Wednesday, 25 February 2015

(10.30 am)

Submissions by MR ZACAROLI

MR JUSTICE DAVID RICHARDS: Mr Zacaroli.

MR ZACAROLI: My Lord, issue 4. My Lord, this is, as with issue 2 in fact, a question of construction. This time rule 2.88(9).

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: Just to remind my Lord of the basics, it's 2.88(7) that identifies the period during which interest runs and, leaving aside issues about contingent and future debt, which we'll come on to later, it's essentially the date of administration for everything else.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: 2.88(9)'s purpose is a limited one, limited to identifying the rate which is to be applied under sub-rule 7, the default position is the Judgments Act rate, unless there's a higher rate already in existence.

The dispute really comes down to this, that we say the rate applicable to the debt apart from administration is intended to refer to the rate in fact applicable to the debt proved. That necessarily fixes it as the rate applicable by reason of the rights attaching to the debt proved as at the date of

administration. I make that slightly longer description of it to cater for the fact that you may have a contractual right that fluctuates, a rate of interest that varies over time, for example, with LIBOR. So it's not the rate fixed in the contractual case at the date of administration but the rights that the -- the creditor has under its contract at the date of administration, including the right to a fluctuating rate thereafter.

So that's what we say the rule says.

My learned friends' argument depends on the rule introducing a counter-factual enquiry as to the circumstances in which a judgment could have been or perhaps was obtained or obtainable after the date of administration.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: Now, in the latter case of a judgment obtained, that is notwithstanding that the counter-factual contradicts the primary assumption of the statutory scheme, which is that all claims are stopped, the moratorium of the stay applies at the date of administration, so in the normal case there will not be judgment obtained thereafter.

We needn't go to the Cork Report. My Lord knows there's nothing in it on this topic because the

Cork Report took a simpler line, that it's the judgment rate alone.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: The White Paper is worth a revisit because it's then that rule 2.88(9) comes in, or the reason for it comes in. It's bundle 4, tab 1.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: The relevant paragraph is paragraph 88. We have seen the before. It deals with the case of a surplus and then it refers to the minimum rate equivalent to the judgments rate and then goes on to say:

"If, however [the last three lines of 88], a higher contractual rate applies to the debt post-insolvency interest will be chargeable at that rate."

Then in 89 there's another reference to the similar thing:

"Where the insolvency legislation otherwise provides for a particular rate of interest in ...(reading to the words)... or, if appropriate, a contractual rate."

MR JUSTICE DAVID RICHARDS: I see.

MR ZACAROLI: Coming back -- I'll come back to contractual rate in a moment. I just note, my Lord, that the reference to judgment rate here in both paragraphs 88 and 89 is the rate applicable at the date of the

relevant order. I will come back to that.

MR JUSTICE DAVID RICHARDS: Hold on.

MR ZACAROLI: In the middle of 88, the fifth line:

"A minimum rate equivalent to that applicable at the date of the relevant order to judgment debts."

The order there obviously is the winding-up order.

MR JUSTICE DAVID RICHARDS: Yes, I see.

MR ZACAROLI: Now --

MR JUSTICE DAVID RICHARDS: Just to be clear about this, if you have a judgment for £1 million and the judgment rate at the date of the judgment is 8 per cent but before the judgment is satisfied the Judgments Act rate is reduced to, say, 6 per cent, does the judgment from that date carry interest at 6 per cent?

MR ZACAROLI: I don't know, my Lord. I just thought of that question as my Lord was saying it. We'll check that.

MR JUSTICE DAVID RICHARDS: All right.

MR ZACAROLI: But when we come to the rule, we'll see that it undoubtedly ties the rate for the purposes of administration and liquidation and bankruptcy to the date -- to the judgment rates applicable at the date of the relevant winding up.

MR JUSTICE DAVID RICHARDS: That is in the rule, is it?

MR ZACAROLI: It is. Perhaps we can look at it straightaway. It's one of my points later down the

road. 2.88(7) refers back -- sorry, (9) refers you back to (6). It's the rate in (6) which is the rate of interest claimed on the date when the company entered administration.
MR JUSTICE DAVID RICHARDS: I see.
MR ZACAROLI: The same words appear, just for my Lord's note, section 189(4) in winding up is the date on which the company went into liquidation and in bankruptcy section 328(5) is the same.
MR JUSTICE DAVID RICHARDS: Thank you.
MR ZACAROLI: Now, the reason that I primarily went to paragraph 88 of the White Paper, however, was for the reference to contractual rates. It's clear that what the draughtsman of the White Paper had in mind was the simple case of a creditor who comes with an existing contractual rate and that was the primary, at least, purpose of the introduction of rule 2.88(9).
Now, at this point can I deal with, as my learned friend did, one aspect of the Ruritania problem.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: I have carefully described our case a moment ago as it's the rate which applies to the debts proved.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: I don't for the purposes of the argument on issue 4 draw a distinction between the debts proved or

a proved debt. You would just have a foreign currency debt. So I don't think there is -- I mean, I think that much is clear.
MR ZACAROLI: Yes. As I say, we accept that.
MR JUSTICE DAVID RICHARDS: Yes. I mean, I am still -- I have to tell you, it's still a matter which is concerning me.
MR ZACAROLI: On the basis that you get an odd interest --
MR JUSTICE DAVID RICHARDS: Yes, I mean, all the more so because here we have the insolvency rules apparently providing across the board that you'll have a foreign currency interest trade applicable to a sterling debt in circumstances where already, by the time these rules were made, the approach of the courts was that the usual order should be an interest rate applicable to the currency in question. Not an absolute rule; the court has a discretion under the statute. But very strongly the authorities indicated that it would normally be right to have the relevant currency interest rate.
Now, why should the insolvency rules be put together in a way which is so contrary to the, I should have thought, logical and commercial approach to appropriate interest rates being taken by the courts post-Miliangos? It's a concern.
MR ZACAROLI: I understand the concern. We would say that

the proved debt, but I can see that would be an important distinction if you have a foreign currency debt because the debt proved is the foreign currency debt, arguably, whereas the proved debt is once it's been converted because you can only prove it by converting it.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: Now, we don't, however, like my learned friend, take a point that the rule excludes a foreign currency debt or a rate of interest applicable to a foreign currency debt.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: We accept that that's within the wording of the rule.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: But that doesn't affect the timing point.
MR JUSTICE DAVID RICHARDS: No. I mean, the proof point, I've been considering that as well because I think I've sort of hinted at that, but it did occur to me that, as it were, approaching it as a matter of construction and saying that the debt is a reference to the proved debt, which means a debt in sterling, can't really work, I would have to accept, because it's the rate applicable to the debt, apart from the administration. If you didn't have an administration, you wouldn't have

that point -- we still rely on the point that the draughtsman did not positively intend to introduce a future foreign judgment rate for that reason.
MR JUSTICE DAVID RICHARDS: Right.
MR ZACAROLI: But I think the point here is it is difficult to argue on the construction of this rule that it excludes an existing contractual right to a foreign --
MR JUSTICE DAVID RICHARDS: I follow that. I do follow that. When was 2.88(6) introduced? Sorry to be darting around. Did that come in later than -- well, I don't know. I won't ask you that now because there's quite a sort of history to these rules.
My interest -- I am interested to know whether perhaps in the 1986 rules, as they were originally introduced, how did -- was there express provision for conversion of foreign currency debts? I can't remember at the moment.
MR ZACAROLI: We'll do some research on that.
MR JUSTICE DAVID RICHARDS: Thank you. I am grateful.
MR ZACAROLI: I can't answer that now.
So --
MR JUSTICE DAVID RICHARDS: Let me say, on a case of this importance, I mean, I don't think it would be appropriate for me simply to say all the parties are agreed that a foreign judgment rate applies and

therefore, for the purposes of this application, I will assume that to be correct. This is not in that sense ordinary inter partes litigation. There are rights of many people affected here who are not actually represented as such.
MR ZACAROLI: My Lord, we understand that. It so happens that my clients, it's not in their interests to argue the contrary. We're not arguing the contrary. As my Lord knows, we're here not as representatives.
MR JUSTICE DAVID RICHARDS: I follow, yes.
MR ZACAROLI: Therefore, it may well be my Lord isn't to make any declaration or decision on this point. It's left open for, as my learned friend says, someone who is concerned by it.
MR JUSTICE DAVID RICHARDS: Okay we'll have to see about that, yes.
MR ZACAROLI: So finishing up my introduction. There is nothing in the Cork Report or the White Paper which supports this counter-factual approach to construing rule 2.88(9).
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: My Lord, with that introduction, we make seven points on the construction of the rule.
The first point, which I think my Lord has as my learned friend introduced our case on this basis, that

the debt referred to in rule 9 is necessarily a cross-reference to 2.88(7) because (9) is only relevant for determining the rate applicable of interest. So it cross-refers to (7). (7) refers to paying interest on those debts and those debts in the last line of (7) must be referring back to the debts proved in the first line.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: A judgment debt, not in existence but which might be obtained in the future, is not the debt which is proved.
The rights of a creditor as a matter of English law after judgment flow from the judgment. The key point here is not so much whether the debt has in fact merged in the judgment. That's not point really. The point is that they are conceptually regarded as two different things. We say the draughtsman of the rule must be taken to understand English law as it existed at the time of the 86 Act and rules, and that is one aspect of it and, therefore, in referring to the proved debt, he is referring insofar as he was thinking of this point at all to the debt which existed, not some future, different version of the debt once a judgment is obtained.
MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: My Lord, we have referred in our skeleton to the Director General of Fair Trading v First National Bank for one paragraph.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: It describes this point. I don't think my Lord needs to turn it up.
MR JUSTICE DAVID RICHARDS: No, thank you.
MR ZACAROLI: So that's --
MR JUSTICE DAVID RICHARDS: Sorry, just to be clear, in 2.88(7) the phrase is "on those debts" and that takes us back to --
MR ZACAROLI: The beginning of (7):
"Any surplus remaining after payment of the debt ..."
MR JUSTICE DAVID RICHARDS: Sorry, yes, of course it does. Yes. Thank you.
MR ZACAROLI: My Lord the second point is this, and I have already intimated and indeed shown my Lord the words, but the rule requires the Judgments Act rate to be applied to be the date which existed on the date when the company went into administration.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: The White Paper that we looked at a moment ago supports that. There's a deliberate choice.
MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: This suggests that in determining which is the higher of the two rates you're comparing the rights attaching to the debt as at the date of administration. It reinforces that point. Certainly it is a further indication the draughtsman did not intend to incorporate by this phrase "rate applicable apart from administration" a rate under a future judgment at a future judgments rate in some other country.
MR JUSTICE DAVID RICHARDS: Or, even, you would say presumably, a future judgment obtained in this country if the Judgments Act rate had changed?
MR ZACAROLI: Yes, absolutely. Yes I would have thought the draughtsman wasn't envisaging a future judgment in this country, given he's already catered for that by applying the judgments rate at the date of administration.
MR JUSTICE DAVID RICHARDS: I agree.
MR ZACAROLI: The third point is that, as my Lord will remember, the Cork recommended judgment rates for all. The White Paper brings in an addition to that. It recommends bringing in one aspect of the contractual rights of creditors, namely the rate to which they were already entitled. That's what the White Paper is recommending. That is essentially, although the wording isn't exactly the same as we've seen, what rule 2.88(9) is doing.

So we say it reflects one part, but only one part, of the approach taken in winding up before 1986 by reflecting the rate, but under the pre-1986 law relating to companies it had never been suggested that a creditor who had not obtained a judgment pre-insolvency could in some way obtain interest as if it had one. One authority to reinforce that point, which my Lord has seen just yesterday, but just to take my Lord back to it, is Fine Industrial Commodities, bundle 1B at tab 76.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: The decision is summarised in the first paragraph of the headnote:

"The court has no power, either by statute or under its general jurisdiction in the winding up ...(reading to the words)... simple contract to creditors of the company."

Just to remind my Lord of the facts. At the top of page 258, certain shareholders request the liquidator to seek directions of the court before paying interest to creditors. There were 83 unsecured creditors. The only creditor who was to the knowledge of the liquidator entitled to prove for interest was the respondent Bennett and Sons who had recovered judgment against the company before liquidation.

At the beginning of his judgment, Mr Justice Vaisey,

at page 260, in the second paragraph, summarises the question:

"Are the creditors of the company entitled to interest on their debts?"

He deals with the one creditor with a judgment, there's no difficulty about them, the declaration is made; there's an issue about whether it should be an earlier date, but that's not material. No one claimed for the ten days before winding up.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: Then he deals with the others. My Lord has been taken through this so if I can take you just to page 262, where he first of all is dealing with the point about the company no longer being an insolvent company and therefore the bankruptcy rules don't apply.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: Then just above the second hole-punch just after the quote "after the winding up of an insolvent company", he says:

"But I should have thought that as soon as it is found that there is a surplus ...(reading to the words)... ought to come in and prove their debts without any claim to interest."

That echoes the words of Lord Justice Giffard in Humber Ironworks which he cites over the page.

MR JUSTICE DAVID RICHARDS: Yes. It's a sort of statement of policy as to what is appropriate in the distribution of an estate with which the Cork Committee then of course disagreed, but, yes, I --

MR ZACAROLI: I'm not sure it's meant to be policy. It may be put in that way but he is, I think, striving to find a way in which he could do this. And of course he couldn't. He can't find a way of giving them interest.

MR JUSTICE DAVID RICHARDS: I see, he's hoping he can give them interest. I was reading that as if he was saying, "I shouldn't".

MR ZACAROLI: If you look over the page to the beginning of the main paragraph:

"I had rather hoped I should find in the present case I had a discretion and I would be able to award some interest ..."

So I think his inclination was to want to try and award interest.

MR JUSTICE DAVID RICHARDS: Yes, I see.

MR ZACAROLI: Then in that paragraph the critical words are --

MR JUSTICE DAVID RICHARDS: I see. Fair enough.

MR ZACAROLI: -- towards the end:

"But I cannot discover any case or any section of the Act which ...(reading to the words)... as if they

were judgment creditors."

MR JUSTICE DAVID RICHARDS: I see.

MR ZACAROLI: So --

MR JUSTICE DAVID RICHARDS: So having said that he's got no statutory power to do it because of the construction of the relevant provision in the Companies Act, he's enquiring whether there's some equitable power and he concludes there isn't.

MR ZACAROLI: Yes. So there's no way -- and, therefore, there is no case -- my Lord has had no case cited to him in which a creditor was entitled to interest on the surplus without a pre-existing right to judgment.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: So even if sub-rule 9 was regarded as bringing in all of the old law relating to companies, which we say it wasn't, it was just bringing the rate, but against me on that point, even if it was bringing everything, the old law never allowed someone without a judgment to interest as if they had had one.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: A fortiori since it's only bringing the rate, it clearly doesn't do so.

That leads to my fourth point which is the point that this is entirely consistent with the general principle that the commencement of insolvency operates

as the date for establishing rights of creditors against the estate of the debtor.

My learned friend took my Lord to a sentence in our original position paper where I frankly accept we had not put the point as clearly as it could have been and we had referred to "simultaneous ascertainment and distribution".

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: The distribution point wasn't an important part of the argument then. If my Lord looks at our skeleton, we have, not surprisingly, when one thinks about these points for the purposes of producing a skeleton argument, points develop and we have developed and our skeleton is where my Lord will find the argument I'm now reciting set out.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: But, so that my Lord can see the point that I am making, there are two cases. One is Dynamics, which my Lord knows well but it's worth looking at what Lord Justice Oliver said about the cut-off date of winding up. Bundle 1B, tab 85. In a very well-known section, beginning at page 762, he refers to the long passage from Lord Justice Selwyn in Humber Ironworks, including the phrase "the tree lies where it falls". He then refers to European Assurance Society Arbitration in

1872, at page 763 letter C.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: And also British American Continental Bank and he summarises the position at page 764, between D and G. Perhaps my Lord will read between D and G on 764.

MR JUSTICE DAVID RICHARDS: Yes. (Pause)

Yes.

MR ZACAROLI: The reference to ascertainment and distribution is echoed in the first line of the quote there in section 257(1):

"As soon as may be after making a winding-up order the court shall cause the assets to be collected and applied and discharged of its liabilities."

Of course the application in discharge of liabilities is not the important point. It's not the distribution that's important, it's the ascertainment of liabilities that is the important point.

NEW SPEAKER: Yes.

MR ZACAROLI: The same point is echoed in the judgment of Lord Hoffmann in Wight v Eckhardt where there is again a reference to immediate distribution in passing but it's not the thrust of what he's saying. That's at bundle 1D, tab 132.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: It's paragraphs 28 and 29. 28, he refers to

the passage -- part of the passage we looked at from justice -- Mr Justice Oliver in the Dynamics case. Then 29:

"The image of collecting and uno flatu distributing the assets of the company on the day of the winding-up order is a vivid one but the courts apply to it give effect to the underlying purpose of fair distribution between creditors pari passu and not as a rigid rule."

So its purpose is to enable a pari passu distribution not actually to get rid of the assets on day one.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: Where this is relevant here is that my learned friends' submissions were based on the fact there ought to be no distinction between interest, statutory interest, and claims of non-provable -- non-provable claims, that tort claim that used to exist. My Lord, those are irrelevant to the analysis, we submit, because those only come into play by definition once all the proved debts and all statutory interest on the proved debts has been paid in full.

On the other hand, there is a very important and well-recognised cut-off so far as interest is concerned in two ways. First of all, interest is only provable up to the date of administration.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: Secondly, statutory interest is payable from that date and it's only payable on the proved debts.

So we do say that the fact that there is a key date, the date of administration, for the purposes of ascertaining and crystallising claims made to the company is as relevant for the purposes of deciding what rate should be applied to interest as it is for determining what are the claims of creditors to proof.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: The fact is that commencement of winding up, bankruptcy or administration is fixed to a certain date and that can be of critical importance for a number of reasons. By way of example it's most important, for example, as being a cut-off for the proof itself in 13.12.1 of the rules. It's a cut-off for execution creditors, creditors seeking to execute against the assets of the company. The date of administration or winding up is important. Section 128, if my Lord wants to take a note.

MR JUSTICE DAVID RICHARDS: Thank you.

MR ZACAROLI: Of course it's critical for rule 2.88(1) that we've looked at, and it's also of course important for all of the avoidance provisions, although the look-back period doesn't begin with the date of the order, rather

the date of the petition, nevertheless it's all based on there being a certain date when creditors' rights and the debtors' rights are fundamentally affected.

Put another way, the commencement of insolvency creates a line in the sand which means that different conclusions do apply depending on whether an event happened before or after that line in the sand. It's -- my Lord may have heard arguments to the effect that, well, this can't be right because if this had happened two days later, the result would have been different in an insolvency context and such arguments are invariably rejected because insolvency does work on the basis of strict dates, and this is one example.

It's at this point that my learned friends' submissions on issues 4 and 2 collide in some way or coincide because of the arguments that you salami-slice the approach to this question, judgment before, judgment afterwards, proceedings before, et cetera. It's a thesis which pervades their case on issues 2 and 4. So what I say here has some relevance to issue to issue 2, as I mentioned yesterday.

MR JUSTICE DAVID RICHARDS: Right.

MR ZACAROLI: To summarise our points on this, the fact that a judgment has not been obtained at the commencement of insolvency has always been seen as a critical

distinction, as we've just seen from Fine Industrial. It's never been the case that creditors are treated as if they had a judgment at the date when they did not have a judgment. We had Whittingstall v Grover cited once again in this context. I don't want to go back over all my submissions on that.

MR JUSTICE DAVID RICHARDS: No.

MR ZACAROLI: Could I just flag up to my Lord that in our reply skeleton we deal with the distinction between a decree in a testamentary case and a winding-up order.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: At paragraphs 48 to 59 of our reply skeleton, where we cite the relevant passages from Mr Justice Chitty in Whittingstall v Grover, we set out the relevant rules, both then and now, relating to testamentary estates and, in particular, we refer to the passage in the Herefordshire Banking case which I didn't give my Lord the reference yesterday. It's 1A, tab 24, where Lord Rommily points out the crucial distinction between a decree in a deceased person's estate case, which does constitute a judgment against creditors, and a winding-up order, which does not.

MR JUSTICE DAVID RICHARDS: Right.

MR ZACAROLI: That is a very important background to understand the relevance of Whittingstall v Grover and

its irrelevance, therefore, to our case.

MR JUSTICE DAVID RICHARDS: Yes, I see.

MR ZACAROLI: So although it's right that the same rationale that was applied in the deceased estate's case, namely, well, the creditors are stopped from pursuing the deceased and therefore we'll give a judgment in their favour, and that same rationale underlies the reason why the Judgments Act rate is given for creditors generally in administration or liquidation. That's the same rationale, but the legal response to it is very different: in the one case a judgment is made which affects the rights of creditors, it's a judgment for them; in a winding-up bankruptcy it's not.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: Now, this problem cannot be overcome, we submit, with use of the hindsight principle which, again, is relied upon both in the context of 4 and 2 -- issues 4 and 2. The hindsight principle is purely about using later events to establish a certain value for a claim that was previously of uncertain value, and my Lord stated that very clearly in the MF Global judgment in 1E, tab 161 at paragraph 48.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: It can't be used to create rights which did not exist at the time. So it can't be used -- you can't

use hindsight to say that the subsequently obtained judgment is the proved debt. It isn't. The proved debt was the underlying right before they obtained the judgment.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: To take the example of the personal injury claim, which came up in argument yesterday, a subsequently obtained judgment, which would be relevant for the purposes of a claim against insurers, for example, does not alter the fact that at the date of administration the debt, the claim was the underlying debt, the provable debt so the claim for damages for personal injury was then the claim. With hindsight the judgment merely quantifies that claim at a certain amount.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: Now, the very close connection here with issue 2 is that you can't use hindsight to rewrite history, and under issue 2 that's relevant because you can't use hindsight to rewrite history by saying that interest which did not become accrued and due until the surplus arose had in fact accrued due earlier. That's a part, I think, of my learned friend's argument on issue 2 you can't use hindsight for that purpose. That would be re-writing history.

MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: Now, the personal injury claimant, my learned friend Mr Dicker, I think, mischaracterised our case on the relevance of merger at this point because he said that the personal injury claimant would have been entitled to interest on the underlying claim but a judgment obtained after administration would cause merger and therefore the original claim disappears, and you can't get interest on the judgment because we say it's too late. He said that would be nonsense. Well, of course, it is nonsense. That is not the conclusion we suggest. We suggest that the fallacy in that argument is that in thinking that what happens after the date of administration is relevant to the question of interest under 2.88(9) at all, the debt proved was the personal injury claim. It would carry in fact no right to interest as a mere claim for damages, but it was entitled to interest upon the administration order in the event of a surplus through the operation of rule 2.88(7) at the Judgments Act rate.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: Assume the claim was pursued thereafter, whether or not the claim merges in the judgment is irrelevant and certainly does not remove the right to interest which is established by the fact that the debt

proved carried a right to interest at the Judgments Act rate. And it's the same if the debt did carry a right to interest greater than 8 per cent. That would then be the debt proved and therefore the rate of interest applicable to the debt proved.

Our fifth point, and related to that, the "as if" point, but a slightly broader point: in my learned friends' skeletons it's suggested that the fact that the Judgments Act rate is chosen is because Parliament intended creditors to get the benefit of any Judgments Act rate that they would have been entitled to. We say that's a non sequitur. The reason the Judgments Act rate was chosen as the default rate was because it was thought that that's as a minimum what creditors would be entitled to, since they're all shut out from claiming a judgment. It's a rationale for choosing the rate; it doesn't mean that Parliament went the extra step and intended that if a creditor had a right to some different judgment it should be that rate which applies.

In a sense, the fallacy of that argument can be shown by the fact that there's no suggestion from my learned friends' side that if a judgment rate from another jurisdiction would produce a lower rate of interest, it should be that rate which applies. If

Parliament's intention was actually all we're doing here is identifying the rights under whatever judgment you could have got, what's the reason for imposing a lower rate in a foreign jurisdiction?
MR JUSTICE DAVID RICHARDS: Sorry, I'm not -- I mean, because the policy is it's only if it's a higher rate that you --
MR ZACAROLI: Yes --
MR JUSTICE DAVID RICHARDS: The 8 per cent -- the Judgments Act rate is a floor, isn't it?
MR ZACAROLI: Exactly. That's because the policy is the Judgments Act rate operates fairly as a floor to all; not because that's the rate which creditors could have got generally -- not all creditors could have got.
MR JUSTICE DAVID RICHARDS: I see.
MR ZACAROLI: That's the point.

The sixth point goes back to the mismatch between currencies. Given that the Judgments Act rate is specifically applicable to a sterling debt, given that the proof is payable in sterling, and that a foreign Judgments Act rate is likely to be linked to its own currency, we say it's highly unlikely the draughtsman positively intended to include generally rates under foreign judgments that would be obtained in the future.

Now, we accept, as I said in opening, that as

a matter of the drafting of the rule we can't exclude -- we don't think we can exclude a foreign contractual rate, nor do we think that you could exclude a rate under a judgment obtained rule.
MR JUSTICE DAVID RICHARDS: Quite.
MR ZACAROLI: Because those are the rates that actually apply to your debt at the time.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: But those, in a sense, we say, are just consequences of the way it's been drafted.

My learned friends' case, the counter-factual necessary in their case requires a positive intention on the part of the draughtsman to include a subsequently obtained judgment because it's only that which is relevant to introduce a rate which wouldn't have been applicable to the debt at the date of administration.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: The foreign judgment is the only case that only parties thought of that's relevant to this.

Now, the draughtsman clearly wouldn't have been thinking of a subsequently obtained English judgment because the Act has already dealt with that.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: So the counter-factual which is necessary for the other side's argument depends on the draughtsman

positively intending a future foreign judgment rate to have been included. We suggest that's a highly unlikely intention to impute to the draughtsman.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: The seventh point is the impracticalities point, that the complexities to which the counter-factual give rise which are simply not catered for in the rule --
MR JUSTICE DAVID RICHARDS: Sorry to bang on about this, but you say that the draughtsman clearly wouldn't have been thinking of a subsequently obtained English judgment.
MR ZACAROLI: Yes.
MR JUSTICE DAVID RICHARDS: Because the Act has already dealt with that, but has it? When you say the Act has dealt with it, do you mean --
MR ZACAROLI: Act and the rules. Act in relation to liquidation --
MR JUSTICE DAVID RICHARDS: The judgment, but there is the point that you could have a subsequent judgment and interest -- judgment rate interest might be different at that point.
MR ZACAROLI: I accept that. That's an example that's not catered for, but it's catered for in this sense, that in relation to English claims, the draughtsman had thought sufficient to fix the judgments rate at the date of

administration.
MR JUSTICE DAVID RICHARDS: Quite. So that would be odd if you had a subsequent judgment in England for which permission, if it was a compulsory liquidation, leave had been given to proceed which carried interest at a higher rate than the rate applicable at the date of administration.
MR ZACAROLI: My Lord says "odd". It's not odd in this sense, that rules provide you with your interest for the post-administration period at a rate that applies to everybody equally.
MR JUSTICE DAVID RICHARDS: I mean, I think it was a point in your favour. If you have -- if the judgment rate is 8 per cent at the date of administration, you then have, as I have mentioned earlier, a personal injuries claim, for which leave is given to commence proceedings, which result in a judgment, by which time the Judgments Act rate is 10 per cent. Now, it would be odd, I think, if the draughtsman had intended in those circumstances that that judgment creditor should get interest at 10 per cent from the date of his judgment.
MR ZACAROLI: I agree entirely with that, yes.
MR JUSTICE DAVID RICHARDS: Odd. Of course that may be the effect.
MR ZACAROLI: So our seventh point was the complexities and

difficulties which the counter-factual case gives rise to which are simply not catered for in the rule and therefore suggest that rule never intended them. That's the key point here.
MR JUSTICE DAVID RICHARDS: Yes, yes.
MR ZACAROLI: Just to summarise the key points, and these are in paragraph 133 of our initial skeleton.
MR JUSTICE DAVID RICHARDS: Hmm, hmm.
MR ZACAROLI: The first point is whether what's necessary for the creditors to establish is that it could have obtained a judgment, it would have obtained a judgment or it did obtain a judgment.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: The rule is silent as to which of those matters.
The debate between "would" and "could" could be very important where the creditor has a choice of jurisdictions in which to sue, which is not an uncommon situation.
MR JUSTICE DAVID RICHARDS: Yes. I am just opening up your skeleton and looking at 133.
MR ZACAROLI: 133.
MR JUSTICE DAVID RICHARDS: Yes, thank you.
MR ZACAROLI: The point I'm on now is really at paragraph 133.3 -- well, 2 and 3 because you need to

determine which jurisdiction is it that one picks, where there's a choice. Is it just that the creditor can choose the highest that it could possibly sue in? Because that, in a sense, is a right it had to pursue litigation in other jurisdictions. On what standard -- if it's not "could" but "would", what is envisaged, a sort of theoretical, hypothetical investigation as to what people would have done, had there been no administration, but it's a nonsensical and very complex enquiry amongst many creditors, completely contradicting the idea of simplicity and certainty of that interest?
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: The other point is this, just to highlight this part: that is since the counter-factual is what would, could or did happen after the date of administration, logically the counter-factual should only allow interest from the date that whatever it was that was going to happen would have happened.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: We don't -- in a sense we agree with my learned friends on this point. That's not what rule 2.88(9) is about. It's about identifying the rate which is then to be inserted for the periods referred to in sub-rule 7.
MR JUSTICE DAVID RICHARDS: Yes. So is it Mr Dicker's

submission that if a foreign judgment is obtained, so not his more refined case, but there is a judgment obtained after a years -- a year after the commencement of administration, the interest payable under that judgment, say 9 per cent, is payable from the start of the administration?
MR ZACAROLI: Yes, that's as I understand their case. As I say, we would agree, if we lose everything up to that point, that's the logical answer because 2.88(9) is not about identifying periods, it's about identifying the rate to be inserted.
MR JUSTICE DAVID RICHARDS: Quite.
MR ZACAROLI: But that strongly suggests the counter-factual is not right.
MR JUSTICE DAVID RICHARDS: Yes, I'm with you.
MR ZACAROLI: My Lord, that just leaves the following, which is to deal with York's argument in their skeleton which Mr Dicker referred to but Mr Smith didn't develop, but I will still deal with it, and that is that a creditor has a contingent right to a judgment at the date of administration.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: We very much doubt this is a real issue in this case.
MR JUSTICE DAVID RICHARDS: I mean, contingencies are

relevant for the purposes of proof.
MR ZACAROLI: Yes.
MR JUSTICE DAVID RICHARDS: The hindsight principle is relevant for the purposes of putting a value on contingent claims.
MR ZACAROLI: Yes.
MR JUSTICE DAVID RICHARDS: Of course you can't prove for post-administration interest, so questions of proof are irrelevant.
MR ZACAROLI: Irrelevant to interest, yes. But he --
MR JUSTICE DAVID RICHARDS: Exactly. So the question arises what is the relevance of asking -- of entering into the question of: do I have a contingent claim to interest on the judgment or to a judgment and therefore to interest on it?
MR ZACAROLI: I don't thinks the way it's put.
MR JUSTICE DAVID RICHARDS: No.
MR ZACAROLI: I think it's put on the basis there's a contingent right to the judgment debt, not to the interest on it, to the judgment debt. So if one asks --
MR JUSTICE DAVID RICHARDS: I see. It's a contingent right to the judgment debt. I'm with you, okay.
MR ZACAROLI: So, as I say, I think this is unlikely to be a real issue in this administration at all. Given the speed with which Lehmans collapsed, there will not have

been loads of people who started proceedings beforehand, and there will not be a contingent judgment debt unless you have started proceedings because you're outside the regime altogether -- the litigation regime.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: If my Lord wants a reference, it's paragraph 169 of Lord Sumption in Nortel. That's 1E, tab 169 at paragraph 136. Lord Sumption is dealing there with the costs awards, and there's a contingency because you've begun litigation.
MR JUSTICE DAVID RICHARDS: Right.
MR ZACAROLI: So we don't think this is a real issue in this administration.
MR JUSTICE DAVID RICHARDS: I follow.
MR ZACAROLI: But just to deal with it as a sort of theoretical point. So the position is that you have someone, let's say with a claim for £100 -- let's make it dollars so it fits in with issue 4 -- $100, and the creditor says, well, I've started proceedings to sue for that because the debtor is refusing to pay me. And at the date of administration, therefore, I have a contingent right to a judgment in the same way that I have a contingent right to a costs order, I have a contingent right to a liability order. The problem here, however, is that there are undoubtedly two

co-existing rights because the underlying claim, the contract debt, is extant. It exists.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: The creditor could never prove both. The idea in the real world of the creditor proving their contingent right to a judgment which is now stayed, where the proceeding are stayed, and therefore subject to the real possibility, and one might say probability, of it never happening would be absurd when they have a perfectly good right to prove for their existing debt.
So where there's co-existing rights in that way we say it would be absurd for the creditors to seek to prove the underlying -- the judgments debt as opposed to their existing contract debt.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: Moreover, it would be absurd or very doubtful an administrator would accept that proof because he would say, "Well, you can't get a judgment now". And there's no way you'll get the stay lifted just for the purposes of getting a leg up to claim interest which the rules otherwise don't give you. So mirroring, I think, my Lord's comments yesterday, we would say that in those circumstances it would be highly unlikely a creditor would get leave, other than the case where it gets leave for a different purpose --

MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: -- to claim against insurers, for example.
Now, there are two ways of dealing with that very small category of cases. The first is to say what we're really talking about here -- no, the first is to say that the court could, on that claim being obtained, impose conditions -- on the judgment being obtained impose conditions for lifting the stay, one of which is that you won't claim any interest on the judgment; that a perfectly tenable thing for the court to do. But we say the second way is probably the cleaner one, which is to say this is really a question of construction of the rule again; that's what this must come back to. And the question is: did the draughtsman of 2.88(9) intend that the rate applicable to the proved debt would include a rate applicable to a creditor's proof of a future contingent judgment debt when the creditor already has an existing non-contingent debt at of the day administration? We say really for all the reasons we've been through so far, the draughtsman didn't have that intention in mind when he drafted rule.
MR JUSTICE DAVID RICHARDS: Yes. Just to pick up the point about the costs awards, so assume the proceedings have been commenced before the commencement of the administration, so at that time the claimant has

a contingent claim for interest, so has a -- for costs -- so has a provable claim for the costs still to be awarded, and those costs will carry interest, dating back, I think, to when the costs were incurred. What's the analysis there?
MR ZACAROLI: Well, it's unlikely to be an issue other than in relation to proceedings -- well, in England certainly. In the US, where most of this issue is directed, generally there aren't costs orders.
MR JUSTICE DAVID RICHARDS: No, I follow.
MR ZACAROLI: But in England we would say the cleanest answer again is to say that the contingent right to costs is an existing claim at the date -- there is no parallel other claim there of course. It's just the contingent claim.
MR JUSTICE DAVID RICHARDS: Correct. Exactly.
MR ZACAROLI: But that exists at the date of administration. There is currently no interest attaching to that right.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: So the judgments rate applies in default.
MR JUSTICE DAVID RICHARDS: That's your answer there, yes.
MR ZACAROLI: Yes.
MR JUSTICE DAVID RICHARDS: I follow.
MR ZACAROLI: It's probably relevant because once the costs order is obtained in England the judgment rates attached

anyway, but if it were a higher judgments rate because the judgments rate has changed in the interim period, then that again supports the view that it should be the judgments rate at administration which applies.
MR JUSTICE DAVID RICHARDS: With a costs order I think the court can order the interest to run from the date the costs were incurred.
MR ZACAROLI: Yes, it can.
MR JUSTICE DAVID RICHARDS: Which might pre-date the commencement of the administration, but you would say, well, it's still -- you look at the rate applicable at date of administration which is 8 per cent.
MR ZACAROLI: Yes. In fact that -- it may be a non-point for another reason. I suppose if the proceedings are continuing, costs will be an expense.
MR JUSTICE DAVID RICHARDS: Well, we're thinking of the claimants' costs. I see.
MR ZACAROLI: If the administrator defends the proceedings, then the costs will become an expense by definition.
MR JUSTICE DAVID RICHARDS: But he might not, I suppose.
MR ZACAROLI: But we're going to be talking mostly about past costs and past interest.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: So the interest we're talking about is in fact a provable debt because it relates to a prior --

MR JUSTICE DAVID RICHARDS: Well, no, because you've not got an order for costs in your favour so it's still a contingent -- well, it is provable, but post-Nortel.
MR ZACAROLI: -- but provable. And therefore what is stopped by rule 2.88(1) is interest relating to the period after administration.
MR JUSTICE DAVID RICHARDS: I see, yes. The question then is what the rate would be post-administration and your answer would be 8 per cent on the --
MR ZACAROLI: If there were -- but this is -- in most cases we would be talking only about costs already incurred and therefore interest up to the date of administration.
MR JUSTICE DAVID RICHARDS: Yes, okay.
MR ZACAROLI: I suppose there will be a period after this as well, by definition, and in that period it's the 8 per cent.
My Lord, those, unless I can assist further --
MR JUSTICE DAVID RICHARDS: Sorry, to pursue another example. You have a section 994 petition which has been issued with the company that goes into administration as the respondent.
MR ZACAROLI: Yes.
MR JUSTICE DAVID RICHARDS: The order sought is a monetary order. That too, I think, would fall within the Nortel analysis. You have commenced the proceedings. There is

no liability, as such, until the court exercises its discretion to make the order on the 994 petition, but there are ongoing proceedings and leave is given to continue them. The court exercises its discretion, orders the company to pay £1 million, which -- that million pounds becomes a provable debt -- well, there's a provable debt anyway but that will ascertain the amount of the claim.

MR ZACAROLI: Yes.

MR JUSTICE DAVID RICHARDS: The judgment -- well, would I suppose carry judgment, you know, absent an administration would carry Judgments Act rate after the date of the order. There, again, you would say, well, no, it's 8 per cent from the date of the administration?

MR ZACAROLI: Yes.

MR JUSTICE DAVID RICHARDS: I see.

MR ZACAROLI: My Lord, those are our submissions.

MR JUSTICE DAVID RICHARDS: Good. Thank you, Mr Zacaroli.

Submissions by MR TROWER

MR TROWER: My Lord, I have no submissions on substance to make but I meant to say this to your Lordship. The Ruritanian piso issue has arisen on a couple of occasions in respect of issue 4.

Can I just show your Lordship a letter which Linklaters sent to the parties and is in volume 5,

tab 1, page 56 to page 57. This letter was sent immediately after your Lordship raised the point and what we have done in it is identified three possible possibilities in relation to Ruritanian pisos, if I can put it that way.

MR JUSTICE DAVID RICHARDS: Yes.

MR TROWER: What we are checking as well at the moment, but we don't have a final answer on it, is whether this actually has any relevance for this administration at all.

MR JUSTICE DAVID RICHARDS: All right.

MR TROWER: The prospects are that it doesn't because what we do know is the vast majority of claims are euros, dollars and Swiss francs, where the issue wouldn't arise in any practical sense. It might arise right on the margins and it may well be -- we quite understand why your Lordship has asked the question for the purposes of testing the argument, but in practical terms it may not be a question which your Lordship has to address for the purposes of giving directions to the administrators on this particular issue, but can I come back to you with a final position on that.

What we have done is if your Lordship would just read the letter. The parties have actually ended up I think with answer 1.

MR JUSTICE DAVID RICHARDS: Yes, of course.

MR TROWER: Pages 56 and 57. (Pause)

MR JUSTICE DAVID RICHARDS: So it's answer 1 that seems to be --

MR TROWER: They have come to answer 1.

MR JUSTICE DAVID RICHARDS: The proved debt and so -- but what you're raising Mr Trower, is, well, maybe this isn't an issue -- a real issue in this case.

MR TROWER: It may not be real issue in this case, although I quite understand why it is that one may need to --

MR JUSTICE DAVID RICHARDS: Issue 4 pre-supposes it is a real issue, doesn't it?

MR TROWER: Well, I know.

MR JUSTICE DAVID RICHARDS: But perhaps only -- but perhaps because of Mr Dicker's argument, that one takes into account judgments -- that you should apply the rate that would obtain on judgments which could have been entered.

MR TROWER: That could have been obtained.

MR JUSTICE DAVID RICHARDS: I think that it's said that under New York law the judgment rate is 9 per cent.

MR TROWER: It's 9 per cent.

MR JUSTICE DAVID RICHARDS: So is that where the relevant bit comes in?

MR TROWER: That may be where the wrinkle comes in, but your Lordship's very specific point about the extreme example

on Ruritanian pisos doesn't arise.

MR JUSTICE DAVID RICHARDS: Probably because of the point you make about the different interest rates. I see.

MR TROWER: My Lord, I don't want and don't think it's probably appropriate for me to develop anything at the moment, but I wanted your Lordship to know that as to what we have said.

MR JUSTICE DAVID RICHARDS: Thank you.

MR TROWER: I know Mr Dicker said he wants to come back to this point on issue 28 and that's fine from our point of view. But we just wanted your Lordship to see that.

MR JUSTICE DAVID RICHARDS: I'm grateful for that, Mr Trower. Thank you.

MR TROWER: My Lord, subject to that, I am not instructed to make any submissions on this issue.

MR JUSTICE DAVID RICHARDS: Very well.

Mr Dicker?

Reply submissions by MR DICKER

MR DICKER: My Lord, briefly by way of reply. There is, I think, a fundamental difference between Wentworth and the Senior Creditor Group about what is involved when you distribute the surplus. Ignoring for the moment the specific issue in relation to interest, just dealing generally with the concept of distribution of the surplus, my learned friend's position, as I understand

it, is that it's done by reference to the rights in fact applicable to the proved debt as at the date of administration. He certainly says that's the position in relation to interest. We say that's not right. It's done by reference generally at least by rights as at the date of distribution of the surplus.

We say that's always been the position. If one goes back all the way to Bromley v Goodere and the analysis of the position, there's no point prior to discharge in distributing the surplus to the bankrupt if creditors can probably sue the bankrupt for non-provable claims which they have against him for whatever reason they're non-provable. Lord Hardwicke said, "And discharge doesn't affect that".

We say that's still the general position. One sees that from your Lordship's own judgment in TNM.

What my learned friend says is you start effectively -- you start and stop with Dynamics and the principle of notional distribution, collection and distribution on day one and effectively that is then determinative. That's why everything, all rights are ascertained and fixed as at the date of administration.

Now, we say that principle applies in the context of the process of collective enforcement for the purposes of payment of proved debts. It's not how the court

approaches matters when the company turns out to be solvent. The clearest indication of that, can I just show your Lordship reflected in the judgment in find industrial, which your Lordship has at bundle 1B, tab 76.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: My Lord, it's Mr Justice Vaisey's judgment, as your Lordship knows, cited with approval by Vice Chancellor Pennycuick in Rolls-Royce. The passage I want to show your Lordship, often referred to, is at page 262 from Mr Justice Vaisey's judgment. It's two short passages. The first in the first full paragraph, about eight lines -- six lines down, he starts by saying:

"Although for some purposes during the winding-up proceedings ..."

Does your Lordship have that?

MR JUSTICE DAVID RICHARDS: Yes, thank you.

MR DICKER: "Although for some purposes during the winding-up proceedings this company must have been deemed ...(reading to the words)... but to be winding up a company which is solvent."

We say that this approach, effectively looking at the rights as at the date of distribution of the surplus, is entirely in accordance with principle and

policy, including most obviously members last. Otherwise one has a situation in which, by the time the surplus is distributed, creditors are on any basis entitled to whatever right may be -- it doesn't matter -- against the company, those rights are effectively, on Wentworth's submission, extinguished and the surplus distributed to the members.

Now, my learned friend's submission then in this respect has an echo of his submission in relation to section 69 of the 1883 Act. Your Lordship may remember that referring to payment in full with interest.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: In accordance with this Act.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: My Lord, your Lordship knows that our submission is that payment in full has always meant payment in full, not merely of proved debts but of all debts. My learned friend's submission effectively that in 1883 the meaning of that phrase changed so that it no longer meant payment in full of all debts, it meant payment in full of proved debts plus interest. That's how he gets his construction argument on 1883 going, but, my Lord, that argument, we say, is wrong in relation to 1883 and has never been an argument that has been applied anywhere else. It's not or is not applicable beforehand

and it's not applicable in relation to the 1986 Act.

