

<p>1 Thursday, 19 February 2015</p> <p>2 (10.30 am)</p> <p>3 Opening submissions by MR DICKER (continued)</p> <p>4 MR DICKER: My Lord, I was just finishing the Commonwealth</p> <p>5 authorities.</p> <p>6 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>7 MR DICKER: There are two. The first is a decision from</p> <p>8 Hong Kong called Peregrine Investment Holdings Limited.</p> <p>9 I just need to show your Lordship the judgment. For</p> <p>10 your Lordship's note, the reference is 1E, tab 147. The</p> <p>11 judge in that case simply referred to Bower v Marris,</p> <p>12 Humber Ironworks and said that such authorities and the</p> <p>13 principles in them also applied in Hong Kong. There's</p> <p>14 no further analysis.</p> <p>15 MR JUSTICE DAVID RICHARDS: Right.</p> <p>16 MR DICKER: My Lord, the other case I did want to show your</p> <p>17 Lordship was a decision from the Second Circuit Court of</p> <p>18 Appeals in the United States, called Ohio Savings Bank &</p> <p>19 Trust Company v Willys Corporation. Your Lordship has</p> <p>20 that in bundle 1B, tab 64.</p> <p>21 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>22 MR DICKER: My Lord, picking it up on page 2 of the report</p> <p>23 in the right-hand column, the last full paragraph:</p> <p>24 "This appeal involves the legality of an order</p> <p>25 instructing the receiver in an equity receivership as to</p> <p style="text-align: center;">Page 1</p>	<p>1 and the ...(reading to the words)... amount of interest</p> <p>2 so payable."</p> <p>3 Then the two methods are identified in the</p> <p>4 right-hand column:</p> <p>5 "Method 1, the dividend payments to creditors</p> <p>6 treated ...(reading to the words)... balance of the</p> <p>7 payment then being applied to reduce the principal of</p> <p>8 the claims."</p> <p>9 My Lord, dropping a paragraph, the judgment</p> <p>10 continues:</p> <p>11 "The question involved in the appeal is to the</p> <p>12 extent to which the principal of the claims has been</p> <p>13 paid by the five dividends aggregating 100 per cent of</p> <p>14 such principal. The contention of the appellants is the</p> <p>15 principal has been paid in full and that only interest</p> <p>16 remains to be paid."</p> <p>17 My Lord, the familiar argument.</p> <p>18 Then the next paragraph:</p> <p>19 "This brings us to enquire into the rules applicable</p> <p>20 to the payments already made and those which remain to</p> <p>21 be made because of the interest which may be due</p> <p>22 thereon."</p> <p>23 There's a reference to United States authorities,</p> <p>24 first Story v Livingston:</p> <p>25 "The correct rule in general is the creditor should</p> <p style="text-align: center;">Page 3</p>
<p>1 the application to be made of the dividend payments</p> <p>2 being payments upon interest-bearing debts. The court</p> <p>3 below instructed that such payments should be applied</p> <p>4 first to the payment of the interest and then towards</p> <p>5 the discharge of the principal. From this order the</p> <p>6 Willys Corporation, the debtor, and the protective</p> <p>7 committee for the first preferred stockholders of that</p> <p>8 corporation have appealed. They insist the order</p> <p>9 referred to is erroneous in law, claiming that such</p> <p>10 payment should be applied to the reduction of the face</p> <p>11 amount of the principal of the claims as allowed, and</p> <p>12 the interest which accumulated during the receivership</p> <p>13 should be paid last."</p> <p>14 The opinion of the court is given by Circuit</p> <p>15 Judge Rogers. It starts at the top of page 3.</p> <p>16 If your Lordship goes to page 4, the last -- it's</p> <p>17 column 1, the last full paragraph and the last four</p> <p>18 lines of that, he says:</p> <p>19 "The only disagreement between the appellants and</p> <p>20 the appellees" --</p> <p>21 MR JUSTICE DAVID RICHARDS: Sorry, page 4?</p> <p>22 MR DICKER: Yes, page 4, column 1, just below -- just above</p> <p>23 the bottom, last four lines.</p> <p>24 MR JUSTICE DAVID RICHARDS: I'm with you, yes.</p> <p>25 MR DICKER: "The only disagreement between the appellants</p> <p style="text-align: center;">Page 2</p>	<p>1 calculate interest whenever a payment is made. To this</p> <p>2 interest the payment is first to be applied ...",</p> <p>3 et cetera.</p> <p>4 Then in the next paragraph, number 2:</p> <p>5 "... and that is understood to be the rule in all</p> <p>6 the federal courts before and since that time."</p> <p>7 Various authorities referred to.</p> <p>8 Halfway down column 1, 1835, the question came</p> <p>9 before Chancellor Walworth in New York in</p> <p>10 Stone v Seymour:</p> <p>11 "He states that ..."</p> <p>12 Then if your Lordship goes down in the quotation to</p> <p>13 the hole-punch, it says:</p> <p>14 "These rules prevailed in the Roman or civil law,</p> <p>15 now settled law of France, Spain, Holland, Scotland,</p> <p>16 England and the United States. The last of these</p> <p>17 principles is also supported by all of the English and</p> <p>18 American cases in which the rule has been settled as to</p> <p>19 the computation of interest."</p> <p>20 Then:</p> <p>21 "We shall not review the New York cases which have</p> <p>22 since been decided", and then there's a very long list</p> <p>23 of those cases.</p> <p>24 More relevantly, for present purposes, halfway down</p> <p>25 column 2 on page 5, he says:</p> <p style="text-align: center;">Page 4</p>

