In the Supreme Court of the United Kingdom

Notice of objection/ Acknowledgement

(1) BURLINGTON LOAN MANAGEMENT LIMITED
(2) CVI GVF (LUX) MASTER SÀRL
(3) HUTCHINSON INVESTORS LLC
(4) YORK GLOBAL FINANCE BDH LLC

— V —

(1) ANTONY VICTOR LOMAS, (2) STEVEN ANTHONY PEARSON, (3) PAUL DAVID COPLEY, (4) RUSSELL DOWNS, (5) JULIAN GUY PARR (as the joint administrators of Lehman Brothers International (Europe))
(6) WENTWORTH SONS SUB-DEBT SÀRL

Appeal number: UKSC2017/0205; UKSC2017/0206

Date of filing: 05/DEC/2017
D D M M M Y Y Y Y

Name of respondent

WENTWORTH SONS SUB-DEBT SÀRL

Respondent's solicitors

Kirkland & Ellis International LLP

Name of appellant

See continuation sheet

Appellant's solicitors

See continuation sheet

1. Respondent

Respondent's full name: WENTWORTH SONS SUB-DEBT SÀRL

The respondent was served with the

- [x] application for permission to appeal
- [ ] notice of appeal
- [ ] application

On date: 21/NOV/2017 (D D M M M Y Y Y Y)

The respondent intends to ask the Court to:

- [x] refuse to grant permission to appeal
- [ ] order the appellant to give security for costs if permission to appeal is granted
- [ ] dismiss the appeal
- [ ] give the respondent permission to cross-appeal
- [ ] allow the appeal for reasons which are different from, or additional to, those given by the court below
- [ ] Other *(please specify)*

The respondent wishes to receive notice of any hearing date and to be advised of progress. The respondent's details are:

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How would you prefer us to communicate with you?

- [ ] DX
- [ ] Email
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2. Certificate of Service

Either complete this section or attach a separate certificate

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Other D D / M M M / Y Y Y Y

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by

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3. Other information about the respondent

☐ The respondent is in receipt of public funding/legal aid

Certificate number

☐ The respondent is applying for public funding/legal aid

Information about the respondent's case

Set out here the respondent's grounds of appeal, reasons why permission to appeal should be refused or why the appeal should be allowed. Include information to explain what the respondent intends to ask the Court to do.

See continuation sheet

Is the respondent seeking a declaration of incompatibility?

☐ Yes ☑ No

☐ The respondent will seek to raise issues under the Human Rights Act 1998 *(please give brief details)*

☐ The respondent will ask the court to make a reference to the European Court of Justice *(please give brief details)*

Please return your completed form to:

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NOTICE OF OBJECTION OF WENTWORTH SONS SUB-DEBT SÀRL

CONTINUATION SHEET TO PAGE 1

Appellants

1. SENIOR CREDITOR GROUP ("SCG"), COMPRISING:

i. BURLINGTON LOAN MANAGEMENT LIMITED

ii. CVI GVF (LUX) MASTER SÀRL

iii. HUTCHINSON INVESTORS LLC

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Introduction

1. The SCG should be refused permission to appeal on the *Bower v Marris* Calculation and the Compound Interest Issue, and York on the *Bower v Marris* Calculation. The grounds relied upon by the SCG and York are without substance. There is in any case no point of law of general public importance which the Court ought to consider at this time. The Supreme Court dealt recently, in *Waterfall 1*, with general questions about the relationship of the relevant chapter of the 1986 insolvency legislative code to earlier cases containing principles of judge-made law. What was said on those issues in *Waterfall 1* disposed authoritatively of any arguable points of principle. That leaves only the issue of construction of a specific insolvency rule, Rule 2.88, on which David Richards J and the Court of Appeal (Gloster, Patten and Briggs LJJ) reached the same, clear, conclusion. The objections below take the grounds in relation to each issue together because, as is apparent from the SCG's grounds[2], there is substantial overlap between the applications on those issues.

