

# Appellant's notice

(All appeals except small claims track appeals)

For Court use only	
Appeal Court Ref. No.	2015/3764
Date filed	13 <sup>th</sup> November 2015

Notes for guidance are available which will help you complete this form. Please read them carefully before you complete each section.



## Section 1 Details of the claim or case you are appealing against

Claim or Case no.  Fee Account no.

Name(s) of the  Claimant(s)  Applicant(s)  Petitioner(s)

THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS INTERNATIONAL (EUROPE) (IN ADMINISTRATION)

Name(s) of the  Defendant(s)  Respondent(s)

(1) BURLINGTON LOAN MANAGEMENT LIMITED, (2) CVI GVF (LUX) MASTER S.A.R.L., (3) HUTCHINSON INVESTORS, LLC, (4) WENTWORTH SONS SUB-DEBT S.A.R.L. (5) YORK GLOBAL FINANCE BDH, LLC

### Details of the party appealing ('The Appellant')

Name

See continuation sheet *CVI GVF (LUX) MASTER SARR*

Address (including postcode)

See continuation sheet  
*C/O FRESHFIELDS BRUCKHAUS  
DERINGEE LLP  
65 FLEET STREET  
LONDON EC4A 3DF*

Tel No.	See continuation sheet
Fax	See continuation sheet
E-mail	See continuation sheet

### Details of the Respondent to the appeal

Name

THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS INTERNATIONAL (EUROPE) (IN ADMINISTRATION)

Address (including postcode)

c/o Linklaters LLP  
One Silk Street  
London EC2Y 8HQ  
  
Ref: Tony Bugg/ Euan Clarke/ Jared Oyston

Tel No.	020 7456 2000
Fax	020 7456 3482
E-mail	tony.bugg@linklaters.com

Details of additional parties (if any) are attached

Yes  No

## Section 2 Details of the appeal

From which court is the appeal being brought?

The County Court at

The Family Court at

High Court

Queen's Bench Division

Chancery Division

Family Division

Other (please specify)

What is the name of the Judge whose decision you want to appeal?

MR JUSTICE DAVID RICHARDS

What is the status of the Judge whose decision you want to appeal?

District Judge or Deputy

Circuit Judge or Recorder

Tribunal Judge

Master or Deputy

High Court Judge or Deputy

Justice(s) of the Peace

What is the date of the decision you wish to appeal against?

9 October 2013

To which track, if any, was the claim or case allocated?

Fast track

Multi-track

Not allocated to a track

Nature of the decision you wish to appeal

Case management decision

Grant or refusal of interim relief

Final decision

A previous appeal decision

## Section 3 Legal representation

Are you legally represented?

Yes  No

If 'Yes', please give details of your solicitor below

Name of the firm of solicitors representing you

See continuation sheet

FRESHFIELDS BRUCE WOODS JERLINGER LLP

The address (including postcode) of the firm of solicitors representing you

See continuation sheet

65 FLEET STREET  
LONDON EC4A 3DF

Tel No.	See continuation sheet
Fax	See continuation sheet
E-mail	See continuation sheet
DX	See continuation sheet
Ref.	See continuation sheet

Are you, the Appellant, in receipt of a Legal Aid Certificate or a Community Legal Service Fund (CLS) certificate?

Yes  No

Is the respondent legally represented?

Yes  No

If 'Yes', please give details of the respondent's solicitor below

Name and address (including postcode) of the firm of solicitors representing the respondent

Linklaters LLP  
One Silk Street  
London EC2Y 8HQ

Tel No.	020 7456 2000
Fax	020 7456 3482
E-mail	tony.bugg@linklaters.com
DX	DX 10, Chancery Lane
Ref.	Tony Bugg/ Euan Clarke/ Jared Oyston

## Section 4 Permission to appeal

Do you need permission to appeal?

Yes  No

Has permission to appeal been granted?

Yes (Complete Box A)

No (Complete Box B)

### Box A

Date of order granting permission

9 OCTOBER 2015

Name of Judge granting permission

MR JUSTICE DAVID RICHARDS

### Box B

I

the Appellant('s solicitor) seek permission to appeal.

If permission to appeal has been granted in part by the lower court, do you seek permission to appeal in respect of the grounds refused by the lower court?

Yes  No

## Section 5 Other information required for the appeal

Please set out the order (or part of the order) you wish to appeal against

Declarations (iii), (iv), (v), (viii), (x), (xviii) and (xix) of the Order of Mr Justice David Richard dated 9 October 2015, as set out in the attached continuation sheet.

Have you lodged this notice with the court in time?  
(There are different types of appeal -  
see Guidance Notes N161A)

Yes  No

If 'No' you must complete  
**Part B of Section 9**

## Section 6 Grounds of appeal

Please state, in numbered paragraphs, **on a separate sheet** attached to this notice and entitled 'Grounds of Appeal' (also in the top right hand corner add your claim or case number and full name), why you are saying that the Judge who made the order you are appealing was wrong.

I confirm that the grounds of appeal are attached to this notice.