So we say the starting point, before you get to interest, the feature of the statutory scheme which one has to bear in mind is the idea that you're distributing the surplus by reference to rights which exist at the date of distribution of the surplus. Once you have dealt with all of those, the shareholders only get the residue.

So that's --

MR JUSTICE DAVID RICHARDS: I mean, one way of looking at it though is to say that statutory interest doesn't fall within that area of non-provable claims but actually the surplus you're talking about is not truly a surplus. It's simply a surplus over proved debts and then you apply what you then have in paying statutory interest on proved debts. We haven't yet got to the position of non-provable claims.

MR DICKER: No, my Lord, that's absolutely right and that's why I said one has to start, as it were, with the way in which the scheme works in general. We say if one then focuses in on, as your Lordship has just done, in relation to interest, what is the position in relation to that? Does it reflect this general approach or does it provide for something different?

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: Now, so far as the wording of the rule is concerned, we made the submission that the rule simply refers to the rate applicable to the debt, apart from the administration. There's nothing in the terms of the rules which say you have to look at the rate as at the date of administration.
MR JUSTICE DAVID RICHARDS: Right.
MR DICKER: Or anything of that sort. It's essentially just saying what was the rate applicable to the debt, apart from the administration? If you leave the administration aside, treat the company as if it was, is and always was solvent, what's the rate applicable?
What is the relevance, we ask, of the date of administration in that context, echoing a point your Lordship made yesterday? The hypothetical which the rule envisages, at least envisages ignoring the administration because it's the rate applicable, apart from the administration.
Now, to take -- ignore for the moment foreign judgments. Take a simpler case. Consider the following example: a creditor has a claim against a company and doesn't carry interest as a matter of contract. The day after administration the legislature passes an Act, let's call it the Late Payment of Commercial Debts Act, which says every creditor with an unpaid debt, which is

unpaid for longer than 30 days, has a right to interest on that date -- on that debt as at the following rate.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: Now, if one just looks at the wording of 2.88(9), the rate applicable to the debt, apart from the administration, why wouldn't it include that statutory right?
MR JUSTICE DAVID RICHARDS: We assume that that's not a retrospective piece of legislation, but it operates from the date it comes into force which is the day after administration.
MR DICKER: Correct. Why shouldn't creditors be entitled to the benefit of that right, given to them by statute, merely because they had previously gone into administration in circumstances where it turns out the company is solvent and one should treat the company, at least ignoring interest, one should treat the company as if it was, is and was always solvent?
MR JUSTICE DAVID RICHARDS: Is that quite right then, Mr Dicker? Are we treating the company as if it was and always is solvent when we're talking about paying statutory interest?
MR DICKER: My Lord --
MR JUSTICE DAVID RICHARDS: Because that's what we're focusing on at the moment.

MR DICKER: The answer is not necessarily because it depends on the construction of the rules.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: My point, as I say, is one has to construe the rules in context and one of the overarching features of the statutory scheme is this idea of members last, therefore distribution of the surplus by reference to rights as at that date, that you would expect to encompass the example I've just given, the statute giving creditors a right --
MR JUSTICE DAVID RICHARDS: But not necessarily -- I mean, what -- the point I'm focusing on is we're looking here at 2.88 and what that intended to confer, not what should be taken care of before the final surplus is distributed to shareholders.
MR DICKER: My Lord is absolutely right, but our submission is when one comes to 2.88(9) is there anything in the wording of that rule which requires your Lordship to produce a result different from the result you would expect to apply; in other words, the result which would ensure creditors are satisfied in full before any distribution is made to shareholders.
Now, if --
MR JUSTICE DAVID RICHARDS: I see the way you've put it.
MR DICKER: So one starts, as it were, with the general

insolvency scheme, the underlying features, as Lord Walker and Lord Neuberger referred to it, and you -- as with every part of this Act, you have to -- in our submission, you have to construe the rules bearing those features in mind. The question then is: is there anything in 2.88(9) that prevent you from doing that? We say "no". There might have been if the rule had said it's the rate applicable to the debt as at the date of administration, but it doesn't say that. It just speaks generally about the rate applicable, apart from the administration.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: My Lord, there's a further point and a different way of attacking my learned friend's submissions. My learned friend's starting point, as I understand it, is you have to look at the rights attached as at the date of administration. So let's just assume he's right about that for the moment. We say he's not, but let's assume that he's right about that. Where does one then go? Take an example of a contract. You have a provision in a contract entitling you to interest conditional on, let's just say, commencing arbitration proceedings and the exercise of a discretion by the arbitrator in the event he finds in your favour that you should receive interest. My learned friend would accept

that those rights were sufficiently attached by the date of administration.
MR JUSTICE DAVID RICHARDS: That's right. I accept that. Think about it. Carry on, Mr Dicker.
MR DICKER: Now, one then says in exactly the same way as we argued it in Nortel, what is the difference between that and a right pursuant to statute effectively in identical terms? So the statute says you imagine a contractual provision that says in the event you commence proceedings and the Tribunal decides as a matter of discretion that you should be entitled to interest, you will receive interest. Imagine that text cut and pasted into a statute applicable effectively to anyone. The source of the right can't matter, so why isn't the creditor entitled to say, using my learned friend's approach, I have a sufficient right, as at the date of administration; there is this statutory provision which says in certain circumstances I'm entitled to interest. In the contractual case you don't have to go on and get your arbitration award, et cetera, that's all taken care of during the scheme. Why is it any different in relation to the statutory provision?
That logically takes one, in our submission, to the salami-slicing exercise. Imagine a creditor who had actually commenced proceedings beforehand, doesn't get

judgment until afterwards. My learned friend, as I understand it, assuming that my logic so far is correct, should accept that that creditor has a sufficiently attached right to interest pursuant to his judgment because he commenced proceedings beforehand. Now, why should the draughtsman have intended to benefit only those who commenced proceedings beforehand? The statute gives you a right, we're assuming, to interest. We're dealing with a solvent company. Whether you commence proceedings before or after the administration date is effectively an irrelevancy in this situation.
MR JUSTICE DAVID RICHARDS: We're not necessarily dealing with a solvent company because the company may have insufficient assets to paid full amount of statutory interest.
MR DICKER: Well, we're --
MR JUSTICE DAVID RICHARDS: So I think it's important to bear that in mind.
MR DICKER: That's true. I think, as we understand it -- well, my Lord, I can't go any further.
MR JUSTICE DAVID RICHARDS: Obviously we have to approach these issues, at it were, on the basis that it would be possible. It may not be the case with Lehmans but possibly in the cases of other companies that there is

a fund available for statutory interest but not a sufficient fund to pay all the statutory interest.
MR DICKER: Yes. At that point one goes back and says, "Okay, this is one situation which plainly has to be grappled with, it's a situation where there is a surplus for shareholders", and we say it's dealt with in this way. It doesn't matter whether you get your right only afterwards. It certainly doesn't matter if you had an attached right in the way my learned friend described it beforehand. That's then effectively embodied in the language of 2.88(9). There's no reference to the date of administration being the cut-off date.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: Having got that, your Lordship is absolutely right, there is an intervening category, but the effect of that construction of the rules is simply that in that intermediate category the creditor is entitled to interest in accordance with the judgment he only obtained afterwards, even in that situation, because that's what the rules provide.
Now, my learned friend had a series of submissions on the relevance of the previous law. Your Lordship might simply note the, if I may say so, different approach to the relevance of the previous law in relation to this issue so far as Wentworth is concerned

compared to question 2. Plainly the law's previous position is relevant. We say it supports our case here because one goes back, as I say, to the fundamental principles and the features of the scheme.
The final point I had by way of reply, was this, just one specific question I think from your Lordship which my learned friend answered. What date does the date of interest run from? Now, we say logically if the effect of the rules was only to provide that a creditor with an actual judgment was entitled to rely on that judgment as the rate applicable, then logically that rate would only apply from the date he in fact obtained the judgment.
As your Lordship knows, that intermediate possibility isn't one for which either side advocates. Wentworth say you never get there because there's a cut-off date at the date of administration. We say you go far past that because the wording of the rules is such it doesn't matter whether you get a judgment at all. It's on that second -- if we're right on our primary position, and it doesn't matter whether you get a judgment at all, we say the logic therefore must be that in that situation the rate runs from the date of administration. The logic for that would be the moratorium has in practice prevented you from obtaining

a judgment. You should be treated as if you had obtained a judgment on the date of administration.
MR JUSTICE DAVID RICHARDS: Is that the real issue on issue 4, question 4, the point you've outlined? You say it's not -- I just want to understand whether in this case the question -- you have a sort of three possible positions. Mr Zacaroli's position, your position and the one in the middle.
MR DICKER: Yes.
MR JUSTICE DAVID RICHARDS: But I think what you're telling me, that really no one is contending for the one in the middle, by which I mean where a judgment is in fact obtained after administration, such judgment carrying a higher interest rate.
MR DICKER: My Lord, as I submitted in opening, it's not our primary case. We do submit that, however, if a judgment is obtained a creditor would be entitled --
MR JUSTICE DAVID RICHARDS: Yes. I mean, that's a necessary stepping stone in your principal submission, it seems to me.
MR DICKER: It's not -- I'm not sure it's a necessary stepping stone because, as I say, if one comes at it from what I call the overarching principle, but it's certainly part of that submission.
My Lord, the --

MR JUSTICE DAVID RICHARDS: Your overarching approach is to sort of use Nortel to say, well, there is -- I don't quite know how you get to it without using the intermediate position as a stepping stone.
MR DICKER: My Lord, essentially we have two arguments.
My first one was that you look at rights as at the date of distribution. That's how -- and that general approach is reflected in rule 2.88(9). That's the first point. So it doesn't matter whether or not you can apply a Nortel analysis at all. It's a little like the TNM situation. You acquire a right --
MR JUSTICE DAVID RICHARDS: I don't want to sound stupid here, but if at date of distribution you do not have a foreign judgment giving you a higher rate of interest, what's the basis for saying --
MR DICKER: No, your Lordship is right, if that's where the point goes, absolutely.
MR JUSTICE DAVID RICHARDS: I'm trying to understand how --
MR DICKER: Well, my Lord, two different arguments. One is you look at rights as at the date of distribution.
MR JUSTICE DAVID RICHARDS: All right.
MR DICKER: TNM, an example, we say nothing in the rules relating to interest inconsistent with that. That's focusing simply on whether the rights have accrued by the date of distribution. That's the first argument.

The second --
MR JUSTICE DAVID RICHARDS: Which rights are you referring to there?
MR DICKER: The right to interest, in this case pursuant to a judgment.
MR JUSTICE DAVID RICHARDS: An actual judgment?
MR DICKER: Yes.
MR JUSTICE DAVID RICHARDS: I follow.
MR DICKER: The second argument, which is a different argument, is effectively to adopt my learned friend's approach. Assume he's right and what one is looking for is rights attached prior to the date of administration, effectively applying the Nortel line, applying the argument that why should it matter whether or not the right exists in a contract or is simply given to you as a matter of statute, if that's sufficient that is another way of establishing an actual right prior to distribution.
Those two arguments only apply -- the first argument requires an actual judgment prior to distribution.
MR JUSTICE DAVID RICHARDS: Right.
MR DICKER: The second argument requires some notion of attached rights prior to the date of administration, but doesn't require an actual judgment.
MR JUSTICE DAVID RICHARDS: The attached right being the

fact that you have submitted to the jurisdiction of the New York courts and you could have commenced proceedings there and obtained a judgment?
MR DICKER: Yes. Looked at from the other way round, there is a New York statute which as a matter of New York law gives you a right to interest conditional on commencing proceedings and obtaining a judgment, just as --
MR JUSTICE DAVID RICHARDS: I am still having difficulty with this. If there isn't actually a judgment. I mean, Nortel doesn't help you.
MR DICKER: Well, my Lord, with respect, Nortel in our submission does. Because one of the points in Nortel is go back to the distinction between contractual and statutory rights. You have -- it's very easy in the case of a contract --
MR JUSTICE DAVID RICHARDS: Sorry, let me interrupt you. Why I said that was in Nortel there was a contribution notice; there was no suggestion the pension regulator or whoever could prove for the amount of a contribution notice if there hadn't been fact been one.
MR DICKER: No, and one has to identify what it is that is necessary to trigger the attached rights for these purposes and it may be one says the commencement of the proceedings.
MR JUSTICE DAVID RICHARDS: Your argument doesn't depend on

the commencement of proceedings. Your argument depends on an entitlement to commence proceedings, whether or not it's exercised.
MR DICKER: That's right, but one gets to that, as I say, that's why I used the expression of salami-slicing and what did the legislature contend. On my learned friend's approach -- there may be an argument about quite how much you have do in New York before you get this -- before as a matter of New York law you're regarded as having a right to interest, albeit conditional. Let's just take the analogy with the costs cases.
Assume that what you need to do is effectively have commenced proceedings in New York. So you don't actually have a judgment at all at this stage. You simply have commenced proceedings.
MR JUSTICE DAVID RICHARDS: No.
MR DICKER: On my learned friend's logic, as we say, that should be sufficient. That's where the argument arises. Why in the context of a surplus should it matter whether you commence proceedings beforehand if you haven't yet obtained a judgment and only did so afterwards as against obtaining -- commencing proceedings after and getting a judgment after? In other words, what is the centrality of the date of administration?

MR JUSTICE DAVID RICHARDS: Hold on. In both of those examples you're postulating that there are actual proceedings.
MR DICKER: That's the next stage in the argument, yes.
MR JUSTICE DAVID RICHARDS: Well, what you just gave me there you postulated proceedings commenced either before or after the commencement of the administration. As I understand it, your principal submission here is it doesn't matter whether in fact there are any proceedings or not.
MR DICKER: Correct. That's because for the simple reason that if one gets to a stage of finding that a creditor in one of these intermediate situations is plainly entitled to interest at his judgment rate, one then has to ask, in our submission, how the legislature intended to deal with that possibility when drafting 2.88(9).
MR JUSTICE DAVID RICHARDS: Pause there. I understand the argument, but it's an argument that turns exclusively on the drafting of 2.88. It's not an argument that in any sense depends on how you distribute a surplus before you hand it back to shareholders.
MR DICKER: My Lord, it ultimately depends on the construction of 2.88(9).
MR JUSTICE DAVID RICHARDS: Just to repeat my point to you, if you had -- at the point at which the fund is about to

be distributed to shareholders, to members, you, the creditor, have not got a New York judgment entitling you to a higher rate of interest, you wouldn't be able to stop that distribution.
MR DICKER: No, and that's absolutely right. So one then needs the final part of the argument, which is if one accepts that a creditor who obtains a judgment post-administration would be entitled to interest at that judgment rate before the surplus is distributed, one then asks, okay, assuming the draughtsman recognised that possibility, how did he intend that it should be dealt with? Did he intend that only creditors who in fact obtained a judgment before distribution should be entitled to interest or did he think to himself, "That doesn't make any sense at all, all I will be doing is encouraging creditors to commence proceedings and to obtain judgment. I run the risk that some only may manage to get judgment, for whatever reason, so I run the risk of creditors being treated unequally. Wouldn't it be much more sensible simply to have a rule which operated equally for all creditors, whether or not they had in fact commenced a judgment?" At that point the draughtsman says to himself, "I think that's the sensible solution" and he therefore drafted rule, 2.88(9), in a way that would enable that to occur by

effectively asking for a counter-factual question to be answered.
MR JUSTICE DAVID RICHARDS: To some extent that is exactly what rule 2.88 does because it imposes 8 per cent -- sorry, it imposes Judgments Act rate.
MR DICKER: My Lord, absolutely, and that's what we say -- in a sense that is a mirror of what we say the draughtsman achieved in relation to foreign judgments. So he's asking --
MR JUSTICE DAVID RICHARDS: Okay. I understand. So just coming back to my question. Nobody -- it's right, is it -- I'm not quite clear, Mr Dicker. Are you arguing in the alternative for the intermediate position? Supposing you're wrong on your main submission -- just supposing, that's all -- are you -- because I need to know what is arising for decision, are you submitting that the intermediate position is nonetheless correct or is it simply not really an issue that arises in Lehmans, so no one is really bothered?
MR DICKER: The intermediate situation, as I understand it, does presently arise in at least one case. Mr Lomas's eleventh statement, paragraph 26, refers to a post-administration judgment by a creditor in Milan. That's only example that --
MR JUSTICE DAVID RICHARDS: Would that give him a rate of

interest which is higher than 8 per cent?
MR DICKER: My Lord, that's --
MR JUSTICE DAVID RICHARDS: It would only be then that it mattered.
MR DICKER: That's obviously of no benefit, certainly so far as my clients were concerned, because I'm assuming they weren't the creditor in Milan.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: My Lord, judgments obtained to date --
MR JUSTICE DAVID RICHARDS: That's right, yes. Judgments obtained to date, yes.
MR DICKER: Because if your Lordship were to hold effectively it would be good enough if you had a judgment --
MR JUSTICE DAVID RICHARDS: I can see what going to happen in New York, but, I mean, that might be a very good reason for not deciding it, if it doesn't actually arise for decision today, or maybe it would be a very good reason for deciding it; I don't know. I'm just a little unclear about this, that's all. I just -- it may be that it will fall to Mr Trower to define what it is I have to decide on issue 4. I think you and I have probably taken it as far as we can.
MR DICKER: My Lord, just to stress that last point. We do, therefore, contend in the alternative for the

intermediate case and the consequence of that may be unsatisfactory.
MR JUSTICE DAVID RICHARDS: I follow.
MR DICKER: Ultimately for everyone.
MR JUSTICE DAVID RICHARDS: I follow, yes. All right. This might be -- Mr Dicker, does that actually complete your reply submissions?
MR DICKER: Yes.
MR JUSTICE DAVID RICHARDS: I interrupted you --
MR DICKER: No, I should have said it does before sitting down.
MR JUSTICE DAVID RICHARDS: No, don't worry. I'll take the five-minute break now.
(11.35 am)
(Short break)
(11.42 am)
Submissions by MR DICKER
MR JUSTICE DAVID RICHARDS: Mr Dicker.
MR DICKER: My Lord, questions 6 to 8.
MR JUSTICE DAVID RICHARDS: Yes. Mr Smith, I took it there was nothing you wanted to say?
MR SMITH: Nothing in reply, my Lord.
MR DICKER: My Lord, questions 6 to 8 are concerned with the date from which interest under rule 2.88(8) and (9) is calculated. Question 7 is concerned with contingent

debts. Question 8 with future debts. It's easiest to deal with those first and then deal with question 6.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: As your Lordship knows, the issue is in whether in relation to such debts interest is calculated from the date of administration or the date that the contingent debts ceased to be subject to a contingency and future debt became due and payable, or some other date.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: My Lord, this is ultimately a question of construction of rule 2.88(7), in particular the phrase or the requirement that "surplus be applied in paying interest on those debts in respect of the periods during which they have been outstanding since the relevant date".
My Lord, in what may be called an easy case, the answer is obvious. If the debt was due and payable as at the date of administration, then of course interest is payable from that date. The question is how those rules were intended to apply to contingent and future claims.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: We say one can't answer that question without first having regard to the nature of the statutory

scheme and also the effect of the statutory scheme on those claims.
Now, the Senior Creditor Group and York submit that in both cases interest is calculated from the date of administration. That, they say, is the effect of 2.88(7), particularly when that provision is construed in the light of the statutory regime and two aspects of that regime, firstly, that the liquidation and distribution of the assets are treated as notionally taking place on the commencement date and, secondly, that provable debts are ascertained and valued as at that date.
In other words, we're not simply dealing with contingent or future debts in the same state in which they existed outside of insolvency. Something has happened to those debts, we say, as a result of the insolvency process. One need to answer the question having regard to what has happened.
Now, Wentworth agrees with us in relation to future debts. Wentworth effectively says, well, given that rule 2.105 requires future debts to be discounted for the purposes of dividend to the date of administration to achieve a present value, it obviously follows that interest is then due from the date of administration.
MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: Their position is it doesn't make sense to discount something for present value and then refuse to pay interest on it.

Wentworth disagree in relation to contingent claims. They say that the position in relation to contingent claims is different. Interest only accrues on those claims from the date that the contingency accrues.

The administrators' position is that they disagree with us, both in relation to contingent and also in relation to future debts.

MR JUSTICE DAVID RICHARDS: Right.

MR DICKER: So before turning to the construction of 2.88(7), I need to deal with the two aspects of the statutory regime. The first concerns the notional liquidation and distribution and the way that courts analyse that. As your Lordship knows, the process of collecting and distributing the assets of the company treated as taking place on the commencement date, and the debts which rank for proof are ascertained as at that date. So the basic idea is that assets are collected, claims are ascertained and distributions are made as at the commencement date.

Put another way, the commencement date is the date upon which creditors' claims are notionally enforced through the collective process against the company's

assets and the date on which their entitlement to a share in those assets arises.

That, we say, necessarily involves at least a notional acceleration of contingent and future claims. They are at least notionally treated as outstanding from that date.

My Lord, your Lordship is no doubt very familiar with the various statements to this effect. Can I just show your Lordship or remind your Lordship of one, namely that in re Dynamics Corporation which your Lordship has at bundle 1B, tab 85.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: The two passages are 761, just above letter D, where Mr Justice Oliver says, the second sentence:

"It is, of course, necessary in a liquidation, if a proportionate distribution among creditors of the available assets is to be achieved, that the claims of all creditors be reduced at some stage to a common unit of account. The point of time at which that should be done had been concluded by a series of cases which established that the conversion must be made at the date when payment became due so that the sterling amount of any claim was ascertainable either before or at the latest upon the commencement of the winding up."

Then the well-known passage at 774, starting just

between letter G and H. Just between letter G and H, the sentence beginning:

"What the court is seeking to do in a winding up is to ascertain the liabilities of the company at a particular date and to distribute the available assets as at that date pro rata according to the amounts of those liabilities. In practice the process cannot be immediate but notionally I think it is, and as it seems to me it has to be treated as if it were, although subsequent events can be taken into account in quantifying what the liabilities were at the relevant date. In the context of a liquidation therefore the relevant date for the ascertainment of the amount of the liability is the notional date of discharge of that liability."