<p>1 "The rule in the United States on this subject 2 prevails also in England." 3 Your Lordship has seen a reference to 4 Bromley v Goodere. 5 MR JUSTICE DAVID RICHARDS: Yes. 6 MR DICKER: Over the page, the first paragraph, a reference 7 to Bower v Marris. 8 Then dropping a paragraph: 9 "The authorities show the rule laid down by 10 Lord Chancellor Hardwicke in 1743 is still the law of 11 the English courts." 12 A reference to Warrant Finance Company's case, 13 Humber Ironworks, Whittingstall v Grover, which 14 your Lordship hasn't seen but will, similarly re Calgary 15 and Medicine Hat Land Limited: 16 "The same doctrine prevails in the Chancery Court of 17 Ireland and in the Court of Session of Scotland." 18 That's Gourlay v Watson. 19 MR JUSTICE DAVID RICHARDS: Yes. 20 MR DICKER: The conclusion in column 2, the first full 21 paragraph, the last two lines: 22 "It seems to us the order made in the court below 23 which followed method number 2 was justified" -- 24 MR JUSTICE DAVID RICHARDS: Sorry, the second column? 25 MR DICKER: My Lord, I am sorry. The second column. It's</p> <p style="text-align: center;">Page 5</p>	<p>1 MR JUSTICE DAVID RICHARDS: Yes. We see that, yes. So this 2 must -- the jurisdiction must have been some equitable 3 jurisdiction to appoint a receiver. It's not 4 a bankruptcy under the bankruptcy code and just so 5 I know the context of it? 6 MR DICKER: My Lord, I can't answer the precise -- I can't 7 tell your Lordship at the moment the precise nature of 8 the receivership here. 9 MR JUSTICE DAVID RICHARDS: No. 10 MR DICKER: What your Lordship will see in a minute is that 11 the rule in Bower v Marris is not limited to bankruptcy 12 in companies winding up. 13 MR JUSTICE DAVID RICHARDS: No, I appreciate that. 14 MR DICKER: And, in a sense -- certainly one of the cases, 15 the last one mentioned in the judgment, Calgary and 16 Medicine Hat Land Company, is an English decision on 17 a debenture holder's action for enforcement of his 18 debenture. 19 MR JUSTICE DAVID RICHARDS: Yes, okay. That's fine. Thank 20 you very much. Yes, actually I think it was some equity 21 receivership proceeding. That appears in the headnote. 22 MR DICKER: Mr Fisher points out, just at the top of page 2, 23 column 1, line 3: 24 "The court was asked to appoint receivers and 25 authorise them to continue the operation of the</p> <p style="text-align: center;">Page 7</p>
<p>1 the first full paragraph. Then the last two lines of 2 that paragraph. 3 MR JUSTICE DAVID RICHARDS: Yes. 4 MR DICKER: Then, finally -- 5 MR JUSTICE DAVID RICHARDS: Just before we leave this -- are 6 you about to leave this case? 7 MR DICKER: I was just going to show your Lordship one more 8 passage. It's in the paragraph beginning number 5: 9 "The court ought to have in mind that prior to the 10 order appealed from...(reading to the words)... by the 11 decision in Calgary and Medicine Hat Land 12 Company Limited." 13 My Lord, as I say, your Lordship hasn't yet seen 14 that. 15 MR JUSTICE DAVID RICHARDS: No. 16 MR DICKER: That was all I was proposing to show 17 your Lordship from that judgment. It continues 18 basically by dealing with the Calgary and Medicine Hat 19 Land Company case. 20 MR JUSTICE DAVID RICHARDS: The 21 Ohio Savings Bank & Trust Company -- no, it was the 22 Willys Corporation was in receivership, is that right? 23 MR DICKER: My Lord, yes. 24 MR JUSTICE DAVID RICHARDS: Yes. 25 MR DICKER: That appears to be the position.</p> <p style="text-align: center;">Page 6</p>	<p>1 defendant's business in such matter and to such extent 2 as the court might direct ... preserve and protect the 3 property and assets of the defendant from being 4 satisfied ... [then] receivers were appointed by the 5 district courts on the creditor's bills." 6 MR JUSTICE DAVID RICHARDS: Okay. Thank you. 7 MR DICKER: My Lord, as I say, it's not entirely clear to us 8 to what extent receivership embodied principles of 9 insolvency law. It certainly -- 10 MR JUSTICE DAVID RICHARDS: It looks like it. 11 MR DICKER: It certainly envisaged distributions being made. 12 MR JUSTICE DAVID RICHARDS: Yes, exactly. 13 MR DICKER: My Lord, I mentioned just now that the rule 14 applies outside of bankruptcy and companies winding up. 15 There are two streams of authorities that we refer to in 16 our skeleton argument. The first concerns debenture 17 holders' actions and that's paragraphs 111 to 114 of our 18 skeleton. The main authority being the Calgary and 19 Medicine Hat Land Company case. 20 MR JUSTICE DAVID RICHARDS: I see. 21 MR DICKER: My Lord, the second concerns the administration 22 of deceased estates and payment of legacies. That's 23 paragraph 115 to 119 in our skeleton. 24 My Lord, York deal at some -- in some detail, 25 particularly, with the second stream of cases. That's</p> <p style="text-align: center;">Page 8</p>