## Section 7 Arguments in support of grounds for appeal

I confirm that the arguments (known as a 'Skeleton Argument') in support of the 'Grounds of Appeal' are set out **on a separate sheet** and attached to this notice.

**OR** (in the case of appeals other than to the Court of Appeal)

I confirm that the arguments (known as a 'Skeleton Argument') in support of the 'Grounds of Appeal' will follow within 14 days of filing this Appellant's Notice

## Section 8 What are you asking the Appeal Court to do?

I am asking the appeal court to:-  
(please tick the appropriate box)

- set aside the order which I am appealing
- vary the order which I am appealing and substitute the following order. Set out in the following space the order you are asking for:-

An order setting aside declarations (iii), (iv), (v), (viii), (x), (xviii) and (xix) of the Order of Mr Justice David Richard dated 9 October 2015, and granting in their place the declarations set out in the attached continuation sheet.

- order a new trial

## Section 9 Other applications

Complete this section **only** if you are making any additional applications.

### Part A

- I apply for a stay of execution. (You must set out in Section 10 your reasons for seeking a stay of execution and evidence in support of your application.)

### Part B

- I apply for an extension of time for filing my appeal notice. (You must set out in Section 10 the reasons for the delay and what steps you have taken since the decision you are appealing.)

### Part C

- I apply for an order that:

The parties may file their skeleton argument in support of the Grounds of Appeal at such later date as the Court of Appeal thinks appropriate.

(You must set out in Section 10 your reasons and your evidence in support of your application.)

**Section 10 Evidence in support**

In support of my application(s) in Section 9, I wish to rely upon the following reasons and evidence:

**Statement of Truth** – This must be completed in support of the evidence in Section 10

I believe (The appellant believes) that the facts stated in this section are true.

Full name

Name of appellant's solicitor's firm

signed   
Appellant ('s solicitor)

position or office held   
(if signing on behalf of firm or company)

## Section 11 Supporting documents

To support your appeal you should file with this notice all relevant documents listed below. To show which documents you are filing, please tick the appropriate boxes.

If you do not have a document that you intend to use to support your appeal complete the box over the page.

### In the county court or High Court:

- three copies of the appellant's notice for the appeal court and three copies of the grounds of appeal;
- one additional copy of the appellant's notice and grounds of appeal for each of the respondents;
- one copy of the sealed (stamped by the court) order being appealed;
- a copy of any order giving or refusing permission to appeal; together with a copy of the judge's reasons for allowing or refusing permission to appeal; and
- a copy of the legal aid or CLSF certificate (if legally represented).

### In the Court of Appeal:

- three copies of the appellant's notice and three copies of the grounds of appeal;
- one additional copy of the appellant's notice and one copy of the grounds of appeal for each of the respondent;
- one copy of the grounds of appeal on a separate sheet attached to each of the appellant's notices filed;
- one copy of the sealed (stamped by the court) order or tribunal determination being appealed;
- a copy of any order giving or refusing permission to appeal together with a copy of the judge's reasons for allowing or refusing permission to appeal;
- one copy of any witness statement or affidavit in support of any application included in the appellant's notice;
- where the decision of the lower court was itself made on appeal, a copy of the first order, the reasons given by the judge who made it and the appellant's notice of appeal against that order;
- in a claim for judicial review or a statutory appeal a copy of the original decision which was the subject of the application to the lower court;
- a copy of the order allocating the case to a track (if any)
- one copy of the skeleton arguments in support of the appeal or application for permission to appeal;
- a copy of the approved transcript of judgment; and
- a copy of the legal aid or CLSF certificate (if legally represented)

Reasons why you have not supplied a document and date when you expect it to be available:-

Title of document and reason not supplied	Date when it will be supplied
Skeleton Argument - timetable to be determined	To be determined
Order of Mr Justice Richards dated 9 October 2015 - contents of Order not yet agreed between the parties	Upon the Order being finalised and sealed by the High Court

**Section 12** The notice of appeal must be signed here

Signed



Appellant('s Solicitor)



IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM

THE HIGH COURT OF JUSTICE

No. 7942 of 2008

CHANCERY DIVISION

COMPANIES COURT

Mr Justice David Richards

IN THE MATTER OF LEHMAN BROTHERS INTERNATIONAL  
(EUROPE) (IN ADMINISTRATION)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

B E T W E E N

(1) ANTONY VICTOR LOMAS

(2) STEVEN ANTHONY PEARSON

(3) PAUL DAVID COPLEY

(4) RUSSELL DOWNS

(5) JULIAN GUY PARR

(THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS  
INTERNATIONAL (EUROPE) (IN ADMINISTRATION))

Applicants

- and -

(1) BURLINGTON LOAN MANAGEMENT LIMITED

(2) CVI GVF (LUX) MASTER S.A.R.L.

(3) HUTCHINSON INVESTORS, LLC

(4) WENTWORTH SONS SUB-DEBT S.A.R.L.

