD: That is going to occur necessarily some time after.
MR DICKER: Not in all cases because --
MR JUSTICE HILDYARD: Is there an automatic provision?
MR DICKER: Correct. But subject to that your Lordship is right.
The fifth point which your Lordship may or may not have picked up on concerns what a creditor is proving for. There is a subsidiary argument on the part of York. My learned friend referred you to paragraph 180 of Mr Justice David Richard's judgment. It is the

penultimate sentence where the learned judge says:
"If the creditor does not have a judgment at the date of administration the debt proved by the creditor is not a judgment subsequently obtained but the debt as at the date of administration."
What my learned friend seeks to do is to say effectively the same reasoning applies to a closeout payment on termination of an ISDA master agreement. He says although you subsequently closeout and are entitled to a termination sum, what you have proved for is not that termination sum but whatever your rights were prior to closeout on the date of administration.
Now, we say that's, to the extent we respectfully understand it, wrong. We deal with that at paragraphs 23 and 24 of our first round of submissions on supplemental issue 1(a).
My Lord, the sixth and final point is this: again, your Lordship remarked on the overlap between supplemental issue 1(a) and 1(c) and there plainly is an overlap. My Lord, there are undoubtedly potential issues as to how you calculate the applicable rate of interest where the contract only terminated, where the contingency only occurred after the date of administration. And on that essentially Wentworth and the administrators as we understand it, say, well, all

you do is wait for the relevant event to occur and then you work out how much interest --
MR JUSTICE HILDYARD: The relevant event being?
MR DICKER: The post administration closeout --
MR JUSTICE HILDYARD: Right.
MR DICKER: -- and determination. Then you work out what rate of interest was applicable effectively from that date in accordance with the contract. We say that doesn't reflect the ISDA master agreement and it also doesn't allow for the consequence of discounting contingent debts back to the date of administration.
Now, your Lordship is not concerned with that. Mr Justice David Richards is. Those complications have no impact on the underlying question raised by supplemental question 1(a).
MR JUSTICE HILDYARD: So one sees it is interesting but it is not relevant.
MR DICKER: Absolutely. Certainly the latter views may differ as to the former.
MR JUSTICE HILDYARD: Do you wish to say anything about the point made that the relevant rate, as you call it, might be a very long time after the date of administration, in this case I understand in certain instances?
MR DICKER: No, my Lord.
MR JUSTICE HILDYARD: You say that is forensic.

MR DICKER: No, I would but to Mr Justice David Richards because that effectively raises the question of quantification. On the administrators' case it may arise much much later but the only consequence of that is that the applicable rate, as it were, doesn't come in until the relevant event occurs. We say we may or may not be right about this but that doesn't fully reflect the operation of the proof process, the need to discount back to the date of administration and the fact that that debt is then treated as outstanding from that date to rank pari passu with everyone else.
MR JUSTICE HILDYARD: No, I think I've got myself confused. Does not the interest rate, whatever it may be, run from the date of administration in any event?
MR DICKER: Well, that's an issue essentially for Mr Justice David Richards. This issue arises under 2.889. What you are doing is essentially identifying two different rates and working out which is the greater. One is the judgment act rate for the period. The second --
MR JUSTICE HILDYARD: The period being?
MR DICKER: The period for which the debt is outstanding.
MR JUSTICE HILDYARD: From the date of administration until payment.
MR DICKER: The second is the rate applicable to the debt

apart from the administration, and there are issues as to how you calculate that. Are you simply looking, as I said, Wentworth and the administrators say, are you simply looking at how much interest you would in fact have earned looking back for the relevant period? Or is the calculation different given the way in which the proof process works? That is not an issue for your Lordship. That is a question of calculation only. And that's the issue raised by supplemental issue 1(c).
MR JUSTICE HILDYARD: I think I am asking a very jejune question, for which I apologise, which is take the case where the date of administration is Day 1 and Day 380, the closeout sum, the mechanic, is crystallised and confers a right to interest greater than our judgment rate. What is the position between Day 1, the date of administration, and Day 380?
MR DICKER: Your Lordship has identified a real issue which is precisely the issue raised in supplemental issue 1(c).
MR JUSTICE HILDYARD: Right.
MR DICKER: And, my Lord, it may be that I haven't been clear.
MR JUSTICE HILDYARD: No, I am sure you have, I'm sorry.
MR DICKER: I am trying to be clear. There is a difference between the two parties. As I understand it,