<p>1 paragraph 72 to 81 of their skeleton, the main case 2 being a case called Whittingstall v Grover. My Lord, if 3 your Lordship was content with this, I was going to 4 leave it to Mr Smith to deal with both of those. 5 MR JUSTICE DAVID RICHARDS: Certainly. 6 MR DICKER: What your Lordship will, however, see from 7 Whittingstall v Grover in due course, just to flag the 8 point, is an analysis by Mr Justice Chitty in the 9 context of administration of deceased's estates which 10 essentially says the reason why statutory interest is 11 given at the prescribed rate in that context is because 12 the court effectively prevents the creditor from taking 13 proceedings and obtaining its own judgment, and equity 14 effectively has to compensate the creditor for the fact 15 that it's preventing it from obtaining its remedies at 16 law. So it gives it a corresponding right and that 17 right ended up being enshrined in the rules, still 18 present in CPR today. 19 MR JUSTICE DAVID RICHARDS: Yes. 20 MR DICKER: But passing over both of those and leaving those 21 to my learned friend Mr Smith, my next task was to draw 22 together some points in relation to interests on debts 23 that do not otherwise carry interest; in other words, 24 statutory interest at the Judgments Act rate. 25 Just to remind your Lordship of the statutory</p> <p style="text-align: center;">Page 9</p>	<p>1 but not also to apply in relation to statutory interest. 2 My Lord, just so your Lordship has the reference. 3 It's paragraph 79 and paragraph 80 of their skeleton. 4 My Lord, at that point obviously the direction of 5 argument diverges. Wentworth says it's not payable, 6 it's not applicable in relation to statutory interest 7 and, therefore, it can't be applicable to contractual 8 interest either. We obviously put it the other way 9 round. We start with contractual interest. We say it's 10 perfectly plain that Bower v Marris applies in relation 11 to a creditor who's entitled to contractual interest. 12 It has to, otherwise he wouldn't receive the interest 13 which he otherwise would have received absent 14 insolvency, and that's one of the fundamental principles 15 of the insolvency regime. 16 My Lord, we also say that it's not -- it's clear 17 that it's not in any event limited just to contractual 18 interest, it's also applicable to any right a creditor 19 has outside of the insolvency regime, whether that right 20 is contractual or statutory, including a right to 21 interest pursuant to a judgment. Your Lordship has seen 22 that most clearly stated in Tahore Holdings 23 Property Limited. That the Australian case, the 24 reference was 1D/135. 25 MR JUSTICE DAVID RICHARDS: Yes.</p> <p style="text-align: center;">Page 11</p>
<p>1 position, your Lordship will recall the 1824 and 1825 2 Acts introducing a right to interest on debts that 3 didn't otherwise carry interest. 4 MR JUSTICE DAVID RICHARDS: Yes. 5 MR DICKER: At that stage ranking after creditors' 6 entitlement to interest reserved or otherwise payable. 7 Your Lordship will also recall that the 1883 Act 8 entitled all creditors to interest at 4 per cent, so 9 effectively elevating that to the first line, and then 10 said anyone else with a higher rate of interest is 11 entitled to it on the basis he's got to be paid in full 12 before the surplus is provided to shareholders. So 13 there's a slight tweak in that respect. 14 The submission at this point is that in our 15 submission it's clear that the rule in Bower v Marris 16 applies not just to contractual interest, it also 17 applies to interest under statute, including the 18 creditors' entitlement to interest under section 129, 19 section 132, et cetera. 20 Now, the starting point is, I think, there is common 21 ground between us and Wentworth, at least in this 22 respect. They say it would not make sense for 23 Bower v Marris to apply in one situation but not in the 24 other; in other words, it wouldn't make sense for it to 25 apply, for example, in relation to contractual interest</p> <p style="text-align: center;">Page 10</p>	<p>1 MR DICKER: Your Lordship may remember Mr Justice Barrett 2 saying although the cases talk about contractual 3 interest, it applies equally, regardless of the source. 4 MR JUSTICE DAVID RICHARDS: Yes. 5 MR DICKER: The next point is obviously the justification 6 for giving creditors a right to interest at the 7 Judgments Act rate is the existence of a moratorium. 8 They are effectively to be put into the position that 9 a creditor would have been in had he obtained judgment. 