(5) YORK GLOBAL FINANCE BDH, LLC

Respondents

APPELLANTS NOTICE

Continuation Sheet

SECTION 1: DETAILS OF THE CLAIM OR CASE YOU ARE APPEALING  
AGAINST

DETAILS OF ADDITIONAL PARTIES:

Details of the party appealing ("The APPELLANT")

(1) Burlington Loan Management Limited	Schulte Roth & Zabel International LLP One Eagle Place, London SW1Y 6AF T +44 (0) 20 7081 8000 F +44 (0) 20 7081 8010 E sonya.vandegraaff@srz.com Reference: Sonya Van De Graaff
(2) CVI GVF (LUX) Master Sarl	Freshfields Bruckhaus Deringer LLP 65 Fleet Street, London EC4Y 1HS T +44 20 7936 4000 F +44 20 7108 5781 E Christopher.robinson@freshfields.com Reference: Christopher Robinson
(3) Hutchinson Investors, LLC	Ropes & Gray International LLP 60 Ludgate Hill, London EC4M 7AW T +44 20 3201 1628 F +44 20 3201 1758 E James.Douglas@ropesgray.com Reference: James Douglas

Details of the parties responding

Wentworth Sons Sub-Debt Sarl	Kirkland & Ellis International LLP 30 St Mary Axe London EC3A 8AF T +44 (0) 20 7469 2000 E kon.asimacopoulos@kirkland.com Reference: Partha Kar and Kon Asimacopoulos
York Global Finance BDH, LLC	Michelmores LLP 48 Chancery Lane, London WC2A 1JF

	<p>T 44 (0) 207 659 7680</p> <p>F+44 (0) 20 7659 7661</p> <p>E charles.maunder@michelmores.com</p> <p>Reference: Charles Maunder</p>
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**SECTION 3: LEGAL REPRESENTATION**

DETAILS OF ADDITIONAL PARTIES:

Details of the party appealing ("The APPELLANT")

(1) Burlington Loan Management Limited	<p>Schulte Roth &amp; Zabel International LLP</p> <p>One Eagle Place, London SW1Y 6AF</p> <p>T +44 (0) 20 7081 8000</p> <p>F +44 (0) 20 7081 8010</p> <p>E sonya.vandegraaff@srz.com</p> <p>Reference: Sonya Van De Graaff</p>
(2) CVI GVF (LUX) Master Sarl	<p>Freshfields Bruckhaus Deringer LLP</p> <p>65 Fleet Street, London EC4Y 1HS</p> <p>T +44 20 7936 4000</p> <p>F +44 20 7108 5781</p> <p>E Christopher.robinson@freshfields.com</p> <p>Reference: Christopher Robinson</p>
(3) Hutchinson Investors, LLC	<p>Ropes &amp; Gray International LLP</p> <p>60 Ludgate Hill, London EC4M 7AW</p> <p>T +44 20 3201 1628</p> <p>F +44 20 3201 1758</p> <p>E James.Douglas@ropesgray.com</p> <p>Reference: James Douglas</p>

Details of the parties responding

Wentworth Sons Sub-Debt Sarl	<p>Kirkland &amp; Ellis International LLP</p> <p>30 St Mary Axe</p>
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	<p>London EC3A 8AF  T +44 (0) 20 7469 2000  E kon.asimacopoulos@kirkland.com  Reference: Partha Kar and Kon Asimacopoulos</p>
York Global Finance BDH, LLC	<p>Michelmores LLP  48 Chancery Lane, London WC2A 1JF  T 44 (0) 207 659 7680  F+44 (0) 20 7659 7661  E charles.maunder@michelmores.com  Reference: Charles Maunder</p>

**SECTION 5: DETAILS OF ORDER BEING APPEALED**

Issue 2 (paragraph 2 of the Application Notice)

(iii) On the true construction of Rule 2.88(7) of the Rules, Statutory Interest is to be calculated on the basis of allocating dividends first to the reduction of the principal (i.e. the proved debt) and then to the payment of accrued Statutory Interest; and is not to be calculated on the basis of notionally allocating dividends first to the payment of accrued Statutory Interest and then in reduction of the principal debt.

Issue 2A (paragraph 39 of the Application Notice)

(iv) A creditor entitled to Statutory Interest is not entitled to any further interest or damages or any other form of compensation in respect of the time taken for Statutory Interest to be paid.

(v) If and to the extent that Statutory Interest paid to a creditor on a proved debt under Rule 2.88(7) is less than the amount of interest to which that creditor would otherwise have been entitled in respect of that debt, the creditor does not have a non-provable claim for the difference.

Issue 3 (paragraph 3 of the Application Notice)

(viii) Where Statutory Interest is payable at a “*rate applicable to the debt apart from the administration*” and such rate is a compounding rate, accrued Statutory Interest does not continue to compound following the payment in full of the principal amount through dividends.

Issue 4 (paragraph 4 of the Application Notice)

(x) The words “*the rate applicable to the debt apart from the administration*” in Rule 2.88(9) of the Rules include a foreign judgment rate of interest applicable to a foreign judgment obtained prior to the Date of Administration but do not include:

- a. a foreign judgment rate of interest applicable to a foreign judgment obtained after the Date of Administration; or
- b. a foreign judgment rate of interest which would have become applicable to the debt if the creditor had obtained a foreign judgment (when it did not in fact do so).