Objections

Bower v Marris Calculation

2. SCG asserts that "*[i]n all prior instances of corporate insolvency in which this issue had arisen, the conclusion reached has been that Statutory Interest could and should be calculated in [accordance with the Bower v Marris Calculation].*"[3] This is wrong. It also masks the real point – namely that Statutory Interest was first introduced in corporate insolvency by the 1986 insolvency legislation, which was a new code. Before 1986, interest from a surplus in a winding up was not regulated by statute. At the end of the statutory process of distribution, creditors were remitted to pre-insolvency entitlements to interest (if any), as held by the Court of Appeal in *Re Humber Ironworks & Shipbuilding Co* (1869) LR 4 Ch App 643 and applied in *Re Lines Bros (No 2)* [1984] Ch 438 before the introduction of the Insolvency Act 1986. In the absence of an appropriation by the contract itself, at the end of the statutory process of distribution a creditor was remitted to his right to interest including his right to appropriate payments from the debtor's estate to principal or interest as he saw fit. In the reported cases, such election was often made by the court without an actual election by the creditor by the use of a presumption

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1 The normal 5-page limit is exceeded because the notice is a combined notice of objection in relation to the applications of the SCG and York.

2 SCG/6/22-24.

3 SCG/6/3(1).

in favour of the payment of accrued interest, but not necessarily so[4]. David Richards J correctly analysed the pre-1986 bankruptcy, winding up and other cases[5] and recognised that:

(1) The *Bower v Marris* Calculation was a facet of the doctrine of appropriation. This entitles the debtor to choose which of two or more due debts is to be be discharged by a payment by the debtor and, absent such a choice, entitles the creditor to choose[6]. The '*Bower v Marris* Calculation' – which is first reported to have been applied in bankruptcy in *Bromley v Goodere* (1743) 1 Atk 75 (not *Bower v Marris* (1841) Cr & P 351), i.e. at a time when there was no statutory regime as regards interest[7] – merely recognised that a payment made "*in process of law*", i.e. a dividend paid pursuant to the statutory regime in bankruptcy, was not a payment made with any regard to *any* intention of the debtor *or* the creditor. The creditor's right to elect how the payment should be treated therefore fell to be exercised at the end of the statutory process of distribution upon the remission to the creditor's pre-bankruptcy rights against the debtor. The remission analysis persisted in corporate insolvency until 1986 when the modern statutory code as to interest from a surplus was first adopted. See *Waterfall IIA* [2015] EWHC 2269 (Ch) at [39]-[45], [58]-[65] and [71]-[78] (David Richards J).

(2) The *Bower v Marris* Calculation cannot be applied to Statutory Interest. The entitlement to be paid Statutory Interest is a right that accrues after the proved debts have been paid. Until that time, there is no right to be paid Statutory Interest. The dividends paid in the meantime are not therefore payments "*on account*" of the proved debts *and* statutory interest with a right of election to be exercised by the creditor upon the emergence of a surplus against proved debts. The common law doctrine of appropriation, based as it is on a remission to pre-insolvency entitlements to interest, simply has no scope to operate and no role to play in the modern statutory scheme. The premise for the *Bower v Marris* Calculation is absent[8]. The question is simply one of statutory construction. See *Waterfall IIA* [2015] EWHC 2269 (Ch) at [133]-[150] (David Richards J).

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4 The presumption is otherwise when factors such a taxation mean it is to the creditor's advantage to appropriate to principal. See paragraphs [39] to [45] of the judgment of David Richards J.

5 The explanation of the *Bower v Marris* Calculation as a facet of the doctrine of appropriation is readily apparent from its diverse application, e.g. testamentary cases, to trust cases, and to cases concerning debts. The common problem is a payment made "*on account*" of two or more items, whether principal and interest, or capital and income.

6 *Chitty on Contracts*, 32nd ed at 21-061 and 21-069.

7 There was in fact no statutory regime applicable to the bankruptcy in *Bower v Marris*, as recognised by the Court of Appeal, at [32]. Section 132 of the Bankruptcy Act 1825 did not apply retrospectively to the estate in that case which subject to a commission under the predecessor Act.

8 York accepts that there is no entitlement to be paid Statutory Interest until the surplus has arisen: York/6/27-28. York however makes the nonsensical submission that a creditor can appropriate a dividend to a debt that has *not* accrued due for payment: York/6/29.

Construction of Rule 2.88

3. David Richards J and the Court of Appeal unanimously construed rule 2.88 against the arguments of the SCG's and York. They advance an unnatural reading-down of the operative terms of that rule. They say that:

   (1) the words "*after payment of the debts proved*" merely "*reflects*" the statutory order of priority[9].