10 MR JUSTICE DAVID RICHARDS: Yes. 11 MR DICKER: Put another way, if a creditor had obtained 12 judgment the day before and was entitled to rely on the 13 rule in Bower v Marris, why on earth should it make any 14 difference that he would have obtained judgment the day 15 after but couldn't as a result of the moratorium? 16 The next point is every case that has considered the 17 point has either held or indicated that the rule applies 18 in both situations. 19 MR JUSTICE DAVID RICHARDS: Yes. 20 MR DICKER: Put another way, there is certainly no case 21 which anyone has found which suggests the rule does not 22 apply to statutory interest at the Judgments Act rate. 23 Can I just remind your Lordship of three authorities 24 your Lordship so far has seen on that? The first is 25 Bower v Marris itself. Your Lordship may remember</p> <p style="text-align: center;">Page 12</p>

<p>1 Lord Cottenham's reference to section 132 of the 85 Act, 2 not drawing any distinction in this respect between 3 claims as to contractual interest and claims to interest 4 at the prescribed rate. It may just be worth looking at 5 that passage. It's bundle 1A. 6 MR JUSTICE DAVID RICHARDS: He referred to the 1885 Act. 7 MR DICKER: 1825. 8 MR JUSTICE DAVID RICHARDS: 1825, sorry. 9 MR DICKER: That was the -- 10 MR JUSTICE DAVID RICHARDS: Yes. 11 MR DICKER: The passage then perhaps for your Lordship's 12 note, it's at the bottom on page 357. 13 MR JUSTICE DAVID RICHARDS: Yes. 14 MR DICKER: He refers to section 132. 15 MR JUSTICE DAVID RICHARDS: Yes. 16 MR DICKER: He doesn't draw a distinction in that section 17 between the various parts of section 132. He doesn't 18 say that the rule in Bower v Marris only applies where 19 you are dealing with interest reserved or only applies 20 where you're dealing with interest reserved or otherwise 21 payable at law, but does not apply to interest at the 22 prescribed rate. It's effectively treated and referred 23 to as one. 24 So that's the first point. 25 The second -- the first case.</p> <p style="text-align: center;">Page 13</p>	<p>1 would be treating them differently. Creditors with 2 contractual rights to interest would effectively be 3 compensated for additional delay in the way that 4 creditors entitled to statutory interest would not, 5 effectively causing -- giving rise to a difference in 6 treatment, contrary to Lord Justice Giffard's comment at 7 the end of Humber Ironworks, that there is no 8 justification for treating them differently. 9 Secondly, if creditors entitled to interest at the 10 Judgments Act rate did not receive interest calculated 11 on the basis of the rule, then they would not receive 12 interest at an effective rate of 8 per cent, effectively 13 the amount they receive when they eventually receive it 14 would be worth less as a result of the time value of 15 money. 16 We say that can't be what the legislature intended. 17 MR JUSTICE DAVID RICHARDS: Yes. 18 MR DICKER: My Lord, the final point on this is Wentworth 19 has a technical reason why they say the rule in 20 Bower v Marris can't apply to statutory interest at the 21 Judgments Act rate. The reason the argument is that 22 they say the rule in Bower v Marris requires interest to 23 have accrued and statutory interest -- at least 24 statutory interest under the Judgments Act rate cannot 25 have accrued unless and until there is a surplus.</p> <p style="text-align: center;">Page 15</p>
<p>1 The second is the decision of Mr Justice Blair in 2 the Attorney General of Canada v Confederation Trust 3 case. 4 MR JUSTICE DAVID RICHARDS: Yes. 5 MR DICKER: My Lord, again, the reference 1D, tab 133. 6 My Lord, that was concerned with specifically concerned 7 with a provision providing for interest (inaudible) that 8 didn't otherwise carry interest, and Bower v Marris 9 applied. That's why my learned friends say that case 10 must have been wrongly decided. 11 The third is Hibernian Transport. Ignoring, as it 12 were, the wrinkle caused by the question of whether the 13 bankruptcy rules also applied in corporate consultancy, 14 Mrs Justice Carroll -- I think I misdescribed her 15 yesterday -- held that in bankruptcy, where there is 16 a similar provision for interest at the prescribed rate 17 on all debts, whether or not they carry interest, 18 Bower v Marris applies. So that's the third case. 19 The fourth case, one your Lordship hasn't yet seen, 20 outside of insolvency but to identical effect, 21 Whittingstall v Grove in relation to the administration 22 of deceased's estates. 