Paragraph 29 of the Application Notice

(xviii) Where a creditor with a claim originally denominated in a foreign currency receives Statutory Interest on a Sterling admitted claim at the Judgments Act Rate and such Statutory Interest is less than the amount of interest at the Judgments Act Rate which the creditor would have received on his claim in the original foreign currency, the creditor has no non-provable claim in respect of the difference (without prejudice to any non-provable claim to interest that such creditor may have pursuant to paragraph (vi)).

Paragraph 30 of the Application Notice

- (xix) Where a creditor with a claim originally denominated in a foreign currency receives Statutory Interest on a Sterling admitted claim at the “*rate applicable to the debt apart from the administration*” and such Statutory Interest is less than the amount of contractual interest which the creditor would have received on his claim in the original foreign currency, the creditor has no non-provable claim for the difference (without prejudice to any non-provable claim to interest that such creditor may have pursuant to paragraph (vi)).

## **SECTION 8: DETAILS OF PROPOSED ORDER**

### **Issue 2 (paragraph 2 of the Application Notice)**

- (iii) On the true construction of Rule 2.88(7) of the Rules, Statutory Interest is to be calculated on the basis of notionally allocating dividends first to the payment of accrued Statutory Interest and then in reduction of the principal debt (i.e. the proved debt); and is not to be calculated on the basis of allocating dividends first to the reduction of the principal and then to the payment of accrued Statutory Interest.

### **Issue 2A (paragraph 39 of the Application Notice)**

- (iv) a. On the true construction of Rule 2.88(7), Statutory Interest is due (or to be treated as due) as soon as all proved debts have been paid or provided for in full.
- b. Where there is delay in payment of Statutory Interest, a non-provable claim for interest or compensation for delay in payment of Statutory Interest may arise as a matter of contract or other right (including a common law right to damages) in respect of the time taken for Statutory Interest to be paid.

- (v) If and to the extent that Statutory Interest paid to a creditor on a proved debt under Rule 2.88(7) is less than the amount of interest to which that creditor would otherwise have been entitled in respect of that debt, the creditor has a non-provable claim for the difference.
  
- (viii) Where Statutory Interest is payable at a “*rate applicable to the debt apart from the administration*” and such rate is a compounding rate, accrued Statutory Interest continues to compound following the payment in full of the principal amount through dividends.

Issue 4 (paragraph 4 of the Application Notice)

- (x) The words “*the rate applicable to the debt apart from the administration*” in Rule 2.88(9) of the Rules include a foreign judgment rate of interest applicable to a foreign judgment obtained prior to the Date of Administration and also include:
  - c. a foreign judgment rate of interest applicable to a foreign judgment obtained after the Date of Administration; or
  - d. a foreign judgment rate of interest which would have become applicable to the debt if the creditor had obtained a foreign judgment (when it did not in fact do so).

Paragraph 29 of the Application Notice

- (xviii) Where a creditor with a claim originally denominated in a foreign currency receives Statutory Interest on a Sterling admitted claim at the Judgments Act Rate and such Statutory Interest is less than the amount of interest at the Judgments Act Rate which the creditor would have received on his claim in the original foreign currency, the creditor has a non-provable claim in respect of the difference.

Paragraph 30 of the Application Notice

- (xix) Where a creditor with a claim originally denominated in a foreign currency receives Statutory Interest on a Sterling admitted claim at the “*rate applicable to the debt apart from the administration*” and such Statutory Interest is less than the amount of contractual interest which the creditor would have received on his claim in the original foreign currency, the creditor has a non-provable claim for the difference.



## GROUND OF APPEAL

1. The Senior Creditor Group appeals with the permission of the Judge against seven of the declarations made in the Tranche A order handed down by Mr Justice David Richards on 9 October 2015 (the “Order”), reflecting parts of his judgment dated 31 July 2015 (the “Judgment”).

### Declaration (iii)

2. The learned Judge erred in law in holding that, on the true construction of Rule 2.88(7) of the Rules, Statutory Interest payable in the event of a surplus is to be calculated on the basis of allocating dividends in respect of proved debts first to the reduction of the principal (i.e. the proved debt) and then to the payment of accrued Statutory Interest.
3. The learned Judge should have held that all Statutory Interest payable in accordance with Rule 2.88(7), on the true construction of the rule as a whole, and in light of prior legislation, authority and fundamental principles of the insolvency scheme, is to be calculated on the basis of notionally allocating dividends first to the payment of accrued Statutory Interest and then in reduction of the principal debts (the “Notional Calculation”). In particular, the learned Judge erred in the following respects:
  - (1) The learned Judge failed to apply the Notional Calculation, being an application of the rule in *Bower v Marris* (1841) C&P 351, 41 ER 525 (“*Bower v Marris*”). The rule in *Bower v Marris* is a fundamental rule of fairness and equity, determining the order in which debts are to be treated as discharged in the course of administration of a fund. It provides, for the purpose of calculating interest, that dividends are notionally applied first in satisfaction of post-administration interest accrued down to the date of the relevant dividend and thereafter to capital. Interest is then calculated on the

notionally reduced capital down to the next dividend and so on: *Re Lines Bros (No.2)* [1984] 1 Ch 438.