   (2) the words "*in respect of the periods during which they have been outstanding since the company entered administration*" merely "*confirms*" that "*creditors are entitled to interest only in respect of the period after the company entered administration*"[10].

4. There is nothing in these arguments. As both Courts below held:

   (1) On its true construction, rule 2.88 provides a direction to the administrator to utilise any surplus arising after payment of all proved debts in full in paying interest on the amount of each creditor's proved debt for the period between the commencement of the administration and the date or dates upon which the proved debt was paid by way of dividends from the administration estate.

   (2) Rule 2.88 thus provides a comprehensive, self-contained rule for the calculation of interest: directing the principal amount on which it is to be paid (the proved debt), the rate at which it is to be paid (the Judgments Act rate or, if higher, the rate applicable to the debt apart from the administration) and the period for which it is payable (from the Date of Administration until the proved debt, or relevant portion of it, is paid in full).

   (3) Rule 2.88 is, as such, inconsistent with the *Bower v Marris* Calculation which involves notionally allocating dividends first to the payment of statutory interest and then in reduction of the principal debt, and then using the surplus to pay the remaining interest and principal, because it would require the surplus to be used for discharging part of the proved debt itself, because it requires the dividends as having been used to pay post-administration interest, and because it would require statutory interest to be paid with respect to a period long after the date the proved debt, or relevant part of it, was paid.

   (4) Rule 2.88 is equally inconsistent with the SCG's contention that a creditor with a contractual right to interest at a compound rate, should be entitled to continue to

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9 SCG/6/14(1)

10 SCG/6/14(2)

compound interest after the date on which the proved debt, or the relevant portion of it, has been paid, because it would require interest to be paid for a period longer than Rule 2.88 allows.

5. As held by the Court of Appeal at [26]:

> "*When aggregated with the provision as to the interest rate in Rule 2.88(9) and the provision for equal ranking between creditors in Rule 2.88(8) this simple formula constitutes, in our view, a complete and clear code for the award of statutory interest on provable debts. As Mr Zacaroli QC for Wentworth put it, it contains all you need to know.*"

6. The assertion by the SCG[11] and York[12] that rule 2.88 is silent as to the way in which the interest to be paid from a surplus is to be calculated is therefore obviously wrong.

7. The SCG's and York's argument that interest is not paid at the Judgments Act rate, unless *Bower v Marris* is applied, is circular[13]. It assumes a calculation of interest on the proved debt for the period between the date of administration and the date upon which interest is ultimately paid. That, in turn, depends upon the SCG and York establishing that Statutory Interest is required to be paid in respect of the period *after* the dividends have been paid in full. As found by David Richards J and the Court of Appeal, this would be contrary to the clear terms of rule 2.88.

Principle and policy

8. The SCG's and York's assertion that "*no sufficient reasons of principle or policy were identified by the Courts below justifying such a result, and none can be identified*"[14] is also wrong:

   (1) David Richards J considered both policy and principle in formulating his conclusions, as well as the permissible pre-legislative materials. See *Waterfall IIA* [2015] EWHC 2269 (Ch) at [143]-[152].

   (2) The Court of Appeal, at [35]-[36], likewise considered policy and principle in formulating its conclusions.

9. The policy in 1986 to enact a simple and certain statutory scheme was an important part of the reasoning of the Supreme Court in *Waterfall I.* Lord Neuberger emphasised, at [10], that the

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11 SCG/6/14(2), 15(1)
12 York/6/18(iii), 21, 25-29
13 SCG/6/13
14 SCG/6/4; York/6/23(1)

1986 Act and the 1986 Rules had the objective of establishing "*effective and straightforward procedures*". This objective is expressly stated by the Cork Report in relation to the new regime for statutory interest, at paragraph 1392: "*simplicity and certainty are essential*". Lord Neuberger, at [89], relied on this objective of simplicity to rule out the possibility of a "second bite' for foreign currency creditors. This objective tells against the *Bower v Marris* Calculation and continued compounding, each of which would introduce the complication that the relative rights of creditors to post-administration interest would be constantly fluctuating, requiring a re-evaluation of all creditors' entitlements whenever an interim distribution in respect of interest was to be made. No such complications exist on the clear wording of rule 2.88, since once all dividends have been paid, the amount of interest owed to each creditor for the period up to that date is a fixed amount.