23 We say that must be correct as a matter of 24 principle. If the rule applied to creditors entitled to 25 contractual interest but not Judgments Act interest, it</p> <p style="text-align: center;">Page 14</p>	<p>1 My Lord, we say that argument is incorrect. There's 2 no difficulty in regarding creditors' rights to 3 statutory interest as a contingent right at the date of 4 commencement, the contingency being the occurrence of 5 a surplus. That's precisely how it was analysed in 6 Attorney General of Canada v Confederation Trust. The 7 reference is paragraph 25. We say there is no 8 theoretical problem, once a surplus has arisen, in 9 conducting the calculation by applying hindsight; in 10 other words, doing exactly the same as one does in 11 relation to the process of collective enforcement, but 12 in relation to the surplus. One has a contingent right 13 pursuant to the statute to interest at the Judgments Act 14 rate. It's true it's contingent on there being 15 a surplus, but once a surplus arises, there is no 16 theoretical difficulty in saying that we will treat 17 interest as having accrued up to and on the date of each 18 dividend payment and applying Bower v Marris on that 19 basis. 20 MR JUSTICE DAVID RICHARDS: Can I just see in the 21 Confederation Trust case. 22 MR DICKER: Yes, 1D/33. Reminding your Lordship, at 23 paragraph 17 it sets out section 95(2). 24 MR JUSTICE DAVID RICHARDS: Yes. 25 MR DICKER: Paragraph 25, Mr Justice Blair says</p> <p style="text-align: center;">Page 16</p>

<p>1 section 95(2) applies, and then:</p> <p>2 "To say this not to give the provision retroactive</p> <p>3 effect ...(reading to the words)... debts and</p> <p>4 obligations and the costs associated with liquidation."</p> <p>5 He's dealing with a slightly different argument</p> <p>6 there. One of the arguments was that section 95 didn't</p> <p>7 apply at all because it only came into force after the</p> <p>8 start of the liquidation. He says effectively it's</p> <p>9 a continuing liquidation and there's no difficulty in</p> <p>10 analysing it this way, but for our purposes what we rely</p> <p>11 on, which we say is correct as a matter of analysis, is</p> <p>12 the statute gives you a right. It may be it's</p> <p>13 conditional, contingent on there being a surplus, but</p> <p>14 once the right arises, there's no difficulty in looking</p> <p>15 back and saying, "We now know effectively you had</p> <p>16 a claim to interest accrued on the principal as at the</p> <p>17 date and performing the calculation accordingly".</p> <p>18 MR JUSTICE DAVID RICHARDS: So the Wentworth argument is</p> <p>19 that Bower v Marris can apply only where interest has</p> <p>20 accrued due at the relevant payment dates; is that</p> <p>21 right?</p> <p>22 MR DICKER: Yes.</p> <p>23 MR JUSTICE DAVID RICHARDS: They say, "Well, this doesn't</p> <p>24 accrue due at the dates of the payments of the</p> <p>25 dividends, it only accrues due once there is a surplus".</p> <p style="text-align: center;">Page 17</p>	<p>1 rule may be justified on the basis it reflects those</p> <p>2 rights and provides creditors what they would otherwise</p> <p>3 have been entitled to, and, as a rule of calculation,</p> <p>4 there's no difficulty in saying not merely we'll treat</p> <p>5 prior dividends as having been applied notionally first</p> <p>6 in respect of interest, if you can do that there is no</p> <p>7 reason why you can't also say, as part of the</p> <p>8 calculation, we will to the extent necessary treat</p> <p>9 interest as having been accrued up to the relevant date</p> <p>10 of principal. We now know, given that there is</p> <p>11 a surplus, that that as a matter of statute is the</p> <p>12 interest to which you were entitled.</p> <p>13 MR JUSTICE DAVID RICHARDS: This particular argument, the</p> <p>14 Wentworth argument on this point, was that actually</p> <p>15 advanced in the Attorney General v Confederation Trust</p> <p>16 case?</p> <p>17 MR DICKER: No.</p> <p>18 MR JUSTICE DAVID RICHARDS: No.</p> <p>19 MR DICKER: My Lord, moving on to the section in our</p> <p>20 skeleton dealing with policy and principle. It's</p> <p>21 paragraphs 120 and 121. I think I can take this fairly</p> <p>22 shortly.</p> <p>23 Just to add a little structure and a few additional</p> <p>24 points. The first point we say is the easiest situation</p> <p>25 concerns a creditor with a contractual right to</p> <p style="text-align: center;">Page 19</p>
<p>1 MR DICKER: Correct.</p> <p>2 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>3 MR DICKER: So they draw a distinction. It's a fallback</p> <p>4 argument for them.</p> <p>5 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>6 MR DICKER: They draw a distinction between claims to</p> <p>7 interest as a matter of contract.</p> <p>8 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>9 MR DICKER: And claims to interest where your only right to</p> <p>10 interest is under the statutory scheme.</p> <p>11 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>12 MR DICKER: The argument effectively on Wentworth's part</p> <p>13 is: Bower v Marris is all about remission to your</p> <p>14 contractual rights.</p> <p>15 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>16 MR DICKER: So that's fine, it covers contract, but the</p> <p>17 logic of it in the remission to contractual rights is</p> <p>18 you have an underlying right to interest which is</p> <p>19 accruing and that, they say, is a critical part of one's</p> <p>20 ability to apply the rule in Bower v Marris.