- (2) The learned Judge failed to construe Rule 2.88 in a manner which gave effect to basic principles and sensible policy objectives: *Re Kaupthing Singer & Friedlander Ltd* [2011] 1 BCLC 12 at [32]-[33]. Fundamental principles of English insolvency law relevant to the interpretation of Rule 2.88 include the principles that:
- (a) A company's debts and liabilities, whether provable or not, must be satisfied in full before any surplus can be distributed to shareholders (the "Creditors First Principle"): *Re Nortel GmbH* [2014] AC 209 at [39]; *Joint Administrators of LBHI2 Ltd and ors v Lomas and ors* [2015] EWCA Civ 485 at [60] and [184], [189], [198].
  - (b) The operation of the insolvency code as applied to a distributing administration does not affect the underlying debts, and only affects the way in which the debts can be enforced: *Wight v Eckhardt Marine GmbH* [2004] 1 AC 147 at [26] and [27].
  - (c) Provable debts are discharged only to the extent that they are paid out of dividends: *Joint Administrators of LBHI2 Ltd and ors v Lomas and ors* [2015] EWCA Civ 485 at [137].
  - (d) If there is a surplus after all proved debts have been paid in full, creditors are entitled to interest as compensation for the delay resulting from the statutory scheme, in a manner that respects their underlying rights. They should not be prejudiced by the accidental delay which, in consequence of the insolvency proceedings or other circumstances, occurs in realising the assets or in distributing them, or by the moratorium that protects the insolvency proceedings and prevents creditors from enforcing their debts or obtaining Judgment on them: *Re Humber Ironworks and Shipbuilding Company* (1868-9) LR 4 Ch App 643 at 646; *AG of Canada v Confederation Trust Co* (2003) 65 OR (3d) 519 at [32].

- (e) If there is a surplus after all provable debts and rights to Statutory Interest have been satisfied in full, the company is treated as if it is, and always has been, solvent. Any debts or liabilities which have not been discharged in full by the process of the insolvency should be satisfied before funds are returned to shareholders unless the Act or Rules necessarily provide otherwise: *Joint Administrators of LBHI2 Ltd and ors v Lomas and ors* [2015] EWCA Civ 485 at [137], [139], [145]-[147], [251], [252] and [253].
- (f) The debts and liabilities which must be discharged before funds are returned to shareholders include any claims which have arisen or have become actual liabilities of the company since the commencement of the administration, or are the non-provable unsatisfied balance of claims that were otherwise provable: *ibid*, *Re R-R Realisations Ltd* [1980] 1 WLR 805; *Re Danka Business Systems Plc* [2013] Ch 506.
- (3) The learned Judge failed to give due or sufficient weight to the fact that:
- (a) The rule in *Bower v Marris* was consistently held (from at least 1743 through to the introduction of the Insolvency Act 1986) to be reflected in the effect of the insolvency scheme (both bankruptcy and corporate insolvency) in relation to the fair and correct approach to the calculation of post-insolvency interest after the discharge of the principal debts payable out of an estate which had proved to be solvent: see *Bromley v Goodere* (1743) 1 Atk 75; *Re Humber Ironworks and Shipbuilding Co, Warrant Finance Company's case* (1869) LR 4 Ch App 643; *Re Humber Ironworks and Shipbuilding Co, Warrant Finance Company's case (No.2)* (1869) LR 5 Ch App 88; *Re Joint Stock Discount Co* (1896) LR 5 Ch App 86 and (1870) LR 10 Eq 11; *Re Lines Bros Ltd (No.2)* [1984] Ch 438. This approach recognised the underlying fairness and equity of the rule in *Bower v Marris*, and fundamental principles of insolvency law as identified above.
- (b) Prior to the Judge's decision, there was no English or foreign case which had concluded that the applicable insolvency regime with which

it was concerned did not provide for the application of the rule in *Bower v Marris* when calculating interest payable out of any surplus before funds were returned to shareholders. In other jurisdictions, including those where interest was payable in accordance with statute (and there was otherwise no underlying right to interest), the rule in *Bower v Marris* had been held to continue to apply to the calculation of post-insolvency interest: see, for example, *AG of Canada v Confederation Trust Company* [2003] OJ No. 2754; *The Attorney General of Canada v Reliance Insurance Co* [2009] OJ No. 3037; *Re Tabore Holdings Pty Ltd (in liq)* [2004] NSWSC 397; *Gerah Imports Pty Ltd v The Duke Group* [2004] SASC 178.