So one has at least this --

MR JUSTICE DAVID RICHARDS: I see, yes.

MR DICKER: One has at least this image of a notional collective enforcement, assets realised and applied in discharge of debts -- one might add outstanding -- as at that date. They are effectively at least notionally treated as outstanding at that date and the assets applied in discharge of them.

Now, that's simply the notional collection and distribution, but we say that is then reflected in the

way in which the statutory scheme deals with contingent and future debts. Starting, if I may, with contingent debts. My Lord, as your Lordship knows, proof of debt is required to state the value of the claim as at the date on which the company entered administration. For the purposes of administration, your Lordship will see that reflected in rule 2.73 -- I am sorry, 2.72(3)(b)(ii):

"Proof must state the following matters: the total amount of the creditors' claim as at the date on which the company entered administration."

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: That merely, as it were, codifies effectively the cut-off date.

Now, for contingent claims that is achieved, again, as your Lordship knows, by rule 2.81:

"The administrator shall estimate the value of any debt which by reason of its being subject to any contingency or for any other reason does not bear a certain value and he may revise any estimate previously made ..."

Sub-rule 2:

"Where the value of a debt is estimated under this rule, the amount provable in the administration in the a case of that date is that of the estimate at the time

being."
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: We say the process of estimation requires an administrator to place a present value as at the date of administration on uncertain future claims. That's necessary to enable the company's assets to be distributed pari passu amongst its creditors.
Now, a contingent claim is a claim which may or may not become due and payable in the future depending on whether or not one or more contingencies occur. Therefore, as a matter of principal, when you're estimating its value, there are essentially two parts -- estimating its present value, there are essentially two parts one has to take into account. Firstly, the likelihood of the contingency occurring and the fact that, if it does occur, debt will only be payable in the future.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: You need to do that to make a just estimate of the value of the claim so as to ensure the assets are distributed pari passu.
We say, if that's right, then, as Wentworth accept in relation to future claims, the process of present -- of estimating the present value of a contingent debt necessarily involves treating it as outstanding. It

doesn't make sense to give a debt a present value, save on the basis that you are going to treat it as if it was being paid on that date, payable on that date and therefore should accrue interest from that date.
Now, in our submission this is precisely what the authorities provide. Can I show your Lordship, firstly, European Assurance Society Arbitration. It's bundle 1A, tab 36. My Lord, the case concerned valuations of policies or annuities. The judgment is given by Lord Westbury. Your Lordship will see it starts at page 70, at the bottom of column 1.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: He says:
"In this case I have to decide two points, one as to the time and the valuation ...(reading to the words)... wherein some indefinite enactments may probably be attributed to the existence of that doubt."
Then he effectively says, well, of course you value it as at the date of commencement of the liquidation.
He goes on:
"If you examine the subject I think it will be admitted at once ...(reading to the words)... these are claims to arise as is the case of annuities from time to time in future [so some of them are future]. In the case of policies they are contingent claims arising

...(reading to the words)... the holder of the claims, will be entitled to rank among the rest of the creditors."
So basic stuff. Present value, both for contingent and for future claims.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: He concludes, page 71, column 1, ten lines from the end of the first paragraph, in the middle column:
"I have no hesitation therefore from adhering to the rule laid down by the statute and followed by Lord Cairns and I declare that every policy and every annuity shall be admissible to proof in this administration according to the value of the policy and the annuity as at the date of the order to wind up."
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: My Lord, fairly basic stuff, we would say, reflected, although more briefly, in a number of more recent cases. Can I just give your Lordship three examples. The first is Danka Business Systems at first instance, which is 1B, tab 158. It's tab 158 and the relevant paragraph is paragraph 40.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: It starts:
"In summary therefore the position is as follows: the members of a company are entitled to place

their ...(reading to the words)... with an uncertain value rules 4.86 applies."
Then dropping to the last six lines of that paragraph to the sentence that's relevant, it says:
"The statutory scheme has been designed to place a present value on uncertain future claims in order to enable the liquidation process to be brought to a speedy conclusion."
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: So, again, we say fairly basic stuff. Contingent claims which may or may not fall due in the future, when you presently value them you need to take into account both the likelihood of the contingency, and the fact, if it does occur, it will only be payable in the future.
My Lord, two other references. First, from your Lordship's judgment in MF Global. The same bundle, tab 161.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: The relevant paragraph is paragraph 54 on page 1044.
MR JUSTICE DAVID RICHARDS: 54?
MR DICKER: 54.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: It reads:

"It is relevant to emphasise a feature of the hindsight principle which is of particular significance to the present case ...(reading to the words)... which is unascertained at the relevant future date."

Then your Lordship says this:

"It is essentially a process of putting a present value on possible future events or outcomes."

The third and final reference on this point in the authorities is to your Lordship's judgment and Waterfall 1, tab 167.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: It's paragraph 77, just above letter E, where your Lordship says, just above the letter E:

"In order to bring administrations and liquidations to a conclusion as quickly as practical ... future debts are discounted ... the creditor receives the full present value of the debt calculated provided by the insolvency rules."

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: My Lord, there's also a discussion in Professor Goode's book, Principles of Corporate Insolvency Law, which your Lordship has in bundle 2, tab 6.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: The relevant paragraph is 4-39 --

MR JUSTICE DAVID RICHARDS: Sorry, volume 2?

MR DICKER: Volume 2, tab 6.

MR JUSTICE DAVID RICHARDS: Thank you. It's 4- ...?

MR DICKER: 4-39.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: "Estimation of liabilities."

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: Then there's a section dealing with how one estimates liabilities, including a discussion about how one deals with the fact that claims may be 80 per cent likely if you estimate it on the basis they're 100 per cent likely or 80 per cent or, but I can ignore that.

The passage I was going to show your Lordship starts right at the bottom of 146, where Professor Goode states:

"Different approaches are possible. One is to say that if there is more than an even chance of the contingency occurring, the liabilities should be taken as the present value of the contingent liability, for example the amount of a guaranteed debt discounted to take account of its futurity. On this approach a contingent liability with an 80 per cent chance of accrual, although discounted for futurity, would not be discounted for the 20 per cent chance that it would not

accrue, whilst a liability with a 50 per cent chance of accrual would be disregarded altogether."

Ignoring, as it were, the point he's discussing, which is how you deal with whether -- the 80 per cent versus the 50 per cent chance, there's the reference to discounting to take account of its futurity. He says that in line 4 and he repeats that in line 5.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: He discusses -- he then goes on, perhaps I should read it:

"An alternative approach is to value the contingent liability ...(reading to the words)... and is capable of valuation and disregarded altogether in other cases."

My Lord, the point is embedded in a discussion of a different point, but the one common theme here is whatever approach one takes for contingent claims, you discount them for futurity. The point Professor Goode is then discussing, okay, ignore the discount for futurity which he repeatedly says you have to make, how do you estimate the likelihood of the contingency happening? The point he's discussing here is whether, if the contingency is just over 50 per cent, you admit it in full, or if it's 80 per cent you admit it for 80 per cent. That's obviously not the point with which your Lordship is concerned.

MR JUSTICE DAVID RICHARDS: I have a feeling this cropped up a bit in Waterfall 1 or possibly MF Global. But futurity is a difficult element with contingent liabilities because it all depends on the contingent liability. So that if you have your house insurance which is an annual policy, the prospect of a fire occurring in your house is probably statistically the same as occurring tomorrow or at the end of the year. It's very unlikely that futurity would play any part at all in the estimation of the value of your claim. Likewise, a guarantee of a debt which is either presently payable or is payable on demand. That would be the obvious example. Different of course if it's a guarantee of a debt which does not fall due for payment for five years. So whether futurity is an element in the valuation of contingent liabilities very much depends on the liability and could be quite difficult sometimes, I think.

MR DICKER: My Lord, we agree with all of that. Our submission is, however, that the process of estimation for contingencies involve putting a present value.

MR JUSTICE DAVID RICHARDS: It undoubtedly does that, yes.

MR DICKER: Now, to the extent that the contingency is -- the claim is contingent because it may or may not fall due in the future, the process obviously involves

at least to the extent possible discounting for futurity.
MR JUSTICE DAVID RICHARDS: I accept that. That seems right.
MR DICKER: As your Lordship says, there may be cases in which that's relatively straightforward, where one knows that if the contingency occurs it's either going to occur or not occur on a specific date or specific period in the future. That's the easy case. Of course your Lordship is right, it may be more difficult in cases where the contingency may or may not occur equally on any particular date.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: But that's the basic exercise which the rules require.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: Now, just turning to Wentworth's approach. Can I --
MR JUSTICE DAVID RICHARDS: As you rightly say, it doesn't -- it isn't an issue today, but is Professor Goode right in what he says is the prevailing practice? It comes as a bit of a surprise to me, I must say.
MR DICKER: Yes.
MR JUSTICE DAVID RICHARDS: Take my example of the house

policy. The simplest way of estimating the claim of the insured is the cost of a replacement policy, but one would hesitate to say that he had no claim at all because the statistical chance of a fire was small. Anyway, I am slightly puzzled by what Professor Goode says there.
MR DICKER: And I -- your Lordship doesn't need to get into that.
MR JUSTICE DAVID RICHARDS: But I don't need to get into that.
MR DICKER: And I wasn't proposing to address your Lordship on it.
MR JUSTICE DAVID RICHARDS: But, anyway, the point about futurity certainly can arise. So there are two main elements that arise with contingent liabilities: one is the contingency, and the other is futurity.
MR DICKER: Absolutely. If you're estimating it, you have to take both into account.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: Now, Wentworth's position on this, if I can just show your Lordship its skeleton argument, is contained in two paragraphs or at two points. The first is paragraph 162. So at 162 they say:
"There is no equivalent to rule 2.105 [that's the rule dealing with future debts] for contingent debts,

i.e. no rule which requires any discount to be made for the time value of money or estimated value of the contingent debt while it remains contingent."
MR JUSTICE DAVID RICHARDS: I see.
MR DICKER: So that's 162.
The other two paragraphs I need to show your Lordship are 149 and 150.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: The other two paragraphs are 149 and 150 where they say, at 149:
"The principal response of the SCG and York is that the rules provide for all claims to be admitted at the amount they bore as at the date of administration and that in relation to contingent claims, this involves 'essentially a process of putting a present value on possible future events or outcomes'."
150:
"Wentworth does not take issue with either of these propositions, but contends that they are irrelevant to the question of the date from which statutory interest should run."
My Lord, I have to say we're not entirely clear on Wentworth's position in relation to this. No doubt my learned friend will explain it in due course.
So far as 162 is concerned, it's correct, of course,

that there is no specific provision containing a statutory discount formula for contingent debts as there is for future debts, but we say that's built into the estimation process required by rule 2.81. As your Lordship just observed, there are two aspects to a contingent claim and in estimating its present value you need to take account of both.
Your Lordship raised a couple of minutes ago the point that when you initially estimate a contingent debt, it may or may not, depending on the facts, be easy to estimate what discount you give for futurity. In some cases it may be easy if the debt is contingent on an event which will happened on a specific date, not in other circumstances. So the question then arises, what happens if and when the contingency occurs? Your Lordship knows from rule 2.81, the passage I read, that the administrator may revise any estimate previously made if he thinks fit by reference to any change of circumstances or to information becoming available to him, she shall informed creditor as to his estimate and any revision of it.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: Then effectively that becomes the new estimate for the purposes of 2.81(2).
We say the object of this exercise is exactly the

same. The only difference is that it's conducted with the benefit of hindsight. You are estimating the present value of the debt as at the date of administration with the value -- with the benefit of hindsight.

But taking your Lordship back, if you will forgive me, to your Lordship's own judgment in MF Global, 1E, tab 161, paragraph 48 and paragraph 51. My Lord, in paragraph 48 --

MR JUSTICE DAVID RICHARDS: Shall I just read it to myself?

MR DICKER: If your Lordship would, 48 and 51.

MR JUSTICE DAVID RICHARDS: Yes. (Pause)

Yes.

MR DICKER: My Lord, I just emphasise, if I may, the citation from Wight v Eckhardt, page 1044, just at letter C, if your Lordship has that?

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: "Adjustments are made to give effect to the underling principle of pari passu distribution between creditors."

In other words, it's not a new exercise we're doing at this stage; it's the same exercise being done with the benefit of hindsight.

The aim remains to produce a present value of the contingent debt so that it can rank pari passu with all

creditors.

Now, it's fair to say that the present value part of that exercise is not always stressed in the authorities, but can I show your Lordship two authorities which do make it express or from which it's clear. The first is a case called Hill v Bridges which your Lordship has in 1A, tab 40A. My Lord, your Lordship needs one item from the facts. Picking it up at the beginning:

"A testator covenanted by deed for payment to his daughter of a sum of £5,000 with interest at 4 per cent per annum within one month after the death of his wife. He then died in 1879 insolvent and the daughter having sent him claims in respect of the principal sum and the annuity.

"Held: applying the rules in bankruptcy as to contingent liabilities, the daughter was entitled to prove for the full amount of the £5,000 less a rebate of interest at 4 per cent per annum for the period between the date of the judgment and the death of the widow and that her proof in respect of the annuity must be treated on the same principle."

My Lord, then 344 from the argument of Mr Chitty QC, six lines from the end of the line:

"It is singular that neither the present Bankruptcy Act nor the general rules in bankruptcy

contain any directions for the valuation of contingent debts, although under the 177th section of the old Bankruptcy Act 1849, if a contingency happened during the bankruptcy, proof for the full amount of the debt was allowed."

So this obviously before codification of the approach. That approach, your Lordship will see reflected in the judgment of the Master of the Rolls, 345, shortly stated:

"I am of the opinion as regard the £5,000 that upon the principle I adopted in McFarlane's claim the contingency having happened before certificate, the claimant is entitled to prove for the full amount less a rebate or discount at 4 per cent for the period between the date of the judgment and the widow's death."

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: Entirely, we say, as one would expect.

The second authority is not in bundle 1A but in bundle 1B. It's at tab 60A. The decision is in a case called Law Car and General Insurance Corporation. My Lord, it concerned employer's liability policies. The judgment -- the first instance judgment was by Mr Justice Neville. It was reversed in the Court of Appeal. The judgment of the Master of the Rolls Cozens-Hardy starts at page 116. If your Lordship

could ...

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: "The appeal raises the question whether under an employer's liability policy ...(reading to the words)... would have been wound up under the Companies Act then in force."

Then dropping to the last line on that page:

"If during the currency of the policy an accident occurred which if the contract of indemnity had not been repudiated would have entitled the holder to X pounds, the court treated that fact as evidence pro tanto of the value of the indemnity and the holder could have proved for X pounds less a discount for the period between the winding-up order and the date of the accident."

My Lord, then from Lord Justice Buckley, whose judgment starts on page 120. The last two words on page 120 refer to section 158. That's of the Companies Act 1862, which he says:

"... rendered admissible to proof debts payable on a contingency and claims against the company present or future, certain or contingent ...", et cetera.

The relevant words are "a just estimate being made so far as possible of the value of all such debts or claims as may be subject to contingency, sound only in damages that for some other reason do not bear a certain

value".
Then dropping to the last two lines, he says:
"No one seems to have suggested that the proper amount was not the sum assured but the present value of the sum assured. The latter is, however, the accurate amount and it follows from the Vice-Chancellor's language, I think, that if the point that been mentioned he would have so directed."
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: So that's how the scheme works. We say one needs to construe rule 2.88(7) in the light of that, in particular one should not treat a contingent claim as if it was a claim which was unaffected by the statutory scheme. One has to bear in mind both the notional distribution on day one and also the valuation exercise which the scheme requires to take place.
My Lord, if your Lordship then goes now to rule 2.88(7).
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: 2.88(7) requires any surplus remaining after pay amount of the debts proved --
MR JUSTICE DAVID RICHARDS: Just before we do that, can we just go back to 2.88(1)?
MR DICKER: Yes.
MR JUSTICE DAVID RICHARDS: So applying the first two lines,

you have the administration, you have a contingent liability, the contingency has not occurred, so you -- so a value is placed upon the claim by reference to the probability of the contingency occurring, and, to the extent relevant, futurity.
Then we go on:
"... and he may revise any estimate previously made, if he thinks fit, by reference to changes in circumstances, most obviously the occurrence of the contingency".
And the authorities you have shown me would suggest that if the contingency occurs, let us say, a year after the commencement date, then the claim is revalued to the full amount payable by the -- full amount payable but less a discount. I mean, I am taking a period of a year because it's rather more than a few weeks. It might not make much difference but let's say a year or two years, something of that sort, you would actually discount that back to the date of the -- to the relevant date, you would say?
MR DICKER: My Lord, absolutely.
MR JUSTICE DAVID RICHARDS: It might be that -- I notice that there was no such discounting in McFarlane's case which was the fire policy, but I think the fire occurred only a couple of months or something after the relevant

date.
MR DICKER: We say this is what the rules require. Your Lordship is absolutely right that the process of estimation, admission, agreement of claims is often a rough and ready process and it may be a deal is struck which either expressly or implicitly accommodates that or does not, for whatever reason.
My Lord, certainly there are cases where, as I said, the reference to discount for futurity is not made express. In some cases it's not entirely clear why. There's a reference, I think, in my learned friend Mr Smith's skeleton to Stein v Blake, where Lord Hoffmann just shortly says if a claim is quantified -- you use hindsight to quantify the claim and the quantified amount is then admitted. But it's not entirely clear from the way in which he puts it whether he's, as it were, focusing on both these elements. As your Lordship says, there may be circumstances in which it needs to be done and other cases in which it may not.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: Now, our submissions on the meaning of the phrase "in respect of the periods during which they have been outstanding since the relevant date", in the light of the features of the statutory scheme I've shown your

Lordship are these.
Firstly, the rule refers to the surplus being used to pay interest on "those debts" and that is a reference to proved debts defined in rule 13.12 to include contingent debts. At least at this stage no distinction is being drawn, depending on whether the proved debt is present or future, certain or contingent. The surplus is to be paid in respect of all proved debts.
Secondly, the rule requires interest to be paid on proved debts for the period during which they have been outstanding since the relevant date. The relevant date is the date of administration and the period starts on the date of administration. In other words, the formulation of the rule proceeds on the basis that all debts have been outstanding from the relevant date and the question is for how long after that date have they been outstanding for which interest needs to be paid?
Put another way, the rules do not state merely that interest should have been paid in respect of the periods during which they have been outstanding. That formulation would more naturally encompass the idea that certain debts were not outstanding at the relevant date and therefore the period may start after the relevant date and may come to an end at a later date.
My Lord, fourthly, the reference to the periods

during which they have been outstanding since the relevant date we say is intended to accommodate the simple fact that one or more dividends may have been paid since the relevant date; in other words, the full amount of the debt may not have been outstanding for the full period since the relevant date and only part of that period.

My Lord, obviously nothing here cuts across or is intended to cut across our submissions in relation to question 2 which is whether or not this is -- this exercise is done by reference to actual payments or some notional recalculation.

So that's what we say rule 2.88(7) means, in particular the word "outstanding" there.

We also say that support for that is obtained from rule 2.105, if your Lordship goes on to that.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: My Lord, I'll come back to this rule because it's dealing with future debts and I need to deal with it in that context.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: Just by way of an aid to construction of 2.88(7), your Lordship will note that 2.105, sub-rule 2, says:

"For the purpose of dividend and no other purpose,

the amount of the creditor's admitted proof or, if a distribution has previously been made to him, the amount remaining outstanding in respect of his admitted proof shall be reduced by applying the following formula ..."

Now, the phrase one needs to focus on is the phrase in brackets "or, if a distribution has previously been made to him, the amount remaining outstanding in respect of his admitted proof". 2.105 is dealing with future debts. It's therefore dealing with debts who have not yet become due and payable as at the relevant date of distribution. 2.105 says, in sub-rule 1:

"Where a creditor has proof for a debt of which payment is not due at the date of the declaration of dividend, he's entitled to dividend equally to other creditors but subject as follows ..."

So at this stage the debt is still a future debt. The draughtsman is referring to a situation where a distribution has briefly been made to him, removing part of the debt. He describes the balance as "the amount remaining outstanding in respect of his admitted proof". In other words, that part of the debt still a future debt is being described as "outstanding".

Now, the administrators' case in relation to future and contingent debts is that that effectively must be

wrong because you can't use the word "outstanding" -- you can't refer to a debt which is still a future debt as outstanding. You can't do that, unless and until the debt becomes due and payable.

MR JUSTICE DAVID RICHARDS: Yes. I'm not sure about that. This is -- the phrase here is "the amount remaining outstanding in respect of his admitted proof". No one doubts that if you have had a proof admitted for a contingent liability and dividends are then paid, you're entitled to be paid a dividend in respect of your proof and that will reduce the amount of your proof and there will be then be an amount outstanding in respect of your proof.

I'm not sure that --

MR DICKER: But it's the use of the word -- it's the idea that this debt can naturally be referred to --

MR JUSTICE DAVID RICHARDS: It's the proof. I'm not sure about that. That why I say it. There it is. It's an interesting use of the word but it seems to me to be focusing on something different or arguably different from 2.88. It's clear what in rule 2.105 to what that is focuses on, I think. You say it's clear under 2.88 as well.

MR DICKER: Yes. The only thing we're focusing on at this stage is the use of the word "outstanding", and we say

that use there is effectively the same use as in 2.88(7), just as here it can refer to a debt which is still a future debt, so, likewise, under --

MR JUSTICE DAVID RICHARDS: You say the proof or the amount of the proved debt is outstanding? That's what that says.

MR DICKER: Yes.

MR JUSTICE DAVID RICHARDS: It's the same -- effectively the same sense in 2.88 or it is the same sense. I follow, yes.

MR DICKER: Yes.

We also say this is consistent with the natural meaning of "outstanding"; in other words, looking at the word more broadly, the word "outstanding" is not synonymous simply with "due" or "due and payable". It's perfectly natural, for example, to speak of the outstanding principal under a loan facility which does not fall due until some future date.