</p> <p>21 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>22 MR DICKER: Now, we say in response: not so, the rule in</p> <p>23 Marris is effectively a rule that governs how you</p> <p>24 calculate interest in an insolvency. It's not simply an</p> <p>25 application of parties' contractual rights, although the</p> <p style="text-align: center;">Page 18</p>	<p>1 interest. As the authorities repeatedly state, the rule</p> <p>2 ensures the creditors receive the full amount they would</p> <p>3 have received had the company not gone into liquidation.</p> <p>4 Now, just dealing with a point your Lordship I think</p> <p>5 raised with me yesterday. In many cases obviously the</p> <p>6 amount that the creditor would be entitled to receive</p> <p>7 absent insolvency will be a matter of effectively</p> <p>8 express stipulation in this respect. It's obviously</p> <p>9 common, particularly for finance documents, to contain</p> <p>10 an express provision entitling the creditor to apply</p> <p>11 payments as it wishes, not how the debtor wishes.</p> <p>12 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>13 MR DICKER: So it will often be enshrined in the terms of</p> <p>14 the contract itself. But if that's not the case and the</p> <p>15 debtor makes a general payment on account, on the</p> <p>16 authorities the creditor is entitled to apply that first</p> <p>17 interest, if he wishes.</p> <p>18 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>19 MR DICKER: Failing that, if neither -- if it's a general</p> <p>20 payment on account and the creditor has not applied it,</p> <p>21 the default rule is that the court will treat it as</p> <p>22 having been applied to interest.</p> <p>23 The fourth point, which I think your Lordship raised</p> <p>24 yesterday, is what if the debtor says to the creditor,</p> <p>25 "Here's a payment, apply it in respect of principal".</p> <p style="text-align: center;">Page 20</p>

<p>1 I mentioned a decision called Nemichand which addressed 2 that. I ought to just show your Lordship the reference. 3 It's bundle 1D, tab 62A. 4 MR JUSTICE DAVID RICHARDS: Yes. 5 MR DICKER: It's a decision of the Privy Council from 1921. 6 The relevant paragraph is paragraph 3 of the commendably 7 short judgment. Paragraph 3: 8 "The law as to payment being applied as to principal 9 or interest laid down by the board in the case of ..." 10 Then there's the reference to that: 11 "Shortly restated it is this: a creditor to whom 12 principal and interest are owed is entitled to 13 appropriate any indefinite payment which he gets from 14 a debtor to the payment of interest a debtor might make 15 in making a payment stipulate that it was only to be 16 applied only to principal. If he did, so the creditor 17 need not accept the payment on these terms. Then he 18 must give back the money or the cheque by which the 19 money is proffered. If he accepts it, he would then be 20 bound by the appropriation proposed by the debtor." 21 That's the position outside of insolvency. 22 MR JUSTICE DAVID RICHARDS: Yes. 23 MR DICKER: We say, obviously, outside of insolvency, if the 24 creditor returned the money, what he would then be able 25 to do, obviously, is issue proceedings, obtain judgment,</p> <p style="text-align: center;">Page 21</p>	<p>1 capped at the end of the first year, although only 2 payable in the event some ten years later and therefore 3 worth considerably less as a result of the time value of 4 money. 5 My Lord, we do say why on earth would the 6 legislature have wanted to go to the trouble of 7 specifying interest at 8 per cent if it was effectively 8 content for that right to be watered down as a result of 9 further time passing before that amount of interest is 10 eventually paid? 11 My Lord, the third point is the rule ensures 12 equality of treatment of creditors. This is a slightly 13 different point. One of the consequences of Wentworth's 14 and the administrators' approach is that the treatment 15 of creditors will differ depending on when they prove 16 for their debts and whether they receive any interim 17 dividends. So take a case of a creditor who does not 18 prove until just before the final dividend, he will 19 receive principal and interest on the full amount right 20 up to the date of final dividend. Now, compare 21 a creditor who received interim dividends. He will only 22 receive a sum in respect of interest accrued up to the 23 date of each dividend, effectively degraded by the time 24 value of money. 25 So one of the consequences of their approach is that</p> <p style="text-align: center;">Page 23</p>