- (c) There is no indication in the Report of the Cork Committee or the Government's White Paper preceding the enactment of the Insolvency Act that the introduction of the 1986 was intended to abolish the application of the rule in *Bower v Marris*: the rule is not mentioned in either document.
  - (d) The introduction of a uniform regime in 1986 for post-insolvency interest across all formal insolvency proceedings did not require the abolition of, and is not inconsistent with the application of, the rule in *Bower v Marris*.
- (4) Absent clear wording to the contrary, Rule 2.88 (and the equivalent provisions applicable to bankruptcy and liquidations) should therefore be construed in a manner which gives effect to the rule in *Bower v Marris*:
- (a) The rule embodies an underlying principle of equity or fairness applicable to the distribution of a fund from which interest is payable.
  - (b) There is no reason of policy or principle why Rule 2.88 should be construed as depriving creditors of the right to have interest calculated on the basis that dividends that have been paid on their proved debts should be notionally re-allocated once a surplus is established and Statutory Interest is payable.

- (c) A construction of Rule 2.88 which does not give effect to the rule in *Bower v Marris* fails to give effect to fundamental principles of insolvency, including the Creditors First Principle, and undermines the intended scheme for payment of Statutory Interest. In particular:
- i. A creditor who is otherwise entitled to interest in respect of its debt calculated in accordance with the principle in *Bower v Marris* will receive Statutory Interest calculated under Rule 2.88 in a manner which does not reflect fully the rate otherwise applicable to its debt apart from the administration.
  - ii. Such a creditor will have no non-provable claim in respect of its unsatisfied entitlement to interest (see declaration (v)), and subject to the appeal against that declaration).
  - iii. As a consequence, funds will be returned to shareholders (or, in bankruptcy, to the discharged debtor) at a point when the claims of creditors have not been fully satisfied.
  - iv. There is no reason of policy or principle which should disentitle a creditor to satisfaction in full of its outstanding rights where the debtor company has a relevant surplus after payment of provable debts and Statutory Interest (see, by analogy, *Joint Administrators of LBHI2 Ltd and ors v Lomas and ors* [2015] EWCA Civ 485 at [154]).
  - v. Creditors will be deprived of compensation at the rate of 8% per annum for any delay between the payment of dividends and the payment of Statutory Interest, thus undermining creditors' entitlement to Statutory Interest at the statutory rate of 8% per annum.
  - vi. Creditors may be encouraged to make late submission of proofs in order to delay payment of dividends in respect of the principal debt (or not to agree their claims with the officeholder), and may be treated unequally as a consequence of when payments are received.

- (5) The learned Judge erred in concluding that Rule 2.88 contains clear words which exclude the application of the rule. On the contrary, a construction of Rule 2.88 which gives effect to the rule in *Bower v Marris* is compatible with the language of, and regime established by, Rule 2.88:
- (a) On its true construction, the language of Rule 2.88 indicates that Statutory Interest will be payable once proved debts have been paid but does not prescribe the method for calculating such interest. Similar language to that used in Rule 2.88 was used in prior legislation (for example, Section 129 of the Bankruptcy Act 1824) and did not prevent the rule in *Bower v Marris* from applying.
  - (b) Calculation of Statutory Interest in accordance with the rule in *Bower v Marris* requires interest to be calculated on a notional basis i.e. as if prior dividends had been allocated first to interest and then to principal. It does not require actual reallocation of dividends in respect of interest rather than principal.
  - (c) Consistent with the language of Rule 2.88(7), interest is payable for the periods during which the proved debts have been outstanding since the company entered administration. However, the payment made in respect of Statutory Interest is calculated as if prior dividends had been allocated first in respect of interest outstanding as at the date of each dividend. See *Re Lines Bros (No.2)* [1984] Ch 438.
- (6) The learned Judge should have concluded that a construction of Rule 2.88 which gives effect to the principle in *Bower v Marris* does not depend on the legal rules as to appropriation of payments, or require that as at the date of payment of each dividend interest was due and payable or accruing due to the creditor (see, for example, *Whittingstall v Grover* (1886) 55 LT 213); alternatively, the provisions as to payment of Statutory Interest pursuant to Rule 2.88 satisfy any such requirements. In particular:

- (a) The right to Statutory Interest was an existing contingent right as from the commencement of the administration, such that interest was accruing on the proved debt throughout the administration subject to the contingency of a surplus arising; or
  - (b) Statutory Interest is to be treated as having been accruing throughout the period of the administration once a surplus arises.
- (7) In the alternative, the learned Judge should have held that Statutory Interest payable at the rate applicable apart from the administration (rather than all Statutory Interest including interest payable at the Judgments Act rate) should be calculated on the basis of the Notional Calculation:
- (a) On the true construction of Rule 2.88(9), the “rate” applicable to the debt apart from the administration includes all factors relevant to the rate at which interest accrues apart from the administration, including all modes of calculating interest such as compounding or the application of the rule in *Bower v Marris*.
  - (b) Such a construction is consistent with the fundamental principles identified above, in particular the Creditors First principle.
  - (c) Interest was accruing on any such debt throughout the period of the administration by reason of the creditor’s pre-existing rights, such that any legal rule relating to the appropriation of payments which may need to be satisfied in order for the rule in *Bower v Marris* was satisfied.

**Declaration (iv)**

4. The learned Judge erred in law in holding that a creditor entitled to Statutory Interest is not entitled to any further interest or damages or any other form of compensation in respect of the time taken for Statutory Interest to be paid.