The word --

MR JUSTICE DAVID RICHARDS: Less obvious in the context of an uncalled guarantee. I mean, I think there's a limit on these words or the senses in which one uses them because in a case of the future debt payable in the future, it is payable, albeit only in the future. So in that sense one would say it's outstanding, but I think

you would be unlike to say where I am the guarantor of a debt that no call has been made, nor is any in view, the amount outstanding under the guarantee is the amount -- is the guaranteed debt.
MR DICKER: My Lord, everything depends on context.
MR JUSTICE DAVID RICHARDS: Yes, as Lord Hoffmann would tell us, yes.
MR DICKER: But it depends on the way in which --
MR JUSTICE DAVID RICHARDS: I am just pointing to a limitation on -- you know, the same word naturally is used in one context but not the other.
MR DICKER: And that's because "outstanding" itself can mean slightly different things. One definition of "outstanding" is "unresolved, pending or unsettled". Your Lordship will see that, can I just show you a judgment in a case called Paterson v Crystal Palace Football Club. It's 1D/139. My Lord, it's a case involving construction of agreement. If your Lordship goes to paragraph 10.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: It's a sale and purchase agreement. Clause 2.2, on the right-hand page:
"Not included in the assets. There shall not be included in the assets and the buyer shall not acquire with this agreement any right, title or interest in or

to ... (ix) any of the seller's cash at bank or cash-in-hand or any of the seller's books or other debts outstanding at the transfer date."
If your Lordship then goes on to paragraph 52 in the judgment of Lord Justice Clarke, he says:
"For my part I would accept the submission that, like any other clause in a contract ...(reading to the words)... in the first edition it includes that stands over, that remains undetermined, unsettled or unpaid."
53:
"In these circumstances the judge was, as it seems to me, entitled to hold that an ordinary meaning of the word is wide enough to include contingent debt which had not yet become due and payable. The question for the judge was whether the word 'outstanding' included that meaning in clause 2.2(ix). That depends on the natural meaning of the language in its context. It appears to me the expression 'book or other debts outstanding' is amply wide enough to include contingent liabilities in debt arising out of an existing transfer arrangement."
Then 55 and 56:
"I would entirely accept the judgment of Mr Justice Hoffmann who supports ...(reading to the words)... this agreement was made long after the Insolvency Act 1986."

Then 56:
"By the time of this agreement it was commonplace ...(reading to the words)... at any rate a contingent debt."
Reference to 13.12(iii).
Then he says below the citation of the rule:
"In these circumstances it seems to me that in the context of insolvency or potential insolvency a reference to debt can readily be construed as a reference to a contingent debt depending, of course, upon the circumstances."
MR JUSTICE DAVID RICHARDS: I have just read over to 57 where Lord Justice Clarke comes to his -- or Lord Clarke comes to his conclusions there. I can't help smiling at the reference to the Shorter Oxford Dictionary.
I was once in a case which Lord Hoffmann heard, tried, as an additional judge of the Chancery Division, a rather curious situation when a member of the House of Lords came down from on high to sit in this division. One of the counsel in the case, not me, invited Lord Hoffmann to look at the dictionary definition of whatever the word was and he said, "Well, before do you to that, I should tell you that I have not yet come across a case where I have found the dictionary definition helpful". Just as counsel was putting away

the dictionary, he said, "But please don't let me deter you from citing it here". So counsel continued to do it, at the end of which Lord Hoffmann said, "Mr Mabbe [for it was he], this is not my first case".
I mean, in truth the answer here is it's very much the context of the agreement, isn't it? But it's interesting, and I see why you cite it, that Lord Justice Clarke brought in the insolvency rules.
MR DICKER: I wouldn't have bothered to cite it to your Lordship had it not been for that fact.
MR JUSTICE DAVID RICHARDS: Thank you.
MR DICKER: My Lord, we also say this construction of 2.88(7) is consistent with the approach in previous legislation. I think I can do this most easily just by reminding your Lordship or showing your Lordship two paragraphs in our written argument, paragraphs 293 and 294. My Lord, bearing in mind, of course, contingent claims first rendered admissible by the 1862 Act, we have included the relevant rule or section from the General Rules in Bankruptcy 1869, then the 1883 Act and then section 33.8 of the Bankruptcy Act 1914. If your Lordship just looks, for example, at the last, section 33(8):
"Provided that, if there is any surplus after payment of the foregoing debts, it shall be applied in

payment of interest from the date of the receiving order at the rate of £4 per centum per annum on all debts proved in the bankruptcy."
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: So difficult, we say, to escape the conclusion that under certainly the pre-1986 legislation contingent debts being one of the debts proved in the bankruptcy would be entitled to interest "from the date of the receiving order".
MR JUSTICE DAVID RICHARDS: And just -- the contingent debts became provable in bankruptcy when?
MR DICKER: In 1862.
MR JUSTICE DAVID RICHARDS: Which Act was that?
MR DICKER: The Bankruptcy Act.
MR JUSTICE DAVID RICHARDS: It was the Companies Act 1862.
MR DICKER: The Companies Act 1862.
MR JUSTICE DAVID RICHARDS: At any rate, before the Bankruptcy Rules 1869 or maybe it was the Bankruptcy Act 1869. Never mind, the point you're making is that contingent liabilities were provable in bankruptcy by 1869.
MR DICKER: And I'll check the precise date, but, in any event, certainly by 1914.
MR JUSTICE DAVID RICHARDS: Certainly, yes. Thank you.
MR DICKER: My Lord, so far as Wentworth's case is

concerned, as we understand it, its case is that "outstanding" in relation to contingent debts requires a debt due as an actual debt. Can I show your Lordship two paragraphs from their skeleton argument. The first is 147. 147, they say:
"Accordingly, a debt should not be considered outstanding for the purposes of a rule designed to compensate creditors for delay in payment of their debts until such time as it comes into being as an actual debt, i.e. until the occurrence of the contingency upon which its existence depends."
My Lord, then if your Lordship goes to 167, they say:
"In the absence of a rule requiring the discounting back of a contingent debt to the date of administration [my Lord, I have already addressed your Lordship on that], it remains the case that, notwithstanding that an amount equal to the estimated amount of the contingent debt is payable from the insolvency date as from the date of administration, the debt itself is not outstanding until such time as the contingency occurs."
So on Wentworth's case apparently it's fine to say the contingent debt is payable from the insolvency estate as from the date of administration but it's not fine to describe it as outstanding.

MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: My Lord, so far as the administrators are concerned, I confess to being slightly unclear at present as to their position. Can I show your Lordship three things. First of all, the administrators' position paper, which is bundle 1, tab 7.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: It's 1, tab 7. The two paragraphs I want to show your Lordship are 44.1 and 44.3. In 44.1, they say:
"Contingent debts, although provable from the date of administration, become outstanding for the purposes of rule 2.88(7) only when the debt becomes an actual debt."
My Lord, we say focusing on the right thing, by that I mean the reference to the debt, though getting the answer wrong.
Similarly, paragraph 44.3, they say:
"Until a debt becomes an actual debt it is not outstanding in the sense of being due and payable. It is in that sense the word 'outstanding' is used by the draughtsman in rule 2.88(7). This reflects the fact until a debt is due and payable the administration does not operate so as to keep the creditor out of its money."

Again, focusing on "it needs to be due and payable", obviously in response to the last sentence we say if you look at the debt as if it was unaffected by the administration, of course in that sense it's true that you haven't been kept out of your money but that's not describing the full effect of the administration on your debt. It also discounts it and then pays you the discounted amount.
My Lord, then in their skeleton argument, if your Lordship could take that, my Lord, the relevant paragraph is 137 and paragraph 138.
137:
"In the administrators' submission the start date for the calculation of the amount of the interest applicable to the debt, apart from the administration, is the date on which the creditor would first have become entitled to such interest, apart from the administration."
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: 138:
"This is a fact-specific issue. The precise date for the calculation of the amount of the interest applicable to the debt, apart from the administration, will therefore vary from case to case, depending on the facts. Whilst the start date for interest, apart from

the administration, will often be the due date, this will not invariably be the case."

Then 142, sub-paragraph 1:

"The administrators' submissions in respect of statutory interest at the rate applicable to the debt, apart from the administration, have been set out above. The start date for the rate applicable, apart from the administration, will depend on the terms on which interest would have been payable, apart from the administration. The position is the same whether the debt was actual or prospective or contingent at the commencement. The administrators submit the terms governing the payment of interest on the debt, apart from the administration, must be considered in order to ascertain the correct answer."

My Lord, finally, 156 --

MR JUSTICE DAVID RICHARDS: So 142.2, I think, sets out their position.

MR DICKER: Yes.

The other paragraph I want to show your Lordship is just 156, where they say:

"In the context of rule 2.88(7), the word 'outstanding' has been used to describe the period of time for which interest is payable on the debt at the Judgments Act rate. The debt is therefore outstanding

for these purposes if it is a debt of the type which could be said to attract an entitlement to interest at the Judgments Act rate."

My Lord, I don't know whether that would be --

MR JUSTICE DAVID RICHARDS: I think that probably would. We'll resume at 2 o'clock, please.

MR DICKER: Thank you.

(1.03 pm)

(Luncheon Adjournment)

(2.00 pm)

MR JUSTICE DAVID RICHARDS: Mr Dicker.

MR DICKER: My Lord, looking at the transcript just over the short adjournment, I think I should probably show your Lordship one more reference to the administrators' case on the meaning of "outstanding". I don't know if your Lordship has been troubled with copies of the transcript?

MR JUSTICE DAVID RICHARDS: Yes, I have.

MR DICKER: It's Day 1 --

MR TROWER: Can I just say this. I really can't hear Mr Dicker at the moment. I'm terribly sorry.

MR DICKER: I will try and speak up.

MR JUSTICE DAVID RICHARDS: There are microphones which are meant to amplify a bit and I'm assuming they're on. Anyway, see whether -- yes.

MR DICKER: If I remain inaudible, no doubt my learned friend can gesticulate.

MR TROWER: Yes, I'll wave.

MR DICKER: My Lord, Day 1, page 25, picking it up at line 6. My learned friend says:

"I think rather than getting into any great discussion of that now, because it's not the time, I just want to make clear what the administrators' position is. The administrators' position is that a debt is outstanding for the purposes of rule 2.88 from the moment at which the creditor had a complete cause of action for its recovery. That's what we say the question is, although there is the extra point about where the applicable interest is payable at the rate applicable to the debt, apart from the administration. It must also be the case that the interest has become payable."

So when you look at the word "outstanding" in rule 2.88(7), as I understand the administrators' case, it requires one to go through this exercise. No doubt my learned friend will explain it.

Turning now to one argument made against us, the argument is that if we're right contingent creditors would receive interest from the date of administration. They will receive a windfall.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: My Lord, in fact, the opposite is obviously the case. That submission ignores the rules governing the estimation claims. If Wentworth is correct, the contingent creditor will have had his claim given its present value as at the date of commencement so as to ensure claims can be paid pari passu with all creditors. Like all creditors, he will receive dividends at some later date. Unlike all other creditors, he will not start to receive any interest unless and until the contingency would otherwise have occurred.

My Lord, we say the obvious fallacy underlying this is it ignores the effect of the statutory scheme and the way in which the rules require contingent claims to be estimated.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: If they're wrong about that, it appears that they would agree with us on contingent claims as well. I say that because in relation to future claims, where they accept there is a discounting to present value, they do agree with us and say interest should run in relation to future debts from the date of administration.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: My Lord, can I turn to a slightly different

matter. What I've dealt with so far is the nature of the statutory scheme, the effect of that scheme on contingent claims and the meaning of "outstanding" in rule 2.88(7). That, as it were, is approaching it from purely a sort of legal perspective.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: My Lord, can I now turn and deal briefly with another matter we touch on in our opening skeleton and develop in our reply skeleton, and it's this: as we understand it, Wentworth's and the administrators' position is that a contingent claim can never be outstanding and interest can never run on such claim regardless of the nature of the contingency.
If your Lordship can see how this, it appears, is intended to be applied by the administrators, your Lordship will see that in Mr Lomas's eleventh statement. It's bundle 2, tab 5.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: My Lord, there's much in this statement which is obviously relevant and helpful in other contexts, but the passage that is relevant in this is that beginning at section F, paragraph 34, on page 12.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: In 34 the issue is identified. 35 says:
"Its outcome will have a significant impact."

36:
"In the administration contingent claims broadly fall into two categories. [Firstly] Claims to net financial claims as defined in the CRA, as crystallised by the effect of the CRA".
36.2:
"Claims arising from the termination of financial contracts after the date of administration whether automatically or at the instigation of the creditor or LBIE."
37:
"If the answer to issue 7 is that statutory interest is payable on contingent claims from the date of administration, rather than the date such claims became due and payable, the amount of statutory interest payable in respect of contingent claims will obviously be higher."
He says:
"This can be illustrated, first, by looking at an example ..."
Then if your Lordship will go to 41. Mr Lomas identifies one particular example which, as we understand it he suggests that the rules must have the effect for which the administrators contend. He says, at 41:

"At paragraph 45 of the administrators' position paper, the joint administrators indicated they would also provide evidence as to the potential, if the answer to issue 7 is that that statutory interest is payable in respect of a contingent claim from the date of administration, for a creditor to receive, in respect of the period between the date of administration and the date the debt becomes due and payable, both the benefit of coupon amounts received pursuant to the underlying agreement ... and statutory interest calculated on the basis of that increased claim."
Then he says:
"This can be illustrated by the following example."
So you take a creditor who has a claim under a single agreement with LBIE, admitted and paid in full on 15 September 2014. Had the agreement closed out at the debt of administration, the close-out amount payable by LBIE to the creditor would have been 10 million:
"However, had the agreement closed out at 15 September 2012 the close-out amount payable by LBIE to the creditor would have been 12 million, due (for instance) to the impact of the creditor's entitlements in respect of coupon and dividend payments that accrued pursuant to the agreement between the date of administration and 15 September 2012."

Now, the Senior Creditor Group responded to the administrators' approach and that example in particular in Mr Zambelli's statement which your Lordship has at tab 6. My Lord, I don't know whether your Lordship has had a chance to look at this statement before now?
MR JUSTICE DAVID RICHARDS: Well, I did. I have looked at it, but it's a week or more now since did.
MR DICKER: If your Lordship is like me your Lordship will probably have managed to retain very little of it.
My Lord, can I just pick it up at paragraph 9, where Mr Zambelli says:
"The examples upon which I focus in this statement are principally intended to reflect or illustrate claims arising pursuant to prime brokerage agreements between LBIE and creditors."
So effectively an ongoing custodial relationship, or akin to that, between the two.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: Four or five lines from the end:
"The joint administrators and Wentworth say that such claims were contingent claims prior to close-out with the result, they say, that statutory interest does not run until such debts become due and payable."
Then at 10 he refers to the worked example I showed your Lordship from Mr Lomas's statement. In

paragraph 13, he says:

"I supplement the Lomas ... example (the increased creditor) with the position of four other creditors, each with a general unsecured claim that would have been worth £10 million if closed out on the date of administration. Although these creditors are hypothetical ... based on my experience of reviewing claims against LBIE and are indicative of issues arising from real claims."

In 14, he says he'll present them in the same manner.

Then those four other creditors. The first of these, the benchmark creditor, closed out a prime brokerage agreement with LBIE on the date of administration. The value of the benchmark creditor's claim is 10 million. The statutory interest from the date of administration of 4.8 million calculated on the same assumptions as used in Lomas 11. The benchmark creditor's overall recovery in respect of principal and interest is 14.8 million, regardless as to whose arguments succeed on issues 11.

That's of course because the bench -- issue 7, I am sorry. That's because, of course, that the benchmark creditor's claim isn't on any basis a contingent or future claim.

MR JUSTICE DAVID RICHARDS: Quite.

MR DICKER: Then the second creditor had its general unsecured claim under a prime brokerage agreement valued pursuant to the CRA. This is the first category of contingent claims Mr Lomas referred, to CRA claims. This creditor acceded to the CRA on 31 January 2010. The value of the CRA creditor's unsecured claim under the prime brokerage agreement in respect of securities to which it had an unsecured claim would have been 12 million had the prime brokerage agreement been closed out as at 31 January 2010. However, under CRA the creditor -- the CRA creditor's claim is valued as at the business day before the date of administration, giving a claim of 10 million. The position with respect to the CRA creditor is that, if interest is only treated as accruing from the date of accession to the CRA, CRA creditor is entitled to statutory interest of 3.7 million with an overall recovery of 13.7 million, 1.1 million less than the benchmark creditor, despite the fact that the CRA creditor's claim has been valued on the same basis.

So we have essentially a creditor in exactly the same position. The only difference is that he, unlike the benchmark creditor, enters into a CRA, so effectively settles his claim pursuant to the CRA on

a later date. Mr Lomas's view appears to be that therefore makes his claim, which is now a claim pursuant to the CRA, a contingent claim, with the result that interest should only run from the date of accession to the CRA, even though, under the CRA, this creditor's claim was valued, like the benchmark creditor's claim, as at the date of administration.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: Now, what we say this illustrates is that even if we're wrong on the law or further and alternatively to our submissions on the law, there may be a question of fact as to precisely what is meant by a contingent claim or in what circumstances as a matter of fact you treat a claim as contingent for the purposes of the rule.

My Lord, your Lordship will see how that develops in due course.

So that's the second creditor.

The third creditor is the cash creditor. The value of the cash creditor's claim is an outstanding cash balance of 10 million on its prime brokerage account in respect of which the cash creditor was a general unsecured creditor of LBIE. So, so far so like the benchmark creditor. Like the increased creditor, the cash creditor closed out its prime brokerage agreement

with LBIE on 15 September 2012. Unlike the increased creditor, this results in no change to the value of its claim. The position with respect to the cash creditor is that if interest is only treated as accruing from the date of close-out, the cash creditor is entitled to statutory interest of only 1.6 million and an overall recovery of 11.6 million, 3.2 million less than the benchmark creditor. If interest accrues from the date of administration, however, the cash creditor is in the same position as the benchmark creditor.

So we have a creditor who had a cash balance of 10 million on its prime brokerage account as at the date of administration. However, because the prime brokerage agreement was only closed out later, according to the administrators, interest only runs from that later date, not from the date of administration, although there's absolutely no change in the value of the claim between those two dates.

MR JUSTICE DAVID RICHARDS: I'm not sure I fully follow this because perhaps I don't understand exactly how the PB account works. I mean, perhaps I -- I'm not sure how far it matters, but what's the type of arrangement we have here?

MR DICKER: It's -- PB is prime brokerage.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: So an arrangement in relation to securities, collateral and it may be some cash as well. So, for example, a creditor provides LBIE with securities in exchange for sums which LBIE pays to the creditor. LBIE can then re-hypothecate, depending on the terms of the prime brokerage agreement or otherwise, and there may be margins in collateral accounts and thing of that sort.

My Lord, I'm not sure --

MR JUSTICE DAVID RICHARDS: It may not matter very much.

MR DICKER: I can certainly go through at some stage the detail in relation to it.

MR JUSTICE DAVID RICHARDS: I mean, I wondered how in this example the contingent claims -- I mean, the contingent claim was valued at 10 million, or was it, on 15 September -- as at 15 September 28? Maybe it wasn't.

MR DICKER: Well, on the administrators' case, as we understand it, my Lord, the answer to that may not be clear. What they are, however, saying is that -- I suppose what we say is that's what the rules require. That's the first part of my argument.

The second part, which I'm now dealing with, is to say let's look at how the administrators appear to be intending to apply the contingent regime. Your Lordship saw from Mr Lomas's witness statement he treats contingent -- he treats a claim under the CRA as

a contingent claim because it only crystallised when you entered into the CRA.

MR JUSTICE DAVID RICHARDS: Presumably because the contract in question hadn't closed out before then?

MR DICKER: Yes. Because he treats it as -- well, even -- I'm not sure it even depends on that. If your Lordship goes back to Mr Lomas, 36(1) is claims to net financial claims as defined in CRA as crystallised by the effect of the CRA.

My Lord, going back to paragraph 18, just giving your Lordship the fourth example, the fourth creditor is the decreased creditor. Like the increased creditor, the decreased creditor closed out its prime brokerage agreement with LBIE on 15 September 2012. Unlike the increased creditor, this results in a loss because the value of the claim decreased from 10 million to 8 million. While such a decrease in the value of a claim is more likely for creditors who closed out in the early part of the administration, the close-out on 15 September 2012 is assumed here for ease of comparison with Lomas 11. The position with respect to the decreased creditor is that if interest is only treated as accruing from the date of off close-out, the decreased creditor is entitled to statutory interest of only 1.3 million and an overall recovery of 9.3 million,

5.5 million less than the benchmark creditor.

In 19 he says:

"I make the following additional observations with regard to the observations set out above.

"(1) The benchmark creditor's and the CRA creditor's against LBIE share the same underlying economics as at the date of administration. However, if interest runs from the date of close-out, the CRA creditor is worse off than the benchmark creditor by £1.1 million.

"(2) The decreased creditor, if interest runs from the date of close-out, is worse off in three respects when compared to the benchmark creditor."

He suffered a reduction of 2 million in the close-out value due to the late close-out. Secondly, statutory interest would not accrue at all on the amount by which the value of the close-out amount fell. Thirdly, statutory interest would not accrue until the date of close-out. Thirdly, more generally, if interest runs from the date of close-out all creditors in the examples are worse off than the benchmark creditor.

Mr Zambelli makes the point, at paragraph 20, that when considering the practical effect of the various possible approaches to which interest accrues on claims, he suggests the illustration should ideally reflect the

position of all creditors affected by the question, including those who have been substantially disadvantaged as a result of closing out after the date of administration, not solely creditors in the position of the increased creditor referred to by Mr Lomas.

He then gives, and I can show your Lordship this very shortly, just to finish the statement --

MR JUSTICE DAVID RICHARDS: I mean, on the one hand, I very much see the value of understanding the factual context in which the issues we're debating arises and will be implied, but, on the other hand, those issues we're debating have to apply across the whole range of all companies in administration or liquidation. So we're talking about companies which have absolutely nothing to do with investment banking at all. They are a million miles from that. The same rules will apply. Either -- I mean, the debate may be whether a particular liability is a contingent liability or not, or is an unascertained liability or something of that sort, but, I mean, the point is shortly made that if you -- if at the date of administration you are a trade creditor with a debt of £10 million presently payable, then that's your proof and you receive interest at the relevant rate from the date of administration. Everyone has agreed with that.