Wentworths' and the administrators' position is that in that interregnum period there is effectively no rate applicable to the debt, assuming that this higher rate only clicks in as at the date that the contingency occurs. So essentially when you make the comparison required by 2.889 and you look at how much the creditor would have received in respect of his contractual rate for, this period the answer is zero. That's their argument. We say, again, this is a matter for Mr Justice David Richards on 1(c), that that doesn't actually give the creditor the interest to which he is effectively or should be entitled because of the consequence of discounting the debt back to Day 1.
MR JUSTICE HILDYARD: I see. There are a number of possible answers I say in a sort of jejune way. I mean, it might be that between 1 and 387 and you get the default rate, the judgment rate, or alternatively you get nothing. Alternatively you discount back.
MR DICKER: Your Lordship is right in theory. I don't think anyone --
MR JUSTICE HILDYARD: Anyone is contending for that.
MR DICKER: -- was contending, as it were, for a mix and match effect where they get the highest at any particular point in time.
MR JUSTICE HILDYARD: Because that is a batty notion or

because?
MR DICKER: For whatever reason. I think the choice essentially came down to a global -- essentially when you come to 2.889 and you look at the contractual approach you are looking at it as a whole for the relevant period and then you ask whether, taken as a whole, the amount the creditor would receive is higher than the judgment act rate in which case that is what he is entitled to, or lower at which he gets the judgment act rate. You don't salami slice it into periods.
MR JUSTICE HILDYARD: How beefy, long in other words, are the 1(c) submissions?
MR DICKER: My Lord, we have put in submissions and your Lordship has them in the bundle. You have them.
MR JUSTICE HILDYARD: Yes. I haven't read them but they are there in this pile.
MR DICKER: They are there. How far Lord Justice David Richards has got --
MR JUSTICE HILDYARD: No, it is only that I will read them with the warning you have given me which is however interesting they don't help, but I would quite like to know what their confine was so I don't trample on anything or at least I don't unwittingly.
MR DICKER: Bundle B and your Lordship will see, for example, tab 2 is the senior creditor group's

submissions on issue 1(c).
MR JUSTICE HILDYARD: Tab 2.
MR DICKER: Tab 2, tab 7.
MR JUSTICE HILDYARD: I am afraid I have not read B at all but that is very helpful. Thank you.
MR DICKER: They are there only if your Lordship wanted to look at them because obviously they are the submissions we submitted to --
MR JUSTICE HILDYARD: All I am worried about is (a) getting any help I can but (b) I wouldn't unwittingly want to tread on the daisies which Lord Justice David Richards is tending.
MR DICKER: And in relation to that, your Lordship can look at what is in bundle B. If it is in bundle B that's a matter for Mr Justice David Richards.
MR JUSTICE HILDYARD: Yes.
MR DICKER: Unless I can help your Lordship further.
MR JUSTICE HILDYARD: No, I am very grateful to you. Does anyone want to add any more?
MR ZACAROLI: I don't wish to add anything to the -- because as your Lordship knows we have made substantive submissions on 1(c) and those are in the bundle.
MR JUSTICE HILDYARD: Thank you very much. Good. Mr Trower, do you want to?
MR TROWER: I don't think I do, my Lord. You asked me about

the financial collateral arrangements.
MR JUSTICE HILDYARD: Yes.
MR TROWER: I don't want to add anything to what is said.
MR JUSTICE HILDYARD: Thank you.
I am extremely grateful to all of you. I am sorry to have called for your assistance but it has helped me at your expense. I thought that actually the next, that Waterfall III involved more of the same cast but actually there is to be a change of some of the scenery.
MR TROWER: Yes.
MR JUSTICE HILDYARD: Quite a lot of the scenery. I apologise for the fact that I have not yet sent you a draft judgment. I will obviously take on board -- I propose to hand it down as a composite judgment, dealing with all the issues that we addressed, be they under English, New York, German law or supplemental 1(a).
MR TROWER: Right.
MR JUSTICE HILDYARD: And I would hope that that will come within the next fortnight at the latest. When I send it around in draft I spied from little dabblings into some of the transcripts on previous occasions that Lord Justice David Richards was particularly careful with respect to the dissemination of the draft and at some point I would welcome your assistance in writing on

that if you wish to prescribe or recommend to me any particular process. In his case I think he was away for two weeks and so there was a more aggravated difficulty.
MR TROWER: Yes.
MR JUSTICE HILDYARD: But nevertheless there is bound to be some considerable period because the judgment so far is pretty long and will take a bit of processing and I will also, as part of that process, if I do inadvertently unwittingly step into areas which might be offensive to the questions being dealt with by Mr Justice David Richards, then obviously I would like to know that.
MR TROWER: Yes.
MR JUSTICE HILDYARD: But there is a problem about sensitivity, market sensitivity obviously, so I would like to begin to think about dissemination.
MR TROWER: Yes. Certainly for our part we'll take instructions on that as to what the problems are and make some proposals to the other parties and to your Lordship.
MR JUSTICE HILDYARD: Thank you very much.
MR ALLISON: My Lord, there was one matter. I wanted to wait until that debate was finished. My Lord mentioned German issues a moment ago.
MR JUSTICE HILDYARD: Yes.

MR ALLISON: My Lord may have seen a letter.
MR JUSTICE HILDYARD: Yes, what is the attitude -- I had not overnight had a look at the German position but I understand that the case on 15 June impacts.