5. The learned Judge should have held that a creditor is entitled to further interest or damages or compensation in respect of the time taken for Statutory Interest to be paid. In particular, his decision was wrong because he should have concluded that:

- (1) No person should be prejudiced by the accidental delay which, in consequence of the steps necessary to administer assets in an insolvency proceeding, takes place in realising assets.
- (2) If and to the extent that there is a delay between the payment of proved debts and the payment of Statutory Interest, the Statutory Interest received will not represent the compensation for which Rule 2.88 provides i.e. the time value of money is such that the Statutory Interest when paid will not reflect the intended rate of interest payable pursuant to Rule 2.88.
- (3) On the true construction of Rule 2.88, the payment of Statutory Interest is due (or to be treated as due) as soon as all proved debts have been paid or provided for in full.
- (4) A non-provable claim for interest or compensation for delay in payment of Statutory Interest may arise as a matter of contract (i.e. if there is a general right to interest on any sums due to the creditor) or other right, including a common law right to damages in accordance with the decision in *Sempre Metals Ltd v Inland Revenue Commissioners* [2008] 1 AC 561.
- (5) Such a claim for interest or compensation must be paid before any surplus is returned to shareholders in accordance with the Creditors First Principle.

**Declarations (v), (viii) (xviii) and (xix)**

6. The learned Judge erred in law in holding that:

- (1) If and to the extent that Statutory Interest paid to a creditor on a proved debt under Rule 2.88(7) is less than the amount of interest to which that



creditor would otherwise have been entitled in respect of that debt, the creditor does not have a non-provable claim for the difference.

- (2) If a creditor with a claim originally denominated in a foreign currency receives Statutory Interest on a Sterling admitted claim at the Judgments Act Rate and such Statutory Interest is less than the amount of interest at the Judgments Act Rate which the creditor would have received on his claim in the original foreign currency, the creditor has no non-provable claim for the difference.
- (3) If a creditor with a claim originally denominated in a foreign currency receives Statutory Interest on a Sterling admitted claim at the “rate applicable to the debt apart from the administration” and such Statutory Interest is less than the amount of contractual interest which the creditor would have received on his claim in the original foreign currency, the creditor has no non-provable claim for the difference.

7. The learned Judge should have held that in each of the above scenarios, the creditor has a non-provable claim for the difference. In particular, his decision was wrong because he should have concluded that:

- (1) The Creditors First Principle requires that the rights of creditors should be satisfied in full from any surplus before the remainder is returned to shareholders: *Joint Administrators of LBHI2 Ltd and ors v Lomas and ors* [2015] EWCA Civ 485.
- (2) A creditor’s right to interest or compensation for delay in payment of the debt due for the period after the commencement of an administration may arise as a matter of contract or other right, including a common law right to damages in accordance with the decision in *Sempra Metals Ltd v Inland Revenue Commissioners* [2008] 1 AC 561 and, to the extent not otherwise reflected in the Statutory Interest paid (including by virtue of the “rate applicable to the debt apart from the administration”), give rise to a non-provable claim (*Re Humber Ironworks and Shipbuilding Company* (1869) LR 4 Ch App 643 at 647 and (by analogy) the Judgment at [168]-[170]).

- (3) On its true construction, Rule 2.88 ought not to be regarded as an exclusive code for the payment of interest/compensation for delayed payment in respect of provable debts for the period following administration. In particular, although Rule 2.88 provides a uniform regime for the payment of Statutory Interest out of a surplus, neither the language of Rule 2.88 nor its purpose justifies it being construed as operating to the exclusion of any other right to interest/compensation which is not fully satisfied by virtue of Statutory Interest received pursuant to Rule 2.88(7), and therefore contrary to the Creditors First Principle.
- (4) If and to the extent that Statutory Interest paid to a creditor on a proved debt under Rule 2.88(7) is less than the amount of interest to which that creditor would otherwise have been entitled in respect of that debt, the creditor has a non-provable claim for the difference which must be satisfied before funds are returned to shareholders.

**Declaration (viii)**

8. The learned Judge erred in law in holding that where Statutory Interest is payable at a “*rate applicable to the debt apart from the administration*” and such rate is a compounding rate, accrued Statutory Interest does not continue to compound on its proved debt apart from the administration following the payment in full of the principal amount of the proved debt.
9. If, contrary to the appeal against declaration (iii), calculation of the amount of interest payable out of the surplus proceeds on the premise that principal was paid in full as at the point of payment of the final dividend in respect of principal, the learned Judge should have held that Statutory Interest continues to compound in full following the payment of the principal debt. In particular, his decision was wrong because he should have concluded that Rule 2.88 should be construed in a manner which is consistent with the fundamental principles identified above. The learned Judge’s construction fails to give effect to the creditor’s underlying right to be paid interest on a compound basis, which right

must be satisfied in full from the surplus before any funds can be returned to shareholders. The grounds set out in paragraph 7 above are repeated.