If you have the benefit of a guarantee provided by

the company in administration for a debt of somebody else's debt of £10 million, on that guarantee, you become entitled to call the guarantee after two years, then you will revalue your claim, hitherto a claim for a contingent debt, up to £10 million, subject to your futurity arguments. If you're right, interest will be payable from the date of administration. If Mr Zacaroli is right, Mr Trower is right, then interest will be payable from the date when the guarantee was called.

Now, I mean, that may be said to -- I mean, I don't know whether that is parallel or not to the facts being put forward here, but it just illustrates, doesn't it, that we -- what I'm saying is I'm not quite sure -- we can't really mould the rules to fit the niceties of investment banking.

MR DICKER: Your Lordship certainly can't do that. That's obviously not what we're inviting your Lordship to do.

MR JUSTICE DAVID RICHARDS: No.

MR DICKER: My Lord, there are -- it's obviously -- one would normally construe the rule by reference to at least one -- it's always helpful to have at least one example.

MR JUSTICE DAVID RICHARDS: Sure.

MR DICKER: Mr Lomas gives an example and he suggests that if you look at that example, which is the claim that

talking about a contract which has not closed out at the date of administration but closes out two years later, necessarily it's a contingent claim and what becomes due at close-out could be radically different from what it would have been at close-out on 15 September 2008.

MR DICKER: My Lord, that brings one on to the second point which Mr Zambelli's evidence is directed to. In our submission take an example where you have a series of existing liabilities which are then the subject of a dispute settled with the administrators pursuant to the CRA, for example.

MR JUSTICE DAVID RICHARDS: Now, the dispute settled by the CRA, are they at the date of administration, are they contingent claims or are they actual but unascertained?

MR DICKER: They may be a variety. What happens, as we understand it, is they're all valued as at the date of administration, but the short point is if the administrators' approach is effectively simply to say, "You have now entered into a settlement agreement, your claim is pursuant to the settlement agreement, it was therefore necessarily contingent" --

MR JUSTICE DAVID RICHARDS: Well, I don't know if that is their case, but, I mean, if I could take an example of an ISDA agreement which automatically closes out on 15 September 2008, of course there is still a great deal

carries a coupon and therefore increases after the date of administration --

MR JUSTICE DAVID RICHARDS: Carries a coupon?

MR DICKER: Carries a coupon. So --

MR JUSTICE DAVID RICHARDS: I noticed that. Then it gets a bit more -- is that post-administration interest?

MR DICKER: Yes. Well, there may be an issue as to quite what it represents, but it is something that results in an increase in the value of the claim post the date of administration.

Mr Lomas's point is essentially to say if you add interest on that claim as well, from the date of interest and from the date of administration, you will essentially be getting before than you should do. It's a windfall.

My Lord, we were concerned -- the first point is we were concerned obviously that your Lordship shouldn't, as it were, try to construe the rules to avoid that consequence, at least not without appreciating that there may be other factual scenarios in which the solution produces results that one can equally say the draughtsman cannot have intended. That's one exercise that Mr Zambelli has --

MR JUSTICE DAVID RICHARDS: What I don't quite follow with Mr Zambelli's example, I suppose, is this: if you're

of litigation going on in respect of the proper valuation of the close-out amount as at that date, but when that is resolved by judgment or agreement, six or seven years later, that's not a contingent claim. That simply quantifies the claim as at the date of administration. I doubt if the administrators would be suggesting otherwise on that.

MR DICKER: Well, my Lord, as I said, one of the intentions behind Mr Zambelli's evidence was to try and clarify what is and what is not, so far as the administrators are concerned, a contingent claim, not necessarily --

MR JUSTICE DAVID RICHARDS: I think that clearly is not an issue for today, is it?

MR DICKER: Absolutely not.

So the first exercise is when one construes the rules, if you're trying to think does one's construction make sense and test it by way of an example, don't just test it by way of Mr Lomas's example but also by reference to the four other possibles. Of course there are only four more possible outcomes and there may be others. But, in a sense, better five rather than simply one.

The second point, which I entirely accept is not for your Lordship but which we hoped might at least receive some sort of airing during the course of this hearing,

is quite what a contingent claim is. Your Lordship referred to -- can I illustrate it in a different way?
One issue may be, for example, whether a prime brokerage agreement is effectively a relationship between LBIE and its counterparty which, given the nature of the right and obligations, should be treated as containing claims which are properly to be regarded as outstanding as at the date of administration or only claims contingent on close-out?
MR JUSTICE DAVID RICHARDS: I.e. a non-automatic close-out.
MR DICKER: Yes.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: Now, just taking that very simple example of a prime brokerage agreement which only, for whatever reason, at any particular time, has cash being held by LBIE. Now one knows from cases like the Russian Bank case that if you have a current account with a bank and the bank becomes insolvent, although your claim against the bank for return of the sum credited to your current account is only repayable by the bank of demand, effectively the winding up brings to an end the underlying commercial relationship and the court proceeds on the basis no demand is necessary.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: So what we're concerned to ensure is that

somehow during the course of this application potential subsidiary issues of that sort don't, as it were, get decided without further consideration.
Now, we said that out in our -- we referred to this in our opening skeleton. We served Mr Zambelli's witness statement. We have had -- we had no response. We have developed the points further in our reply skeleton. I'm not going to take your Lordship to that, but that's the only issue we essentially deal with in our reply skeleton. We have also had no response from either administrators or Wentworth.
It may be that their view is that there is no useful response they can give at this stage. From our perspective, that's fine, provided that everyone therefore understands that issues of this sort may remain to require to be determined at some subsequent date.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: That's all I had to say in relation to contingent debts.
Can I turn to future debts?
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: The Senior Creditor Group, as your Lordship knows, submits the same basic analysis applies in relation to future debts, with result that such debts

are outstanding from the date of administration for the purposes of 2.88(7) and interest accrues on them from that date. Wentworth agrees.
The administrators contend, however, that the contrary, as they put it in their position paper, is arguable. They say, in a sense, it must be arguable because you would expect the same result to apply to future debts as applies for contingent debts and, given, they say, that contingent debts only accrue interest from the date the contingency falls due, that must also be true in relation to future dates. Obviously we say the argument flows in the other direction.
As your Lordship knows, the rules relating to future debts are different from those in relation to contingent debts.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: The mechanism by which those debts are ascertained and valued is different. My Lord, the two rules, although there is a tendency simply to focus on one, are firstly 2.89:
"The creditor may prove for a debt of which payment was not yet due at the date when the company entered in to administration, subject to rule 2.105, adjustment of dividend where payment made before time."
Then 2.105, which your Lordship saw this morning.

The basic intent of this rule is obviously that a creditor receives dividends based on the value of his debt as at the date of administration, arrived at by discounting for the period between the date that it would otherwise be due and the date of administration. One can see that in 2.105(ii):
"For the purposes of dividend, the amount of the creditor's admitted proof shall be reduced by applying the following formula: X divided by 1.05 to the power N, where X is the value of the admitted proof and that is required to be divided by 1.05 to the power N, N being the period beginning with the relevant date and ending with the date on which the payment of the creditor's debt would otherwise be expressed in years and months in a decimalised form."
So you take the final date of payment and you discount it back by the statutory discount factor back to the date on which the -- back to the relevant date, the date of administration.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: Now, we say it's therefore not surprising that rule 2.88(7) entitles creditors to receive interest on their debts from the date of administration. If this was not so, creditors with future debts might never receive the full value of their debts and might never

receive any compensation for delayed payment of their claims. That obviously follows.

Wentworth -- so we say the same logic applies to future debts, therefore, as applies to contingent debts.

Wentworth seek to distinguish the two. One point of distinction, they say, appears to be that future debts are different. Can I show your Lordship their skeleton argument at paragraph 172. They say:

"Future debts differ from contingent debts in three main respects."

"(1) As at the date of administration the future debt is certain to become payable."

We say that's true but irrelevant.

Secondly:

"As a result of the insolvency the future debt its accelerated and treated as payable as at the date of administration."

The two cases referred to I'll come back into a moment.

"(3) To compensate for that acceleration, there is a discount applied for early receipt, where payment is not due at the date of at the date of the declaration of the dividend."

So far as (3) is concerned, we say absolutely right in relation to future debt and there's a similar

discount embedded in rule 2.88(6) for the purposes of contingent claims.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: Just focusing on the middle point. The suggestion appears to be there's something special about future debts because they are accelerated and treated as payable as at the date of the administration.

My Lord, just looking at those two authorities. The first, Hodson v Tea Company, your Lordship has in bundle 1A and tab 38.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: Your Lordship can see what the case concerned from the headnote:

"A company borrowed money on the security of debentures ...(reading to the words)... which might from time to time be held by the company ...", et cetera.

The last two lines of the facts:

"Before the principal money became due or the interest had fallen into arrears ...(reading to the words)... as they existed at the date of the winding up."

Your Lordship needs to see why that occurred. Vice-Chancellor Hall's judgment starts at the bottom of 861:

"The argument which has been addressed to me on

behalf of the defendants [in other words, the insolvent company] seem to involve this, that where a company becomes ...(reading to the words)... that really is the practical effect of the argument which has been addressed to me."

So the argument essentially was, well, this is a future debt, it hasn't yet become due and payable. We therefore continue to be entitled to use all the assets of the company, although we're insolvent.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: Just by the first hole-punch, the Vice-Chancellor says:

"It seems to me that the clause on which the liquidator relies is one which contemplates ...(reading to the words)... the money becomes immediately payable and the security immediately enforceable."

One way of analysing this is, effectively, there's an implied term, the relationship comes to an end and the liability is accelerated in the event the debtor becomes insolvent --

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: -- which the parties cannot sensibly have intended to permit, the liquidator had continued to use the assets post-winding up and to leave the debenture holder unable to do anything about it.

MR JUSTICE DAVID RICHARDS: No.

MR DICKER: The other case is Wallace v Universal Automatic Machine Company which is at tab 49.

MR JUSTICE DAVID RICHARDS: Just give me one moment.

(Pause)

Sorry, the other one is where?

MR DICKER: My Lord, tab 49 of the same bundle.

MR JUSTICE DAVID RICHARDS: Thank you. Yes.

MR DICKER: Wallace v Universal Automatic Machine Company, it's a similar point. Your Lordship will see from the facts:

"Where a debenture issued by a company by way of floating ...(reading to the words)... to realise his security for the full of amount of principal, interest and costs."

If your Lordship goes to 552 for the judgment of Lord Justice Lindley. He says, three lines into his judgment:

"The question raised by this appeal is whether, for the purpose of realising such security, the principal money secured by the debentures and thereby made payable at a future date can be treated as if they had become due at the date of the commencement of the winding up."

Then, going down to the penultimate paragraph on that page, he says:

"The plaintiff is not seeking to prove his debt, nor is he bound to do so ...(reading to the words)... realise this security at once. The point was determined in Hodson v Tea Company."

So we say the short point is Wentworth is incorrect in paragraph 172 to suggest that there is a point of distinction between contingent claims and future claims because, as a result of the insolvency, the future debt is accelerated and treated as payable as at the date of administration.

My Lord, that may be the consequence of particular agreements between parties, as it was in Hodson v Tea Company and Wallace v Universal Automatic Machine Company. It's not true in relation to all future debts. Indeed, it couldn't conceivably be because, if it were, rule 2.105 would have no role to play in the insolvency regime at all. Every future debt is accelerated to the date of administration. The question of discounting a future debt back to the date of administration simply doesn't arise.

MR JUSTICE DAVID RICHARDS: Sorry, did you mean 2.105?

MR DICKER: 2.105.

MR JUSTICE DAVID RICHARDS: Yes. Yes, I see. I mean -- yes, I follow.

MR DICKER: So we say this isn't a point of distinction; it

is undoubtedly true some agreements come to an end on insolvency and it may well be that the effect of those agreements coming to an end is to accelerate the liability. It doesn't follow that that's true for every future debt.

Now, just so your Lordship knows, we in fact referred to those two authorities in paragraph 329, sub-paragraph 2, at footnote 42, of our skeleton argument.

MR JUSTICE DAVID RICHARDS: So in Hodson and Wallace, because of the terms of the agreements, they would not be future debts for the purposes of 2.89.

MR DICKER: Absolutely.

MR JUSTICE DAVID RICHARDS: Because the test is whether -- because 2.88(9) applies to a debt of which payment was not yet due on the date when the company entered administration.

MR DICKER: And it wouldn't apply to Hodson because there the effect of the insolvency was to accelerate their debt. So it's no longer a future debt, it's payable today.

MR JUSTICE DAVID RICHARDS: Only as a result of the company going into liquidation.

MR DICKER: Yes.

MR JUSTICE DAVID RICHARDS: But, nonetheless, it was due on

the date when the company entered administration because it entered administration on 2 January and the effect of that clause was to make that debt payable on 2 January, is that the way you put it?

MR DICKER: My Lord, one wouldn't discount -- if there's an agreement between the parties and the effect of that agreement is that a debt will become due and payable on an event, whether its insolvency or otherwise, that debt is then due and payable on that date.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: It's no longer a future debt and you're not going to discount it.

MR JUSTICE DAVID RICHARDS: I follow.

MR DICKER: Our only point is: so whilst it's true that happens for some future debts, not all future debts, therefore it can't be a point of distinction between future debts and contingent debts.

MR JUSTICE DAVID RICHARDS: Your point on 2.105 is that that applies where the debt is not due at the date of declaration of dividend.

MR DICKER: Yes. I was going to come on to that because --

MR JUSTICE DAVID RICHARDS: Which necessarily is obviously a later date.

MR DICKER: Yes. It's one of the features of rule 2.105 that one obviously needs to deal with. I said in

general terms what the rule does effectively is discount future debts back to the date of administration because that's what rule 2.105, sub-rule 2, says. Your Lordship is quite right, it only does that in certain circumstances. It only does that when the debt is still a future debt as at the date of declaration of the dividend.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: Can I come on to that after very quickly dealing with the meaning of "outstanding" in the context of future debts.

I have dealt with it in the context of contingent debts. I have already referred your Lordship to 2.105 (2) and the word "outstanding". The same points as I made in relation to contingent debts can also be made in relation to future debts.

There's only one other reference I want to give your Lordship. That's going back in 2.105, sub-rule 2, paragraph (b), what the rule provides is for a discount of 1.5N:

"N is the period beginning with the relevant date and ending with the date on which the payment of the creditor's debt [and then these words] would otherwise be due expressed in years and months in a decimalised form".

Now, "otherwise be due", we suggest, is consistent with our submissions because the implication of the phrase "otherwise be due" is that although the debt would otherwise be due at the date that it would have been payable, for the purposes of rule 2.105 that's not how it's treated. In other words, the draughtsman, because the rules treat the debt as effectively outstanding as at the date of administration, when the draughtsman comes to consider the discount point he has to go back, as it now is, to a sort of alternative world, which is the date it otherwise would have been due; in other words, the date it was originally due for payment.

MR JUSTICE DAVID RICHARDS: Yes, I follow.

MR DICKER: Now, there's a similar windfall argument in relation to future debts, although it rapidly becomes considerably more complicated than it is in relation to contingent debts. My Lord, I'll try and deal with it as clearly as I can.

The administrators contend that in certain circumstances creditors with a future debt submitted to proof would receive a windfall if interest was payable from the date of administration.

Now, the short answer is the administrators only identify one situation, and I'll come to this, in which

it may give rise to a windfall, they say, in every other situation it appears to give rise to substantial losses. The application of rule 2.105 is complicated and it's not always easy to discern the logic for the approach being taken. I said that the basic effect of the rule, 2.105(2) is to discount the debt back from the date that it would otherwise have become due and payable -- so, the date of payment -- you discount it from that date all the way back to the date of administration and one can see the sense in that, because that then gives you a value which ranks pari passu with everyone else.

Now, the difficulty arises because 2.105 only does that in certain circumstances. It only does it where a creditor has proved for a debt of which payment is not due at the date of the declaration of dividend. So if your debt has already become due prior to the date of declaration of the dividend, you are not discounted.

MR JUSTICE DAVID RICHARDS: No.

MR DICKER: If it becomes due only at a later date or will become due only at a later date, you are.

MR JUSTICE DAVID RICHARDS: Right.

MR DICKER: My Lord, what one needs to do now is divide future debts up into two categories, we say, for the purposes of seeing how the rule operates. The first category involves what may be called simple future

debts; in other words, future debts that do not themselves carry interest. So they're £100 payable in ten years' time. Then if one applies 2.105 both to a situation where the debt has become due before the declaration of dividend and the situation where it has not. Dealing first with where the rule does operate, we have a debt that is still a future debt at the date the dividend is declared. So it is discounted.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: There is no windfall in this situation. The debt is discounted to its present value as at the date of administration and it ranks pari passu with all other claims.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: We say on that basis the creditor should receive interest from the date of administration. If he does not do so, he will not be treated equally. So that's an easy category.

The second category, which is the one the administrators identify, is where the debt has ceased to be a future debt before the date the dividend is declared, such that it is not discounted. This is the situation in which they say a windfall may arise.

Now, it is correct the rule doesn't discount back to the date of administration in this situation and if

interest is applied, it's being applied on an undiscounted amount.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: Nevertheless, to describe that simply as a windfall in our submission ignores the bigger picture. Rule 2.105 more often than not applies when the company is insolvent, when no question of a windfall, in other words receiving more than the creditor would otherwise have received, is likely to arise. The creditor is going to suffer a shortfall. The only question is the amount of his shortfall.

So if one is talking but windfall in the sense of receiving more than 100p in the pound, that can only occur in the event of a surplus.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: No doubt the draughtsman, when he drafted rule 2.105, was thinking primarily of the situation of an insolvent company, rather than the situation of a solvent one.

MR JUSTICE DAVID RICHARDS: Do you think?

MR DICKER: Well, in the sense if only because insolvent companies are rather more common than those who turn out to be solvent.

MR JUSTICE DAVID RICHARDS: Yes, okay. I mean, 2.105 applies in the liquidation of a solvent company,

doesn't it?
MR DICKER: Yes.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: As I say, if one thinks of it in the context of an insolvent company, it would be wrong to say the effect of the rules is to give such a creditor -- an undiscounted creditor -- a windfall. He's going to have a shortfall. The only question is as to its amount. It may be one could say something slightly different which is that he is not being treated equally with all other creditors, in the sense for some reason his debt isn't being presently valued as at the date of administration. He's not receiving a dividend, therefore equally with everyone else, but that simply seems to be the effect of the rule. It's not -- none of this is a reason for construing the word "outstanding" to mean anything other than what we say it means.
MR JUSTICE DAVID RICHARDS: Mmm.
MR DICKER: My Lord, I don't know when would be a convenient moment.
MR JUSTICE DAVID RICHARDS: I would prefer to go on for a little while. We will go on until about 3.15.
I am just trying to get this right. If you have a future debt, the creditor proves for the full nominal amount of the debt, but he receives dividends as

discounted under 2.105. That's right. If by the time -- no, hold on. (Pause)
If by the date of the declaration of the dividend -- let's say two dividends are declared and the future debt is by its terms not yet payable, so his dividend is there discounted, but by the time of the third declaration and subsequent declarations his debt would otherwise have become due or is due in fact, is due, according to it terms.
MR DICKER: As we understand the intended -- as we understand, whether intended or not, the operation of the rule, this is an exercise that has to be done with each declaration of dividend.
MR JUSTICE DAVID RICHARDS: That's as I would have read it, yes. That's what I would have thought so.
MR DICKER: Now, working out the overall effect if one tries to take dividends and the possibility of different results isn't an exercise I confess I've --
MR JUSTICE DAVID RICHARDS: No. One could take a simple case then, perhaps just one declaration. You have -- the company goes into administration and then three years later, let's say, a dividend is declared, maybe 100p in the pound. This particular creditor's debt became due according to its terms two years after the commencement of the administration so no discount under

2.105. When it comes then subsequently or there is a surplus out of which statutory interest can be paid, he gets, on your argument and Mr Zacaroli's argument, interest at the statutory rate on the full amount of his debt from the date of the commencement of the administration. It may be that Mr Trower says in that circumstance there is a windfall, because he's received the undiscounted amount of his debt plus interest for a period when the debt was not payable. That may be the windfall example.
MR DICKER: And we agree that if there is a windfall, it can be properly described as such. This is precisely the situation in which it can arise. In other words, where you have a debt falling due after two years and a dividend after three years, the discounting mechanism for whatever reason isn't applied in that situation. A creditor therefore receive dividend by reference to the full amount of his proof, not by reference to a present value of the full amount of his original future debt. What we say is that to describe that as a windfall in the sense of something that must dictate an alternative construction of the rules, we say you can't do that. That simply appears to be the consequence of rule 2.105. To describe it as a windfall when the company is insolvent is not accurate. The most

you can say is that it affects the extent of -- likely to affect the extent of the debtor -- the creditor's shortfall and that's no doubt what the draughtsman, we say, probably the situation he had in mind when thinking about rule 2.105.
We accept there is a wrinkle in that situation, but your Lordship needs to take into account that if the administrator is right, go to the other situation which is a situation in which 2.105 does apply. So you have dividend after three years. Debt due after four. A four-year debt, discounted all the way back to the date of administration, but on the administrators' case no interest payable.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: So we quibble with the administrators' characterisation of windfall in the first situation, but in the second situation there can be no doubt but that the creditor doesn't -- isn't treated pari passu with everyone else. The debt is discounted back to the same date so he can, but then for some reason he, but only he, doesn't receive interest from that date.
MR JUSTICE DAVID RICHARDS: I follow that, yes.
MR DICKER: My Lord the second category is rather more complicated. It involves a future debt which is not a simple future debt. It involves a future debt which

carries interest.
MR JUSTICE DAVID RICHARDS: Right.
MR DICKER: Again, you have to do the same exercise under 2.105 in relation to a future debt that becomes due and payable before and which becomes due and payable after the date of declaration of the dividend.
Now, in relation to such debts -- in other words, future debts carrying interest -- we say the administrators' regime of you don't pay interest until the future debt becomes due and payable, which was their position in their position paper, invariably prejudices creditors in both situations. So this isn't a situation in which you could arguably describe one way in which -- one situation in which the rules operates as giving rise to a windfall and the other giving rise to a loss. They both, on the administrators' case, give rise to a loss.
Now, just dealing with those two situations. The first situation is where the debt has ceased to be a future debt; to take an example, one day before the date the dividend is declared such that it's not discounted. This is the equivalent therefore of the first situation where the administrator said there was -- there is a windfall, as they would describe it.
MR JUSTICE DAVID RICHARDS: Hmm, hmm.
MR DICKER: On the administrators' case, the creditor gets

full undiscounted amount of his principal but does not receive any interest. That's simply the mirror of the first. So just look at the principal. You get the full discounted amount and the administrators say no interest. But no interest at all, which means that the creditor has effectively lost the right to interest accruing on his debt between the date of the administration and the date that his future debt became due and payable.
The second situation is where the debt is still a future debt at the date of the dividend is declared, such that it is discounted. On the administrators' case, certainly as originally explained, a creditor's debt is discounted to its present value as at the date of the administration and the creditor receives dividends up to the amount of that discounted sum. We all agree on that. The administrators say he doesn't receive any interest on that discounted amount because he's not entitled to interest until his debt has ceased to be a future debt and has become due, and that debt has become due and payable. Nor, it appears, does he receive the interest accruing on his debt to which he was otherwise entitled between the date of administration and the date his debt became due and payable.

MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: In other words, there's a double loss for this creditor. His debt is discounted all the way back. He doesn't get anything, along with every other creditor, by way of interest on his principal debt, and he doesn't get the interest -- he doesn't get anything in respect of the interest which would have accrued on his debt between the date of administration and the date it was eventually paid. So he is particularly worse off.
My Lord, it may be that the administrators' latest case, set out in the skeleton, and then the further case, identified by my learned friend in the transcript on Day 1, is effectively to try and avoid results of that sort, to try and deal with a situation, particularly the situation in which a debt carries -- a future debt carries interest.
My Lord, I'll hear no doubt in due course how my learned friend puts it, but we say the big problem with that is it may or may not, depending on how it operates, produce what would appear to be a sensible, tidy, commercial outcome, but what it attempts to do is to construe the fairly plain language of 2.88(7) in a way that that language simply doesn't permit. That language is simply talking about the date -- the period for which the debt was outstanding. It's not talking about some

hybrid situation.
My Lord, I'll deal with that in due course.
It's fair to say that the -- that rule 2.105 has a slightly chequered history. My Lord, the old rule, prior to the 1986 Act, discounted a future debt from the date it was otherwise due back to the date of dividend. It didn't discount it all the way back to the date of administration. It discounted it back to the date of dividend. Effectively, no doubt, the rationale for that being that the accelerated receipt, the period for which payment has been accelerated, was the period between the date of declaration -- dividend being declared, which was when you actually got some money, and the date when you would otherwise have got the money when the debt became due.
The new rule obviously takes a slightly different approach, given that it discounts back to the date of administration. Presumably that was thought more accurately to reflect the pari passu treatment of creditors. In its original form it was the subject of criticism by Lord Millett in Park Air Services and was redrafted as a result. The redrafting appears to have, at least partially, dealt with some of the issues that Lord Millett identified. It does appear to have thrown up these features so far as its operation is concerned.

As I say, it's not entirely clear to us quite what the draughtsman's logic was in adopting the approach he did and then making it dependent on whether or not a dividend had been declared by the time the debt became due and payable.

My Lord, the final and very last point is, again, as with so many of these questions, the Senior Creditor Group has a fallback position. What we say is if interest does not run until a contingent or future debt has become due and payable, then it's possible that the creditors may have a non-provable claim. If the consequence of that is they end up receiving in total less than the sum to which they were otherwise entitled, they may be able to say, "Our claim outside of the administration has not been satisfied in full. Therefore, we should have a non-provable claim before any surplus is distributed to shareholders or others lower down in the statutory waterfall".

My Lord, that's all I think I was proposing to say by way of opening in relation to 6, 7 and 8.

MR JUSTICE DAVID RICHARDS: Right.

MR DICKER: Unless I can help your Lordship any further?

MR JUSTICE DAVID RICHARDS: No. Thank you very much, Mr Dicker.

Mr Smith, are you going to be addressing me on these

issues?

MR SMITH: Yes, I was, my Lord.

MR JUSTICE DAVID RICHARDS: Maybe now would be a convenient time to take our break then. So I'll rise for five minutes now.

(3.12 pm)

(Short break)

(3.18 pm)

Submissions by MR SMITH

MR JUSTICE DAVID RICHARDS: Mr Smith.

MR SMITH: My Lord, I was going to deal with issues 7 and 8 together because our position is that same analysis equally applies to both contingent and future debts.

So far as issue 6 is concerned, I'm not going to add anything. The answer to that issue in our submission simply follows from issues 7 and 8.

My Lord, if I can perhaps start with rule 2.88(7) itself. My Lord, our case in a nutshell is that the proved debt becomes outstanding on the date of the commencement of the administration. The wording in the second part of the rule is simply directed at identifying the period or period following that day during which interest runs.

Now, my Lord, there's one obvious very important point to start with on 2.88(7) which is the reference in

the second line to "those debts", which are the debts which are outstanding, is obviously the reference to the proved debts in the first line. So, my Lord, it's important to emphasise that what we're -- the question we're concerned with is when does the proved debt become outstanding and, in particular, in our submission, the focus is on that question, on the question of when the proved debt becomes outstanding and not on the question of when the underlying contractual or other liability becomes outstanding.

My Lord, your Lordship obviously knows the right to prove is a right conferred by the statutory scheme so the question of when a proved debt becomes outstanding in our submission is a question of the operation of that scheme. My Lord, it is an important point because the proved debt obviously may be different from the underlying contractual or other liability in material respect. One obvious example of that is the conversion of a foreign currency debt into sterling for the purposes of proving obviously also there's a cut-off date which delineates the amount which can be proved. We'll also come in a moment in the way to which contingent and future debt are treated, but, in our submission, there are important differences between the proved debt allowed under the rules in respect of such

liabilities and the liabilities themselves. So there's very important distinctions we suggest between the proved debt and the underlying liability.

My Lord, turning very briefly to the other provisions of the rules. Obviously in distributing administration, although the distributing element only comes into effect when the notice is given, it is clear that the creditor proves in respect of his claim as ascertained at the date of the commencement of the administration. I don't think that's in dispute. And Mr Dicker, I think, referred you to rule 2.72.3(b)(ii) which deals with the proof.

My Lord the other machinery in the rules is obviously directed at ascertaining the position as at the debt of commencement of the administration as well, dealing with conversion to foreign currency, contingent debt and future debts, and so on and so forth.

My Lord, it's rule 2.88 really fits into that scheme.

There's two specific points we would also make on rule 2.88 itself. The first point is in relation to 2.88, sub-rule 1, which obviously provides that where a debt proved in the administration bears interest, that interest is provable as part of the debt except insofar as it is payable in respect of any period after the

commencement of the administration.

So, my Lord, just stopping there for a moment. If interest on the proof runs to the date of the administration, it might be thought logical if there was a surplus for interest to continue running from that date. My Lord, that would reflect, in our submission, the logic underlying the original judge-made rule which one sees in Humber Ironworks, which effectively limited the creditor to his principal and interest up to the date of the winding-up order, but the moment the surplus came that limitation was in effect lifted and the creditor was then back in the position of being able to exercise his ordinary rights which in my submission would run continue to run from the debt of the winding up order.

Obviously rule 2.88(1) applies equally to future and contingent debts.

My Lord that's the first point.

The second point is in relation to rule 2.88(6) which deals with the rate of interest to be claimed in the first instance under paragraphs 3 and 4. It's the Judgments Act rate. Obviously your Lordship knows that's applied to statutory interest by rule 2.88(9). My Lord, the point to note is obviously that is fixed in rule 2.88(6) by reference to the date on which the

company entered administration.

Now, my Lord, if the Judgments Act rate for the purposes of statutory interest is fixed by reference to the position as at the commencement of the administration, again it might be thought that it was understood by the draughtsman that statutory interest would run from that date. If was intended that statutory interest might run from a different date, it seems likely he would have fixed the rate in a different way. So, my Lord, those two points on rule 2.88 we suggest do support the general notion that interest runs from the date of commencement of the winding up.

My Lord, as I mentioned, the other parts of the machinery are obviously directed as well at ascertaining the value of debts as at the date of the administration. Obviously in addition the rule 13.12 itself which provides for the cut-off for proving in the case of administration at the date of commencement.

My Lord, then in addition to that one has rule 2.69 which is the fairly basic provision that provides for the proved debts then to be paid in full insofar as possible, but otherwise to rank pari passu.

Now, my Lord, just stopping there. We do submit there is a short and rather obvious point, that the proved debt which the creditor is entitled to have paid

is his claim as ascertained at the date of commencement of the administration. There's no distinction in the rules in relation to any type of debt, whether actual, future or contingent. My Lord, at one level it could therefore be said that the proved debt is outstanding from that date simply as a matter of operation of those rules.

Now, my Lord, we would also submit that's consistent with the theory of notional realisation and distribution, which Mr Dicker made submissions on earlier, which assumes that the assets are realised and notionally distributed as at the date of the commencement of the insolvency. That's all of one piece. It's all looking to the position as at the date of commencement of the insolvency which in the case of administration is the date of commencement of the administration.

Now, my Lord, just turning then to the approach of Wentworth and the administrators. They accept that proof in respect of an existing debt, in other words a debt which has accrued due, is outstanding from the date of the commencement of the administration. The question we suggest is why should it be any different in relation to contingent and future debts?

Now, the approach of Wentworth in relation to

issue 7 is to look really to the question of when the underlying contractual or other liability becomes due. That's how they approach it, either because the relevant contingency occurs or, if it was a future debt, by reason of the passage of time. The approach of the administrators may now be somewhat different, but they're still obviously looking to the nature of the underlying liability itself.

Now, my Lord, we say that's simply the wrong approach in principle because rule 2.88(7) is directed to the question of the period for which the proved debt has been outstanding and not at all to the question of when the underlying contractual or other liability has been outstanding. They are two separate things and really the problem with the -- we would suggest with the submissions made by the administrators and Wentworth is they confuse the two distinct concepts.

Now, my Lord, if you take, for example, a contractual claim which would only accrue due on the occurrence of a future contingency, the position in our submission would be as follows. As a matter of the underlying contractual claim, it may well only accrue due in the future. However, under the scheme established by the rules, notwithstanding the contingency, the creditor obviously has a statutory

right to submit a proof in respect of an amount as ascertained at the date of the commencement of the administration.

Now, my Lord, obviously that's provided for by rule 2.81. If I can just take your Lordship to that.

MR JUSTICE DAVID RICHARDS: Yes.

MR SMITH: That obviously falls into two parts. There's firstly the provision in the first sub-paragraph for the administrator to undertake the estimate, but your Lordship then sees, in rule 2.812, it provides that where the value of the debt is estimated under this rule, the amount provable in the administration in the case of that debt is that of the estimate for the time being.

So, my Lord, the right to prove is expressly in respect of the estimated amount. That's in effect the right which the statutory scheme confers and it's that amount which constitutes the proved debt.

Now, the proof in respect of that amount will obviously be a liquidated figure for a specific amount. In our submission it's then outstanding in exactly the same way as a proof submitted in respect of an underling contractual claim which had already accrued due. There's no real difference so far as the rules are concerned in that respect.

In effect what the rule does is confer a statutory right to prove in respect of a liquidated sum, ascertained as at the date of administration, and there's no reason why that shouldn't be outstanding in the same way as a proof is outstanding in respect of a debt which had accrued due.

Now, my Lord, it's true that the estimate of the value of the debt may be revised from time to time. Rule 2.811 specifically provides for that. But that ability to revise the value doesn't alter the fact that creditor has at the outset a right to prove in respect of an amount -- specific amount as from the date of the administration.

So, my Lord, against that context, in our submission the approach of the administrators and Wentworth in relation to contingent debts is to confuse two separate things. There's a specific right to prove in the case of contingent debts conferred by rule 2.812, that's one thing, and the question of when that becomes outstanding, and then distinct from that is the question of the underlying contractual or other liability.

My Lord, so far as future debts are concerned, they are obviously dealt with in a slightly different way in rule 2.89.

MR JUSTICE DAVID RICHARDS: Yes.

MR SMITH: So rather than the creditor proving for a specific amount which has been estimated, the way the rule works is that he simply proves for the full debt, ignoring the future element of it.

MR JUSTICE DAVID RICHARDS: Yes.

MR SMITH: So in that respect there's no difference, so far as proving under the rules is concerned, between a proof in respect of an actual debt and a proof in respect of a future debt. Essentially the proved debt is the same. The only difference is when it comes to the calculation of dividends, as your Lordship knows, where rule 2.185 then applies to determine the dividend which is paid. But that's a point which goes to the calculation of dividends, not to the amount for which the creditor proves for under rule 2.88(9).

My Lord, this ties into a related point which has been canvassed in the skeleton arguments as to whether contingent and future debts are accelerated by reason of commencement of an insolvency. My Lord, in our submission it's necessary to take some care with the word "acceleration" and, again, it's important to distinguish between the creditor's rights under the underlying contract, or other obligations, and the creditor's proved debt under the statutory scheme.

Now, in our submission the position is as

follows: so far as the underlying contractual rights are concerned, obviously wherever an insolvency has the effect of accelerating those rights will depend on their nature.

MR JUSTICE DAVID RICHARDS: Yes.

MR SMITH: But, as already explained, the creditor obviously has a right to prove irrespective of whether there's been an acceleration and his ability to do so doesn't depend in any way on the contractual position. The contractual position in our submission really is irrelevant to his position under the scheme in terms of his ability to prove.

Now, whilst one can say that there is acceleration in a very loose sense, in practical terms a creditor has a matter of practice will have a right to payment under the scheme sooner than he might have had under his contractual liabilities. That's really as far as it goes and really, aside from that very loose sense, acceleration isn't relevant to this analysis.

Now, my Lord, it's on that aspect of the analysis that we part company with Wentworth in relation to its treatment of future debts. Your Lordship knows it's obviously common ground between the Senior Creditor Group, York and Wentworth --

MR JUSTICE DAVID RICHARDS: Sorry, you part company with

Wentworth on future debts?
MR SMITH: In relation to the analysis in respect of future debts, not the results.
MR JUSTICE DAVID RICHARDS: Not the results.
MR SMITH: No. We agree with -- well, the Senior Creditor Group, York and Wentworth all agree on the result in relation to future debts.
MR JUSTICE DAVID RICHARDS: But you get there by a different route, do you?
MR SMITH: Yes. We part company with them on the analysis. The reason why we part company on the analysis is that Wentworth says that the position in relation to future debts is essentially governed by a principle that the effect of the insolvency is to accelerate those future debts.
MR JUSTICE DAVID RICHARDS: I see.
MR SMITH: And they derive that --
MR JUSTICE DAVID RICHARDS: You say that can't be right for the reasons that we've -- I've discussed with -- or Mr Dicker has submitted to me.
MR SMITH: Yes, exactly. So that's -- I'm just submitting the question of the acceleration of the contractual position is really irrelevant to the position under the statutory scheme. It doesn't bear on it. It doesn't affect the creditor's ability to prove in any way.

MR JUSTICE DAVID RICHARDS: Yes.
MR SMITH: As I think Mr Dicker showed your Lordship, those two cases weren't in any way concerned with the ability to prove in a winding up.
MR JUSTICE DAVID RICHARDS: No.
MR SMITH: What they were concerned with was the effect of the winding up on the terms of the debenture essentially, and whether, under the terms of the debenture, the effect of the winding up was to render the secured monies payable with the result the creditor could enforce his security.
Mr Dicker showed you Hodson. He also showed you Wallace, my Lord. There was just one other passage he didn't show you in Wallace which I would like to show you, if I may. It's in bundle 1A, tab 49. My Lord, it's just at page 554 of the report. I think Mr Dicker showed you the judgment of Lord Justice Lindley. On page 554 Lord Justice Kay also gave a judgment. Your Lordship sees he says:
"The question is whether the debenture holders can claim as...(reading to the words)... the principal becomes due."
Then he expressly makes the point:
"It is material to observe it is not a question proved from the winding up, the realisation on the

security."
Now, my Lord, in agreement with Mr Dicker we submit those cases really don't bear at all on the question of when proved debts are outstanding under the scheme. So whilst we agree with Wentworth's position in relation to future debts, we say its reasoning is wrong.
My Lord, that then brings me to the question of discounting and, in particular, the question of discounting future and contingent debts for present value at the date of commencement of the administration for the purposes of proof.
My Lord, in our submission this point doesn't answer the question of when debts -- when contingent and future debts become outstanding. That's a question of the operation of the scheme. But it is obviously relevant to the criticism which the administrators and Wentworth make, that our case would result in a windfall, and it obviously goes to that point.
MR JUSTICE DAVID RICHARDS: Yes.
MR SMITH: Now, my Lord, dealing with it very briefly, as Mr Dicker has obviously already explained and covered a lot of the ground. In the case of future debts, obviously the creditor proves for the full amount. That debt is not discounted as a matter of proof. But there is the statutory mechanism in 2.105 which reduces the

dividends, discounts back to the date of administration.
In the case of contingent debts, it obviously works slightly differently. We agree with Mr Dicker where the contingency is yet to occur, its value clearly will be estimated under rule 2.81. That involves putting a present value on the debt at the date of the administration and that necessarily, we would suggest, includes a discount for maturity. My Lord, Mr Dicker obviously showed you some of the authorities that deal with that, in particular the European Assurance case.
Where the contingency has occurred, there's obviously then a crystallised value to the claim in the sense of a crystallised value has accrued at the future date, but we submit the debt in that respect -- in that case is still discounted to a present value at the date or to the date of the administration. Obviously in that case what will have happened is the claim will have been given an initial estimated value under rule 2.81 with a discount for both the contingency and the futurity element. The contingency then occurs. So what we suggest effectively happened is the discount for the contingency drops away. There's then a revised value under 2.81 but the discount for the futurity would remain.
Now, my Lord, we submit that under the wording of

rule 2.81 that approach is permitted and, indeed, mandated by the rule. Perhaps if your Lordship can take 2.81. Your Lordship sees the relevant part at the beginning of sub-paragraph 1:

"The administrators shall estimate the value of any debt which by reason of its being subject to any contingency or for any other reason does not bear a certain value."

Now, two points we make on that. Firstly, the certain value must mean certain value as at the date of the winding -- as at the date of the administration.

MR JUSTICE DAVID RICHARDS: Yes.

MR SMITH: As at the date of the commencement of the administration. The second point is it makes clear it applies where the lack of certainty is by reason of the debt being subject to any contingency or for any other reason.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: So, my Lord, on that basis we do submit it continues to be operative in relation to a contingent debt where the contingency occurs subsequently to the commencement of the administration, because the element of futurity means that the debt still does not bear a certain value as at the date of the administration. One has a crystallised value of the future date but in

terms of its present value, that is still uncertain. Rule 2.81, we suggest, continues to apply to allow -- and indeed require -- the administrator to estimate its actual present value.

MR JUSTICE DAVID RICHARDS: Do you say -- if we take a contingent liability of a straightforward kind, when the proof is lodged at a time when the contingency has not occurred, so the proof is in an estimated sum reflecting the probability of the contingency occurring and any element of futurity, and then, prior to the declaration of a dividend, the contingency occurs so the amount of the contingent liability becomes fixed, not necessarily the amount for which it's admitted to proof but the amount or the contingent liability becomes an actual liability. Now, at that point, just looking at this, the administrator may revise -- may -- any estimate previously made if he thinks fit by reference to any change of circumstances or information.

MR SMITH: Yes.

MR JUSTICE DAVID RICHARDS: So do you say that the proper approach of the administrator is that which was adopted in the I think couple of cases Mr Dicker showed me this morning, that the administrator would say, "Yes, well I see that the contingency has occurred, that your claim has crystallised, we must eliminate any discount to

reflect the statistical probability of the contingency, but, nonetheless, there is a time value of money point and therefore I won't substitute the full amount for the estimated amount, I'll substitute a discounted amount"? That's, you say, the right approach there.

MR SMITH: Yes, exactly how we submit it works.

MR JUSTICE DAVID RICHARDS: I see.

MR SMITH: My Lord, obviously Mr Dicker showed you a couple of authorities which provide support for that being the right approach. Hills v Bridges was one. Re Law Car was another. There's one other authority on that point which I'd also like to show your Lordship which is a case called Ellis & Company's Trustee, which is in bundle 1B at 63A.

As your Lordship sees, this is Ellis & Company's Trustee v Dixon-Johnson. I don't think the facts matter too much. Broadly it concerned a bankrupt firm of stockbrokers and the trustees sought to recover sums due from the defendant on his client account. He was a client of the firm.

MR JUSTICE DAVID RICHARDS: Right.

MR SMITH: Then he in turn then sought to set off a claim for damages for a failure by the firm to return certain shares which had been pledged as security. So he had given shares to the firm as security. The firm hadn't

returned them in breach of contract.

The particular or the main issue in the case was the question at what date the shares were to be valued for the purposes of his claim for damages which he sought to set off. Mr Justice PO Lawrence dealt with that at page 357. Your Lordship will see, toward the bottom of page 357, the last full paragraph, he's actually just referred to Re Law Car.

MR JUSTICE DAVID RICHARDS: Yes.

MR SMITH: Then he says:

"The defendant's claim for damages in the present case being a provable debt ...(reading to the words)... in this action and not by way of proof."

He refers to Re Daintrey, amongst other things:

"The damages for which the defendant would be entitled to prove ...(reading to the words)... on the day when they ought to be returned."

So he's saying you assess damages as at -- by reference to the value of the shares as at the date they should have been returned, but then, my Lord, he then goes on to make the point that that then ought to be discounted back for the period between that day, which was post the date of the receiving order, and the date of the receiving order itself.

MR JUSTICE DAVID RICHARDS: Yes, I see.