<p>1 obtain a Judgments Act rate, interest, enforce, 2 et cetera. Plainly, obviously, he can't do that in 3 insolvency, nor, for obvious reasons, can he sensibly 4 decline to received dividend payment. 5 So one way or another -- some more complicated than 6 others -- outside of an insolvency, a creditor is 7 entitled effectively to the application of the rule in 8 Bower v Marris. 9 My Lord, the next point is this: it's not only 10 a creditor with a contractual right to interest who may 11 be prejudiced if the rule does not apply. Consider 12 a creditor who's entitled to statutory interest at the 13 Judgments Act rate. The legislature has said that he 14 ought to have interest at 8 per cent, but if Wentworth 15 and the administrators are right, that's not in reality 16 what he gets. On their case the amount of interest he 17 receives is effectively crystallised on each dividend 18 payment, although it may not in fact actually be paid 19 for years. So one has a situation in which a dividend, 20 say of 50 per cent, is paid at the end of year 1. The 21 interest for that year is 8 per cent at the amount of 22 the dividend payment. Now, assume that it takes another 23 ten years to pay the final dividend. Wentworth and the 24 administrators' case is that first year's interest 25 crystallised at the end of the process, was effectively</p> <p style="text-align: center;">Page 22</p>	<p>1 the amount that creditors actually receive will differ 2 depending on whether and, so if, when, they prove their 3 debts and received interim dividends. On their case 4 it's better, assuming there is a surplus, not to prove 5 your debt until the last possible moment. You will then 6 preserve effectively interest at 8 per cent right up to 7 the date you prove and get your dividend. Again, we say 8 the legislature can't have intended creditors to be 9 treated differently, depending on whether they prove 10 early or late, and there will certainly be an 11 unfortunate incentive so far as the administration of 12 insolvencies was concerned if there was any incentive 13 for creditors effectively to say, "We're not going to 14 prove. We're not going to receive dividend as a result. 15 We're going to delay doing it as long as possible so 16 that we continue to receive statutory interest". 17 My Lord, that's obviously contrary to the intention 18 of having a winding-up order being concluded as 19 reasonably practicable. 20 My Lord, the fourth and final point is it ensures 21 the debtor or its shareholders do not benefit from the 22 time taken to conduct the insolvency. 23 Again, there are two aspects to this. The first of 24 course is to the extent that creditors with contractual 25 rights to interest get less than they otherwise would</p> <p style="text-align: center;">Page 24</p>

<p>1 have done, that sum inures for the benefit of 2 shareholders so a creditor with a contractual right 3 loses the shareholder gains. But it also prevents the 4 debtor or its shareholders from obtaining the benefit of 5 any interest earned on the state or increase in the 6 value of its asset in the meantime.</p> <p>7 My Lord, one example of this is the facts in 8 Hibernian. Your Lordship may remember, at the time the 9 company went into liquidation there was a deficiency. 10 The only reason there turned out to be a surplus was 11 because of interest earned on the assets during the 12 course of the administration -- the course of the 13 liquidation.</p> <p>14 MR JUSTICE DAVID RICHARDS: Yes, I remember.</p> <p>15 MR DICKER: As I say, one of the consequences of Wentworth 16 and the administrators' case is that if interest is 17 capped in the way that they say it is, then the benefit 18 of that interest effectively goes to the shareholders or 19 the debtors.</p> <p>20 One can illustrate that easily. Take the present 21 situation. We have had a final dividend. According to 22 the administrators and Wentworth, therefore, the amount 23 of interest the creditors will receive is now a fixed 24 amount, but it may take, as a result of this 25 application, two or three years, depending of how far it</p> <p style="text-align: center;">Page 25</p>	<p>1 right and Bower v Marris doesn't apply to statutory 2 interest, then the effect of that is a creditor receives 3 in total less interest than he would have done if 4 Bower v Marris had been applied, may he not be remitted 5 to his rights and so have a non-provable claim for the 6 balance?</p> <p>7 MR DICKER: Your Lordship's example assumes a creditor who 8 isn't otherwise entitled to --</p> <p>9 MR JUSTICE DAVID RICHARDS: No, someone who is. Someone who 10 is. So you have a right to contractual interest which, 11 if Bower v Marris doesn't apply to statutory interest, 12 by which I mean under rule 2.88, will be able to say, 13 "I haven't received my full contractual entitlement" 14 because Bower v Marris should be applied to if we're 15 just dealing with the position outside the 16 administration rules.</p> <p>17 MR DICKER: My Lord, if it's not within 2.88, then in our 18 submission the logic must be that it's then 19 a non-provable claim --</p> <p>20 MR JUSTICE DAVID RICHARDS: So that would take care of that 21 first example you gave. I mean, it would mean they were 22 further down the waterfall. I think Mr Trower submits 23 that rule 2.88 deals completely with interest.</p> <p>24 MR DICKER: Well, and that --</p> <p>25 MR JUSTICE DAVID RICHARDS: No non-provable claims for</p> <p style="text-align: center;">Page 27</p>