10. The substitution of an equal statutory entitlement for all creditors in place of any pre-insolvency rights to interest for some represents a rational and a fair choice to compensate all creditors equally for the same delay experienced in relation to the distribution of the estate. That is the discernible policy apparent from Rule 2.88 and the pre-legislative materials which preceded the 1986 Act in the Cork Report. There is no need to apply the *Bower v Marris* Calculation so as to achieve justice.

11. The White Paper introduced an exception to that policy of equal treatment in relation to contractual rights to interest in excess of the Judgment Act Rate: specifically, to allow the application of that rate, if higher than the Judgment Act Rate. It is a policy aimed at respecting contractual rights to that extent. The *Bower v Marris* Calculation has however nothing whatsoever to do with a "*rate*", being a calculation based upon *the order* of discharge of principal or interest, rather than a "*rate*" (i.e. a ratio applied to the principal amount) by which interest is computed.

Inconsistency with the Supreme Court in *Waterfall I*

12. As is apparent from the judgment of the Court of Appeal at [25] and [34]-[37], the SCG's and York's submissions are inconsistent with the judgment of the Supreme Court in *Waterfall I.*

13. First, the Supreme Court emphasised that the detailed and comprehensive code found in the 1986 Act and 1986 Rules should lead to the Court being careful not to apply the principles developed under a previous insolvency regime or dicta contained in authorities decided under a previous insolvency regime:

(1) "*[T]he 1986 legislation represents a comprehensive overhaul of insolvency legislation, adding new procedures and new rules and rewriting many of the established procedures and rules*"[15].

(2) While fundamental principles such as the pari passu principle apply just as they always have done, "*when it comes to less fundamental procedures and rules, it cannot be assumed that judicial decisions, even at the highest level, relating to previous insolvency legislation necessarily hold good in relation to the 1986 legislation*"[16].

(3) "*[I]n light of the full and detailed nature of the current insolvency legislation and the need for certainty, any judge should think long and hard before extending or adapting an existing rule, and, even more, before formulating a new rule*"[17].

(4) "*It is in my opinion dangerous to rely on judicial dicta to the effect of an earlier insolvency code, given that the 1986 legislation amounts to what Sealy and Milman (op cit) describe as including "extensive and radical changes in the law and practice of bankruptcy and corporate insolvency, amounting virtually to the introduction of a completely new code*"[18].

(5) When considering the impact of the pre-1986 authorities on foreign currency claims, Lord Neuberger stated as follows:

> "*Given that the treatment of foreign currency creditors in corporate insolvencies was expressly dealt with for the first time in the 1986 Rules, it appears to me that there must be a presumption that the new rule 2.86 was intended to spell out the full extent of a foreign currency creditor's rights, particularly, when one bears in mind the fact just mentioned that the purpose of the 1986 legislation was to simplify and clarify the law*"[19].

(6) Lord Sumption, likewise, said that: "*It is axiomatic that where the Insolvency Rules deal expressly with some matter in one way, it is not open to the courts to deal with it in a different and inconsistent way*"[20].

(7) Lord Neuberger further cautioned that the dicta in cases such as *Humber Ironworks* should not be read out of their proper context. Indeed, he expressly commented as follows in relation to *Humber Ironworks*:

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15 SC Judgment, at [12].

16 Ibid. Lord Neuberger cited as examples the pari passu rule, the anti-deprivation rule, and the rule against double-proof. An obvious point (but one which is repeatedly ignored or mischaracterised by the SCG and York) is that far from being a "*well established*" judge-made rule, *Bower v Marris* had *never* been applied in England to a statutory right to interest in an insolvency such as is contained in Rule 2.88, and had never even been referred to in any edition of Williams, the leading bankruptcy text book.

17 Ibid, at [13].

18 Ibid, at [83].

19 Ibid, at [90].

20 Ibid, at [194].

> *"The court was concerned with the effect of the absence of any rule for payment [of interest], not with the effect of a rule which stipulated for payment."*[21]
>
> *"However, as I have also explained, that observation was made in the context of a decision which was wholly based on what Giffard LJ expressly described as "Judge-made law", because the contemporary statutory provisions gave no guidance as to how contractual interest was to be dealt with in a winding-up. The position is, of course, very different now, especially in relation to interest on proved debts in administrations and liquidations. In that connection, I consider that...rules 2.88 and 4.93 and section 189 provide a complete statutory code for the recovery of interest on proved debts in administrations and liquidations, and there is now no room for the Judge-made law which was invoked by Giffard LJ"*[22].