**Declaration (x)**

10. The learned Judge erred in law in holding that the words “*the rate applicable to the debt apart from the administration*” in rule 2.88(9) of the Rules do not include a foreign judgment rate of interest applicable to a foreign judgment obtained after the Date of Administration.
11. The learned Judge should have held that “*the rate applicable to the debt apart from the administration*” in rule 2.88(9) does include a foreign judgment rate of interest applicable to a foreign judgment obtained after the Date of Administration. In particular, his decision was wrong because he should have concluded that:
  - (1) On its true construction, Rule 2.88(9) requires identification of the rate that would have been applicable to the debt apart from the administration during the period of the administration. It is predicated on identifying a counter-factual rate i.e. that which would have applied to the debt apart from the administration. It extends to a creditor who obtains a foreign judgment after the commencement of the administration (whether as a consequence of proceedings commenced before or after the commencement of the administration): the foreign judgment rate is the rate applicable to the debt apart from the administration.
  - (2) Such a construction of Rule 2.88(9):
    - (a) Reflects insofar as is possible the position that the creditor would have been in if the company is treated as if it is, and always has been, solvent.
    - (b) Avoids a rush to judgment pre administration.
    - (c) Provides proper and full compensation to a creditor at the rate that it is entitled to by virtue of the foreign judgment.

- (3) On its true construction, Rule 2.88(9) cannot require (as the learned Judge held) that the “rate” is already “*in fact applicable to the debt*” (Judgment at [177]) as at the date of the commencement of the administration:
- (a) Such an interpretation is not supported by the language of Rule 2.88(9), and requires the Rule to be read as “*the rate applicable to the debt on the relevant date apart from the administration.*”
  - (b) The assertion of any such cut-off date is inconsistent with the manner in which creditors’ post-insolvency entitlements have always been capable of being enforced against the surplus in respect of which there is no cut-off date of the commencement of the insolvency. The payment of Statutory Interest is logically anterior to, and falls to be made at the point where a surplus has arisen, rather than as at the commencement of the administration, and Rule 2.88(9) should be construed accordingly.
  - (c) The rate at which Statutory Interest is in fact payable by virtue of being the rate applicable “*apart from the administration*” under a contract may change during the period of the administration (including depending on matters such as changes in applicable base rates or LIBOR). It need not be the rate actually payable as at the commencement of the administration.
  - (d) Statutory Interest is payable on future or contingent debts at a rate applicable apart from the administration, and from the commencement of the administration i.e. where it is not, in fact, applicable to the debt as at the commencement of the administration.
  - (e) The learned Judge’s interpretation would lead to arbitrary results which cannot have been intended as between creditors who had obtained foreign judgments prior to the commencement of the administration, and those who obtain such judgments after administration.

- (4) In the alternative, if the rate applicable to the debt apart from the administration is to be determined by reference to the existing rights of the creditor as at the commencement of the administration, it suffices if such a right is a contingent right in the sense described by the Supreme Court in *Re Nortel GmbH* [2014] AC 209. On its true construction, Rule 2.88 should not be limited to current rights to interest in fact applicable to the debt as at the commencement of the administration (i.e. current vested entitlements). There is no basis as a matter of language for any such restriction, nor does it make sense to so interpret Rule 2.88: the rule requires the identification of the rate applicable apart from the administration, not an assessment of the interest rate in fact applicable as at the date of the administration.
12. Further, the learned Judge further erred in law in holding that the words “*the rate applicable to the debt apart from the administration*” in rule 2.88(9) of the Rules do not include a foreign judgment rate of interest which would have become applicable to the debt if the creditor had obtained a foreign judgment (when it did not in fact do so).
13. The learned Judge should have held that “*the rate applicable to the debt apart from the administration*” in rule 2.88(9) does include a foreign judgment rate of interest which would have become applicable to the debt if the creditor had obtained a foreign judgment (when it did not in fact do so). In particular, his decision was wrong given the grounds set out in paragraph 11 above, and because he should have concluded that:
- (1) On its true construction, Rule 2.88(9) extends to a creditor who was contingently entitled to obtain a foreign judgment and would therefore have been able to obtain the benefit of a foreign judgment rate of interest but for the administration: the creditor had a right to obtain interest at that rate which rate is, for the purpose of Rule 2.88(9), the rate applicable to the debt apart from the administration.
- (2) Such a construction of Rule 2.88(9):

- (a) Avoids a rush to post administration judgment.
- (b) Provides proper and full compensation to a creditor at the rate that it would have been compensated at for the delay arising from the insolvency proceedings which have prevented it from establishing its claim by way of proceedings before the foreign court.
- (c) Ensures that a creditor's right to obtain judgment in a particular jurisdiction (and therefore the creditor's right to avail itself of a particular foreign judgment rate) is satisfied insofar as possible by the process of administration and the payment of Statutory Interest.
- (d) Avoids further arbitrary results which cannot have been intended as between, for example, (i) creditors who had obtained foreign judgments prior to the commencement of the administration; (ii) creditors who had commenced proceedings in the foreign court before the date of administration but who had not obtained foreign judgments; (iii) creditors who issued proceedings in a foreign court after the commencement of the administration; and obtained a judgment and (iv) creditors entitled to commence proceedings in foreign court and obtain judgment, but who refrain from doing so either before or after the commencement of the administration.