MR SMITH: So that seems to be adopting exactly the same approach. He's saying when one discounts the claim back to a value as at the date of the receiving order.
MR JUSTICE DAVID RICHARDS: Yes.
MR SMITH: Then, my Lord, just on rule 2.88 itself, on the language of rule 2.88. It's obviously, I think, now common ground that as a matter of ordinary language "outstanding" is not synonymous with "due". I think the administrators' own case seems to involve giving a meaning of "outstanding" that means something other than "due" in the context of rule 2.88.
Obviously when the draughtsman in the insolvency action rules does want to convey the meaning of "due", that's exactly the word he uses. Obviously that word appears frequently in the Act and the rules, not least in section 123.
My Lord, it also doesn't appear now to be in dispute that the word "outstanding" is as a matter of language capable of be including future and contingent debts.
Now, my Lord, the other point on the language of rule 2.88(7) is really derived from the way in which the last part of that sub-paragraph is put together. As your Lordship obviously knows, it requires that the surplus be applied in paying interest on those debts in respect of the periods -- so not any periods, it's "the

periods" -- during which they have been outstanding since the relevant date.
Now, my Lord, there's obviously a limit to how far one can push points of language and grammar but we do suggest that more naturally that's describing something that began in the past and continues afterwards. It suggests that proved debts will have been outstanding for at least some period. That seems to be the natural or the more natural way to read it.
MR JUSTICE DAVID RICHARDS: Yes.
MR SMITH: It's reinforced, we suggest, by the use of the periods, not any period. It does appear to be implicit in the formulation that the debts would have become outstanding at some point, and the question the language is addressing is simply how long since that date they remained outstanding.
Now, my Lord, we then come to the question of what the administrators say outstanding means which they deal with in their skeleton argument at paragraph 160 through to paragraph 164. It's bundle 6, tab 4.
MR JUSTICE DAVID RICHARDS: Yes.
MR SMITH: Now, picking it up firstly at paragraph 160, they say:
"The word 'outstanding' must have the same meaning in rule 2.88(7) whichever of the two rates specified in

2.88(9) is applicable."
This is paragraph 160 of their skeleton argument.
MR JUSTICE DAVID RICHARDS: Yes.
MR SMITH: So they make the point, first of all, the word must have the same meaning whichever of the two rates specified in 2.88(9) is applicable. We would respectfully agree with that.
They then go on to deal with what they say is the meaning in the context of the two rates. They deal, firstly, in paragraph 161, with the rate applicable to the debt, apart from the administration. Your Lordship will see at the top of page 59 of the skeleton argument, they say:
"In that context 'outstanding' is the period since the date on which the creditor could first have sought interest at that rate, apart from the administration."
So that's what they say it means in the context of rate applicable to the debt, apart from the administration.
Then they go on in paragraph 163 to deal with the position where the Judgments Act rate applies. They say:
"In that context 'outstanding' means the period since the date on which the creditor was first entitled but for the administration to seek a money judgment."

Now, it's not at all obvious to us that those will necessarily be the same date. It appears to imply in the case of a Judgments Act interest case that the creditor would need an accrued right to debt or damages which would entitle him to proceed to obtain a judgment, but it's not obvious that it means the same in the case of a rate applicable, apart from the administration, because on the administrators' formulation, if one had, for example, a debt that was contingent but nonetheless had a rate of interest applying to it under the terms of the contract, that would seem to be sufficient to fall within paragraph 161.3.
So it does seems to us that on the administrators' approach to this, which obviously firstly is not necessarily a natural reading of the word "outstanding", there may well be a difference between the meaning of that word as applied in relation to Judgments Act interest and the meaning of that word as applied in relation to the rate applicable, apart from the administration.
It may depend on what exactly they mean by "the creditor could first have sought interest", but it's not clear why they adopt a different formulation for a Judgments Act case than the rate applicable apart from the administration case, unless they do intend to mean

something different in the two cases.
To the extent they are suggesting there's a difference in meaning between the two cases, well, we would suggest that itself is a powerful reason against their construction of the rule.
My Lord, the next topic I just wanted to very briefly deal with was the question of insolvency set-off and how that works and how that impacts on this particular question.
In our submission, consideration of the way insolvency set-off operates also supports the conclusion that the contingent or future debt is outstanding from the date of the commencement of the insolvency. Obviously set-off is dealt with by rule 2.85. Your Lordship will no doubt be very familiar with this. 2.85(1), the rule applies where the administrator's given the notice of intention to make a distribution. Rule 2.85(3), the account is taken as at the date of the notice of what is due from each party to the other in respect of the mutual dealings and sums due from one party and the sums due from one party shall be set-off against the sums due from the other party.
Now, that refers to the account being taken as of the date of the notice, but it doesn't mean that the set-off is between the liabilities as they exist as at

the date when the account is actually done. I think it was described -- the account -- the taking of the account was described by Lord Hoffmann really as meaning no more than the calculation of the balance due. It's the sitting down and actually manually or otherwise taking of the account -- taking the account, but in terms of to what goes into the calculation of the balance due mutual dealings are obviously defined in sub-paragraph 2. They include mutual credits, mutual debts and other mutual dealings of the company, and any creditor of the company claiming or claiming to prove. And then there's an exclusion of various matter which aren't allowed into the account.
Now, again, by reference to Stein v Blake, the effect of that formulation is that the creditor is essentially entitled to set-off the claim which, but for the insolvency set-off, he would have been entitled to prove. So on his side of the account it's his provable claim. Your Lordship also then sees, under 2.85(4), set-off applies specifically in relation to contingent and future debts, whether or not they're due from the company.
Then 2.85(5) to (7), the rule applies to the other machinery one finds elsewhere in the rules for producing the value of future and contingent claims as at the date

of the commencement of the administration. So there, again, for the purposes of set-off, ascertained as at the debt of the administration.

MR JUSTICE DAVID RICHARDS: Yes.

MR SMITH: Then, finally, your Lordship sees 2.85(8), the sum total of all of that is it's only the balance of the account -- only the balance, if any, of the account owed to the creditor is provable in the administration.
Now, if one just considers for a moment how that works in relation to contingent or future debts, where they're subject to mandatory set-off. The effect is essentially to cancel out those debts and produce a net balance which is provable. In our submission that net balance is plainly outstanding from the date of the administration and there's a number of reasons for that.
Firstly, it obviously represents the net balance after setting off the claims as ascertained at the date of the administration. So that's what goes into the account. The balance expressly -- is expressly provable pursuant to the express provision of 2.85(8) alongside all other provable debts, ranking pari passu as ascertained at the date of the commencement of the administration. That net balance itself is obviously not itself contingent or future. It's the net balance which remains after one has gone through the process in

2.85, having notionally accelerated or otherwise the contingent or future debt.
Now, my Lord, the short point in our submission is that if a contingent or future debt owed by the company, which is subject to set-off, results in a net balance which is outstanding from the date of the administration, then it would seem to be very odd if contingent or future debts which were not subject to set-off, because there didn't happen to be a cross-claim, were outstanding from a different date. One would have a slight --

MR JUSTICE DAVID RICHARDS: What sort of claims would they be?

MR SMITH: Sorry?

MR JUSTICE DAVID RICHARDS: What sort of claims would they be?

MR SMITH: They would be claims that --

MR JUSTICE DAVID RICHARDS: Well, that wouldn't be the subject of set-off?

MR SMITH: Well, any claim where there isn't a cross-claim, for whatever reason.

MR JUSTICE DAVID RICHARDS: I see. Like what? Can you give me an example?

MR SMITH: Well, any debt claim, any contingent debt claim, where there isn't a cross-claim.

MR JUSTICE DAVID RICHARDS: I'm sorry, I'm being stupid. Let's rephrase it. I think maybe I thought you were making a different point. I am sorry. (Pause)
I see your point. I don't know. I see. I can see that what you're -- are you leading to this submission, that it creates considerable difficulties of disaggregation if what is being set off is a bundle of claims on the one side against the company's claims on the other?
MR SMITH: Yes.
MR JUSTICE DAVID RICHARDS: It wouldn't be particularly a problem, I don't think, if the only claim the creditor had was a contingent claim which was greater than the company's claim against him because his claim would simply go down from 100 to 20, but 20 would still be a contingent claim.
MR SMITH: Yes, that's right.
MR JUSTICE DAVID RICHARDS: But are you postulating where you have a number of actual and contingent and future claims, "What is the balance", you would say?
MR SMITH: There that's point but there's also another point as well, which is that if the effect of set-off, where there is a cross-claim, is to produce a net balance which is due at the date of the administration, it would seem slightly odd --

MR JUSTICE DAVID RICHARDS: Hold on. So you're pointing to which words when you say that?
MR SMITH: Well, primarily 2.85(8). So it produces a balance --
MR JUSTICE DAVID RICHARDS: Or 3 as well.
MR SMITH: Yes. Obviously the first sentence of 2 --
MR JUSTICE DAVID RICHARDS: And 8, sorry, yes. (Pause)
MR SMITH: It's actually quite interesting to compare the first sentence of 2.85(8) with the second sentence because where the balance is owing -- where the net balance is owing the other way, so in other words where it's owing to the creditor, to the extent it is contingent or future it effectively reverts back to its contractual terms, about that isn't the position where --
MR JUSTICE DAVID RICHARDS: I see actually the disaggregation is taken -- is actually addressed in a way in sub-rule 8.
MR SMITH: In the second sentence.
MR JUSTICE DAVID RICHARDS: Exactly, or that part of it which results from the contingent or prospective claim. So maybe there's some apportionment that goes on.
MR SMITH: It is, but that's certainly the position where you're dealing with the -- you're dealing with the sum owed to the company.

MR JUSTICE DAVID RICHARDS: But, I mean, I'm not sure whether the word "due" here carries any greater meaning -- maybe you say it does -- than being "the sums for which" -- well, all claims contingent, actual, contingent, ascertained, unascertained, and all the rest of it, that each side has against the other.
MR SMITH: Yes.
MR JUSTICE DAVID RICHARDS: I mean, it's a compendious phrase or word to describe that, isn't it?
MR SMITH: Yes. What we suggest is that, looking at the operation of the rule, where it applies effectively is to produce a net balance which we suggest is quite plainly outstanding from the date of administration.
MR JUSTICE DAVID RICHARDS: I follow, yes.
MR SMITH: It would be slightly odd if that was the position where there happened to be a cross-claim against a creditor as compared with the position where it wasn't.
MR JUSTICE DAVID RICHARDS: I mean, you would say, for example, supposing the creditor has a contingent claim against the company, the company has a presently payable claim against the creditor, set-off is mandated there, notwithstanding that as a matter of ordinary legal language nothing is due from the company to the contingent creditor.

MR SMITH: Exactly. The effect of it is to produce the net balance which we submit is outstanding.
MR JUSTICE DAVID RICHARDS: Yes.
MR SMITH: So, my Lord, there is that -- that, we submit, would be an odd result if there was a disparity between the position where there was set-off and the position where there wasn't. It's difficult to see what the reason for that would be.
MR JUSTICE DAVID RICHARDS: Yes, I see.
MR SMITH: My Lord, that was all I was going to say about set-off.
My Lord, there are then a few practical points. Obviously Mr Dicker has again covered this area to some extent. The operation of discounting does give rise, we suggest, to some very serious oddities on the right administrators' case.
If one takes, first of all, future debts, obviously under rule 2.105 where it applies for the purposes of calculating dividends debts would be discounted back. On their case plainly they say statutory interest would only run from the date when the debt fell due which could be some time later. My Lord, that does, we suggest, give rise do very obvious and real lacuna which would result in prejudice.
Now, there clearly is what might be described as an

anomaly in the discounting rule where the future debt falls due before the declaration of the dividend, but, my Lord, in relation to that we simply make two points.

Firstly, that's a consequence of the way in which the draughtsman has chosen to frame rule 2.105. It doesn't really itself tell you what the meaning of "outstanding" in rule 2.88(7) is. Primarily the meaning of "outstanding" is derived from the way the scheme operates. That the first point.

The second point is it's not a point which in my submission really assists the joint administrators because on their case there remains the lacuna the other way. If they're right, that in relation to the creditor who does have his debt discounted back, he doesn't get statutory interest until the date on which the debt in fact fell due. There is not a point which actually helps them in the sense that they still on their case have a very obvious and serious lacuna.

So far as contingent debts are concerned, I have obviously explained the position in relation to that, but if we're right as to how discounting works in relation to contingent debts, obviously there would be similar lacuna on the administrators' case, and indeed that of Wentworth, in relation to contingent debts. They would be discounted back, given a present value at

the date of administration, but on their case statutory interest wouldn't run until later.

There's just one other point I want to make to your Lordship under this heading which touches a little on the facts of this case. It relates to the position where the occurrence of the contingency is under the control of the officeholder itself. So this postulates a situation where the ability to cause the contingency to crystallise is within the power of the officeholder. We deal with this in our reply skeleton argument. Perhaps if I could invite your Lordship to turn that up in bundle 6, tab 7, paragraph 57.

Now, my Lord, the point we make here is that on the facts of this case there will be situations -- indeed our claim is one of them -- where clients have posted assets with LBIE as collateral, essentially as security for lending, but there was no close-out mechanism on LBIE's insolvency. Just for your Lordship's note, the underlying evidence on this is Margaret Mauro's witness statement at paragraph 13.

So because there was no close-out mechanism, there were only two ways in which the position could be crystallised. Either the client discharged the loan, which would have made little commercial sense because it would actually have involved giving more money to an

insolvent company, or it was within LBIE's power itself to demand repayment of the loan.

MR JUSTICE DAVID RICHARDS: Sorry, just can we move back a moment. Just tell me again the relationship between the creditor and LBIE here?

MR SMITH: So this is a case where the creditor has posted collateral with LBIE, so he's posted assets with LBIE as collateral.

MR JUSTICE DAVID RICHARDS: For his loans -- sorry, for lines, to what, that have been made to him?

MR SMITH: Yes, exactly. So on the one hand there's provision of security, on the other hand there's lending coming back. The creditor has a contingent right to get his assets back once the secured lending has been repaid, as one might --

MR JUSTICE DAVID RICHARDS: But that's not a propriety claim, as I understand it, is that right? It's a pure creditor/debtor relationship?

MR SMITH: Yes. When I say "his assets", it's not meant in the proprietary sense.

In the particular circumstances we're concerned with here, there wasn't a close-out mechanism on LBIE's insolvency so the only two ways the creditor could in fact get his money back were either effectively to repay LBIE and thereby increase his exposure --

MR JUSTICE DAVID RICHARDS: Oh, because -- ah, yes, of course, because his exposure is that they owe him the securities or the value of the securities.

MR SMITH: Yes, exactly.

MR JUSTICE DAVID RICHARDS: I see.

MR SMITH: He has basically two choices. One is he either repays the loan, thereby increasing his exposure to an insolvent company, which would seem not to make too much sense commercially, or the other way for it to be closed out would be for LBIE to demand repayment itself, which it could do in relation to the loan.

MR JUSTICE DAVID RICHARDS: Yes.

MR SMITH: So, my Lord, this is a case, we would suggest, where in effect the ability to cause the contingency to crystallise is actually within the control of the insolvent company.

Now --

MR JUSTICE DAVID RICHARDS: Well --

MR SMITH: Because it can demand repayment and effectively close-out the position.

MR JUSTICE DAVID RICHARDS: I mean, so could the counterparty but it wouldn't be sensible to do so, is that what you're saying?

MR SMITH: Well, the only way the counterparty could do it is by actually repaying the loan so it would have to put

the money in.
MR JUSTICE DAVID RICHARDS: Okay, yes.
MR SMITH: Now, so this is an example of a situation which actually arises on the facts of this case where the ability to control the occurrence of the contingency is within the control of the officeholder. We do suggest it would be somewhat odd if statutory interest only ran from the date when the contingency --
MR JUSTICE DAVID RICHARDS: I'm confused on your facts because surely there's mandatory insolvency set-off, isn't there?
MR SMITH: Well, I'm not sure about that, my Lord.
MR JUSTICE DAVID RICHARDS: There must be, mustn't there, because your counterparty owes money to LBIE and LBIE owes the value of the deposited securities, so you have two debts going each way.
MR SMITH: Yes. I suppose the practical answer to that though is of course mandatory set-off is only going to kick in once you have the notice given, the notice to distribute.
MR JUSTICE DAVID RICHARDS: That's true.
MR SMITH: So in relation to the period before the notice is given there's no set-off.
MR JUSTICE DAVID RICHARDS: No. That's true as well.
MR SMITH: So I think your Lordship --

MR JUSTICE DAVID RICHARDS: What's the impact of that though?
MR SMITH: Your Lordship's point is probably correct so far as the position once the notice is given. Prior to that, it doesn't seem to me there would be set-off.
Now, the short point is that this is simply an example of where the ability to control the occurrence of the contingency is within the power of the officeholder. In this sort of case, if statutory interest only runs from the date when the contingency crystallises, one is in the rather odd situation that the administrator can effectively prevent the accrual of statutory interest by delaying the crystallisation of the contingency. We suggest that would be a rather odd situation.
MR JUSTICE DAVID RICHARDS: Tell me actually, as a matter of interest, how does rule 2.88 -- the interest rule -- operate in respect of debts which become the subject of set-off once a notice of distribution is given? I mean, one would have thought that, insofar as any interest is going to be payable, it is only going to be in respect of the balance, is that right?
MR SMITH: Yes, I would have thought that's right.
MR JUSTICE DAVID RICHARDS: I'm not sure how that all fits together.

MR SMITH: By the time you get to here, by the time you get to 2.88, the notice will obviously have been given by that time.
MR JUSTICE DAVID RICHARDS: Yes, exactly. So I'm just trying to work out whether the relevance of your example is because what we're talking about here is interest and that's what this debate is about.
MR SMITH: We are, but it's in relation to the period before the notice is given --
MR JUSTICE DAVID RICHARDS: Which notice?
MR SMITH: The notice of intention to distribute.
MR JUSTICE DAVID RICHARDS: Sorry, that was why I asked you the question I just did. If the effect of the giving of the notice is, as it is, to trigger insolvency set-off, then there is substituted for the existing proof, presumably, the net sum.
MR SMITH: Yes. So --
MR JUSTICE DAVID RICHARDS: -- as ab initio; yes?
MR SMITH: Yes.
MR JUSTICE DAVID RICHARDS: So interest could only be payable on the net sum. I have never thought about this before, I don't think, but that would seem logical.
MR SMITH: I think that's right. If I'm right on my set-off point, which is that actually the effect of this where there's insolvency set-off in any case is to produce

a net balance which is outstanding at the date the administration --
MR JUSTICE DAVID RICHARDS: Yes, one way or the other.
MR SMITH: I agree this point doesn't arise on that hypothesis, if am right on that. Now, it does arise, if it's said I'm wrong about that, and for any reason you're looking at the underlying position and that if there is a situation where effectively the underlying claims remain for the purposes of statutory interest and the administrator is able to control --
MR JUSTICE DAVID RICHARDS: I'm not sure anyone has, you know, thought of broaching that argument on this application.
MR SMITH: No. Certainly I think where we get to is, so far as set-off is concerned, certainly my position is that where that does happen one does have the net balance and certainly interest would accrue on that --
MR JUSTICE DAVID RICHARDS: Yes.
MR SMITH: -- from the date of commencement of the administration.
My Lord, then the final point is that in our submission the administrators' argument in relation to future debts and contingent debts and Wentworth's argument in relation to contingent debts necessarily implies that there was a change in the law in 1986,

a substantive change in the law.
Your Lordship obviously knows the relevant words "in respect of the periods during which they have been outstanding" appeared for the first time in the 1986 rules. Prior to that, there was no express provision for statutory interest in liquidation, but there was provision in bankruptcy in section 33(8) of the Bankruptcy Act 1914 which simply provided --
MR JUSTICE DAVID RICHARDS: Is this the 4 per cent?
MR SMITH: It is, yes. It simply provided that interest would be paid from the date of the receiving order.
MR JUSTICE DAVID RICHARDS: Yes.
MR SMITH: So it simply said the surplus shall be applied in payment of interest from the date of the receiving order on all debts proved in the bankruptcy.
Now, contingent debts were provable in the bankruptcy. That was section 33. Indeed, your Lordship I think asked the question earlier, that change was effected in --
MR JUSTICE DAVID RICHARDS: I think this is a point that Mr Dicker made and he referred me to the paragraph in his skeleton where he had set out the successive provisions in the rules. Is that the point you're making?
MR SMITH: It is, my Lord. So you have the pretty clear

position in the 1914 Act and you have the pretty clear position all the way up to that. There's no suggestion then in the Cork Report that there was any reason to change the position.
MR JUSTICE DAVID RICHARDS: Yes. So these provisions are mirrored in bankruptcy in the Act so then you're saying, well, apparently by a sidewind this change has been effected.
MR SMITH: Yes.
MR JUSTICE DAVID RICHARDS: To which the answer may come from the other side, "Well, it clearly is a new regime".
MR SMITH: Possibly. My Lord, we suggest perhaps the more likely explanation for the addition of that language is the fact it was merely making clear the end period in which interest ceased to run, rather than seeking to define a new start date in which interest did run.
I apologise, I've slightly overrun, my Lord, but that's all we have to say on this.
MR JUSTICE DAVID RICHARDS: Thank you very much, Mr Smith.
How does everyone think we're doing on timing? Let's see what we've got to cover still.
MR ZACAROLI: My Lord, after a quick word with Mr Trower, between us we will certainly be finished by lunchtime. I don't --
MR JUSTICE DAVID RICHARDS: On this issue?

MR ZACAROLI: On this side. Then there's a question of reply.
MR JUSTICE DAVID RICHARDS: What is then left? Let me just --
MR ZACAROLI: Issues 28 to 30, which I anticipate being relatively short compared with what has gone before, and I think all that's left after that for determination on this application is 37, which I don't think there's any issue on between the parties but my learned friend Mr Trower wishes to explain, I think, the complications there.
MR JUSTICE DAVID RICHARDS: All right. Is it possible to sit at 10 o'clock tomorrow morning? Is that a problem for anyone? We'll sit again at 10 o'clock tomorrow morning.
Thank you all very much.
(4.25 pm)
(The court adjourned until 10.00 am on Thursday, 26 February 2015)

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