14. The SCG's and York's applications relating to the *Bower v Marris* Calculation are founded on contentions that David Richards J and the Court of Appeal paid insufficient weight to the state of the judge-made law prior to the introduction of the 1986 Act and the 1986 Rules. However, the Supreme Court has made clear that there is no basis for such a complaint, where the old judge-made law related to fundamentally different statutory regimes, and the matter is comprehensively addressed in detail in the 1986 Rules.

15. Second, the Supreme Court, in holding that statutory interest is not recoverable from a contributory under section 74 of the 1986 Act, emphasised the importance of giving effect to the words actually used by the legislature. Those words should not be departed from unless it gives rise to a situation which is "*absurd or unworkable*"[23]. The Supreme Court rejected the Court of Appeal's conclusion that the use in rule 2.88 of "*the concept of payment out of a surplus is merely a convenient way of identifying liabilities which fall lower than other liabilities in the priorities encapsulated in the waterfall*". This analysis erred, "*in re-writing the legislative provision to enable it to achieve a more instinctively likely result than if the actual words used in the provision are construed according to normal principles of interpretation*"[24]. The SCG's and York's arguments on construction in the present case echo[25] the erroneous reading down of rule 2.88 by the Court of Appeal in *Waterfall I*.

16. There is no basis on which the SCG and York can suggest that the construction of David Richards J or the Court of Appeal which pays proper regard to the wording of rule 2.88 is absurd or unworkable.

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21 Ibid, at [100].

22 Ibid, [125].

17. Third, the Supreme Court has made clear that there is no basis for the SCG's complaint that it cannot have been the intention of the legislation to create a situation in which a creditor may, on a particular set of facts, receive less by way of statutory interest under rule 2.88(7) than it would have received by reference to its pre-insolvency contractual entitlement if these had allowed for the *Bower v Marris* Calculation or continued compounding.

18. The Supreme Court, at [45] and [125]-[127], concluded that (1) the statutory interest regime provides a complete code so that the company ceases to be liable for contractual interest which falls due after the commencement of the administration, and instead, in the event of a surplus, there is a liability for statutory interest; and (2) there is no basis for the contractual right of a creditor to revive if rule 2.88(7) leads to a worse outcome for the creditor.

19. Fourth, the SCG had (before the Supreme Court had given judgment in *Waterfall 1*) placed heavy reliance on the Court of Appeal's decision in *Waterfall I* in relation to Currency Conversion Claims to support its arguments on *Bower v Marris*. The essential submission of the SCG was that in circumstances where the statutory scheme did not interfere with the contractual right of foreign currency creditors to be paid their full entitlement, there was no sensible reason to treat creditors with a right to interest any differently[26].

20. The Supreme Court of course decided that there are no Currency Conversion Claims. The logic therefore now flows the other way, against the SCG. The court's task is to construe the words of the legislation, to determine what rights the legislation provides according to its language, and it is wrong to construe the legislation by reference to what rights a creditor would have had but for the insolvency, and to assume that the legislation intended those rights to be satisfied in full before any return is made to members. Lord Neuberger's observation, at [90], that it is to be presumed that rule 2.86 was intended to spell out the full extent of a foreign currency creditor's rights, in light of the fact that the treatment of foreign currency creditors was dealt with for the first time in the 1986 legislation, applies equally to Statutory Interest and rule 2.88.