MR ALLISON: My Lord, that is our understanding. That is certainly the understanding of our expert and those in Germany. What we did on Wednesday was to write to your Lordship and to the other parties bringing the decisions to your Lordship's attention and the attention of the other parties, highlighting why we say it's relevant to the German issues.
MR JUSTICE HILDYARD: You say it vindicates your expert on an issue.
MR ALLISON: On a key issue which was, my Lord -- and I recognise now it may not be the moment -- one of the key issues on which the experts were absolutely in agreement was there had to be a defaulted payment obligation for a right to further damage to even be on the claims.
MR JUSTICE HILDYARD: That was the basis point.
MR ALLISON: Indeed. And what has happened in Germany's highest court only earlier this month, indeed in the LBIE insolvency, is that there has been a finding in relation to the German master agreement, so the very

same master agreement, that the claim arises by reference to the German insolvency provisions, which my Lord may recall, the points are summarised in the letter that Judge Fischer said were directly relevant and that is how the claim would be calculated. He said that is why in his opinion there could be no claim in existence before the insolvency so there could be no question of default prior to the insolvency.

In contrast Professor Mülbert said the German insolvency code in his opinion was totally irrelevant because LBIE was not the insolvency in Germany.

Now Germany's highest court has looked at that point and has considered that the fact it is governed by German law means that it very much is in play in, the German insolvency code is the relevant provision for working out what the claim is.

I am not for a moment expecting people to make substantive submissions on the point today but that is why it is brought to my Lord's attention. We have given an English translation to my Lord as well. It may be my Lord would like to hear very short further submissions from the parties as to how this is best dealt with but we thought this was clearly something that should be brought to my Lord's attention because in our submission it is directly on point and is something

which was covered by the expert evidence and indeed is a decision in LBIE's insolvency in relation to the very same master agreement.

MR JUSTICE HILDYARD: Yes. What are the contestants' position on this?

MR DICKER: My Lord, ours is simply first of all we haven't had an opportunity to consider it. Secondly, there plainly needs to be an agreed official translation. There isn't at present. Thirdly, we would obviously want an opportunity if my learned friend is going to seek to rely on it to respond. Subject to that, we have no objection in principle.

MR JUSTICE HILDYARD: And is it premature to determine the form of the responses? Will it be in writing? Are you envisaging an oral hearing? Is there any possibility of acquiring any comment from the German experts? Is it too early is that?

MR DICKER: It is simply too early to say.

MR JUSTICE HILDYARD: In that case the two weeks might go back a bit but I would like to know as soon as practical what your prescription is as to how we should deal with. I take it you are acceding to the fact that I really must focus on this and have it before me given the dearth of German explanation on the point until now, if this is relevant at all.

MR DICKER: Yes, and I can't help your Lordship any further in relation to that today.

MR JUSTICE HILDYARD: No.

MR DICKER: I don't know how quickly an agreed translation can be obtained, my Lord. Obviously some of the working out how to respond to it can be done while that's going on.

MR JUSTICE HILDYARD: Yes.

MR DICKER: I wonder whether the sensible course isn't to try and produce both that and any brief response on our part similar to the letter from Kirklands as soon as we can, and then the parties take stock with your Lordship and decide what's appropriate. It may be that's sufficient but it may be that one or other of the parties or your Lordship thinks that more would be required.

MR JUSTICE HILDYARD: Yes, I have a case restarting for closing submissions on somewhere around 7 July and presently I'm enjoying the first tranche of a skeleton argument of slightly over 800 pages, so I'm sort of enjoying other things, but at some point if you could let me know what you propose and if it were necessary to have a short oral hearing then it would have to be arranged for your convenience and mine which would I think be another 9 o'clock start in all probability.

MR DICKER: Yes, that's fully understood.

MR TROWER: My Lord, can I just make this observation and as your Lordship will recall we didn't really participate in the German law points.

MR JUSTICE HILDYARD: No.

MR TROWER: If this does begin to develop into an issue of some complexity, difficulty and time taking, would your Lordship consider thinking about hiving off the German law issues and dealing with them in a separate judgment? That's all -- we raise that as a possibility. What might be unfortunate is if my Lord had reached conclusions in relation to everything else and we had to wait on what became a complicated German law issue. I just raise that.

MR JUSTICE HILDYARD: I think it is a good point but I would like to deal with it incrementally. The purpose of giving a composite judgment was so that if there were thoughts that arose, albeit in a very different context, that they fed into the mix. As you probably know there's an issue of accrual in a different Lehman matter which makes one particularly sensitive to the accrual point.

MR TROWER: Yes. Tax.

MR JUSTICE HILDYARD: Which you say doesn't exist. Yes, very good. Will you keep me informed?

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

MR TROWER: Yes, I am grateful.

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

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

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

MR JUSTICE HILDYARD: Yes, thank you all very much.

(10.20 am)

(The Court adjourned)