21. The response of the SCG and York is exiguous. It is said that the *Bower v Marris* Calculation does not depend upon a remission to rights theory. The only cases cited in this respect are the testamentary estate case of *Whittingstall v Grover* and the Canadian case of *AG of Canada v Confederation Trust*[27]. *Bromley v Goodere, Bower v Marris* and *Humber Ironworks* are not

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26 See, for example, the SCG's introductory oral submissions in the Court of Appeal at [Day 1/Page 7/Line 17 to Page 8/Line 9]: "*There isn't a sensible reason why a distinction is to be drawn between, on the one hand, foreign currency creditors and, on the other hand, creditors entitled to interest. General rule is: creditor first, members last; you would expect that to be reflected in the statutory scheme and, we say, properly construed, it is.*"

27 SCG/6/20(2)

cited because each is clearly a case based upon the doctrine of appropriation and a remission to pre-insolvency rights. *Whittingstall v Grover* (1886) 55 LT 21 is in fact such a case; the right to interest in that case accruing from the date of the decree of administration (which is a judgment in equity for all creditors), as explained by David Richards J, at [107]-[114]. The only cases that are not are:

(1) *AG of Canada v Confederation Trust* [2009] OJ No.3037, which David Richards J analysed in detail and held that the relevant wording of the Canadian statute was different and, moreover, the Canadian court did not in fact consider the basis of the *Bower v Marris* Calculation in reaching its conclusion, at [123]-[153]; and

(2) *Re Hibernian Transport Companies Ltd* [1991] 1 IR 263, which has been overruled in Ireland and which David Richards J also analysed in detail and founded to be unsupported, the judgment having been produced without the benefit of adversarial argument and being a verbatim copy of an Irish Law Commission Report which, itself, was a verbatim copy of a relatively obscure and inaccurate early nineteenth-century bankruptcy text[28].

General public importance

22. Neither the *Bower v Marris* Calculation nor the Compound Interest Issue raise a point of general public importance. The judge-made rule as to interest from a surplus in *Humber Ironworks* was never litigated beyond the Court of Appeal in its lifetime of 117 years between 1869 and its replacement in 1986 by the modern code on interest under Rule 2.88. A surplus in an estate is a rare thing, and a surplus in an estate worth litigating virtually unheard of. Any general arguments about the relevance of the old judge-made principles were put to bed by *Waterfall 1*.

23. The SCG's and York's case is not assisted by the assertion that the construction favoured by David Richards J and by the Court of Appeal is susceptible to abuse by a company that wishes to shed itself of interest liabilities[29]. There is no perverse incentive. Statutory Interest is at a rate far in excess of commercial rates of interest. The very act of going into administration would create a potential liability to interest at 8% to *all* of its creditors.

24. The further assertion that the holders of subordinated debt and equity have delayed the payment of Statutory Interest is unfounded[30]. The majority of the issues in *Waterfall IIA* were developed

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28 See paragraphs [115]-[122] and [142] of the judgment of David Richards J.

29 SCG/6/8(3)

30 SCG/6/5

by the SCG and York to maximise the amount of Statutory Interest to be paid. The delay in distribution has largely been the product of having to deal with their ever-innovative arguments.

Article 1 of the First Protocol

25. The SCG's and York's case on the *Bower v Marris* Calculation is not assisted by reliance on Article 1 of the First Protocol of the European Convention on Human Rights, which is a new point not relied upon before David Richards J or the Court of Appeal:

    (1) The premise for invoking A1P1 is wrong. It is said that "*[c]reditors who, apart from the administration would be entitled to have payment received from the debtor applied first to interest and then to principal, have had such entitlements extinguished.*"[31] However, pre-administration it is the debtor, not the creditor, that has the right to appropriate.

    (2) The further premise for invoking A1P1 is wrong. It is said that no legitimate policy aim supports the construction favoured by David Richards J and the Court of Appeal. As set out above however, the judgments below considered, and are consistent with, fair and rational policies. The Supreme Court had regard to the same policies in *Waterfall I.*

Conclusion

26. For these reasons, the SCG and York should be refused permission to appeal on the *Bower v Marris* Calculation and the Compound Interest Issue. Neither issue raises an arguable point of law of general public importance which ought to be considered by the Supreme Court at this time. Both issues have been unanimously rejected by judges who have substantial experience in this area. As stated by the Court of Appeal, Rule 2.88 is a clear and comprehensive code that "*contains all you need to know*" as to how Statutory Interest is to be calculated.

27. The Supreme Court will be aware that Wentworth has sought permission to appeal against the conclusion of the Court of Appeal on the contingent debt issue (UKSC 2017/0203). Wentworth confirms that it would not pursue its appeal in the event that the Supreme Court denies permission to appeal to the SCG and York.

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31 SCG/6/3(1)