<p>1 goes, before the surplus is eventually distributed. In 2 the meantime the 6 billion, or whatever it is, of cash 3 that the administrators hold will no doubt be earning 4 interest --</p> <p>5 MR JUSTICE DAVID RICHARDS: Although not at 8 per cent, 6 I wouldn't think.</p> <p>7 MR DICKER: Although not at 8 per cent. There are, as 8 I understand it, assets held through affiliates in 9 a form of securities and things of that sort which may 10 well increase in value.</p> <p>11 MR JUSTICE DAVID RICHARDS: Mmm.</p> <p>12 MR DICKER: But that interest will effectively go, on their 13 case, to shareholders and --</p> <p>14 MR JUSTICE DAVID RICHARDS: The point you're making now is 15 not in any way dependent on whether the creditor has 16 a right to interest, apart from the administration. 17 Your first point under this heading relates to those who 18 have a right to interest as a matter of contract or 19 perhaps judgment or something.</p> <p>20 MR DICKER: Correct.</p> <p>21 MR JUSTICE DAVID RICHARDS: This point applies irrespective 22 of whether you have a right outside the administration.</p> <p>23 MR DICKER: Absolutely. Both are prejudiced by delay.</p> <p>24 MR JUSTICE DAVID RICHARDS: What about the -- in respect of 25 the first lot? If Wentworth and the administrators are</p> <p style="text-align: center;">Page 26</p>	<p>1 interest.</p> <p>2 MR DICKER: And so do Wentworth.</p> <p>3 MR JUSTICE DAVID RICHARDS: And so do Wentworth as well, 4 yes.</p> <p>5 MR DICKER: So addressing that argument, we say creditors 6 end up at the end of the day with less than they 7 otherwise would have received.</p> <p>8 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>9 MR DICKER: No chance for a non-provable claim, but 10 your Lordship's earlier point is exactly right. All 11 creditors are prejudiced if Bower v Marris doesn't 12 apply. They are prejudiced in slightly different ways 13 and for slightly different reasons. The contractual 14 creditor because he's not getting to what he bargained 15 for.</p> <p>16 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>17 MR DICKER: The creditor who didn't otherwise have a right 18 to interest is entitled to interest at the Judgments Act 19 rate; he is prejudiced because he's not getting an 20 effective rate of 8 per cent which we say the 21 legislature plainly intended that he should receive.</p> <p>22 My Lord, it's no answer in our submission for 23 Wentworth to say, "Okay, at the moment 8 per cent 24 happens to be a high rate of interest". Your Lordship 25 can't, as it were, decide what the answer as a matter of</p> <p style="text-align: center;">Page 28</p>

<p>1 law is depending on whether on any particular date 2 prevailing interest rates are just below or just above 3 8 per cent. 4 My Lord, there's then a separate set of issues -- 5 points concerning what may be called policy and 6 principle so far as third parties are concerned. It's 7 effectively the effect of Wentworth and the 8 administrators' case on, for example, co-obligors. 9 MR JUSTICE DAVID RICHARDS: Right. 10 MR DICKER: One of the points dealt with in Bower v Marris. 11 MR JUSTICE DAVID RICHARDS: Yes. 12 MR DICKER: My Lord again, my learned friend Mr Smith is 13 going to deal with that. 14 MR JUSTICE DAVID RICHARDS: Okay. 15 MR DICKER: That's another issue. 16 My Lord, so that concludes, although I'm conscious 17 at some length, the statutory history, the authorities, 18 both in this jurisdiction and elsewhere, and draws some 19 of the themes together. 20 The next stage is arguments as to why, according to 21 Wentworth and the administrators, things changed in 22 1986. 23 MR JUSTICE DAVID RICHARDS: Yes. Could I just ask one 24 question. Can you just remind me where the equivalent 25 provisions to 2.88 and interest are in bankruptcy now?</p> <p style="text-align: center;">Page 29</p>	<p>1 justifications for which, but not the only 2 justification -- is that it ensures creditors receive 3 the full amount that they would have received absent the 4 insolvency. There is this distinction between ourselves 5 and Wentworth. They effectively say, "It's no more than 6 your contractual entitlement". 7 MR JUSTICE DAVID RICHARDS: Yes. 8 MR DICKER: We say that's not how it's analysed in the 9 cases. The way it's analysed in the cases is it's 10 effectively part of the operation of the statutory 11 scheme. It's there because it effectively is the just, 12 the right result. Part of the reason why it's the just 13 or right result is that it ensures creditors being paid 14 in full. But it's broader than that and obviously the 15 broader bit, we say, also encompasses the right to 16 statutory interest at the Judgments Act rate. 17 MR JUSTICE DAVID RICHARDS: Yes. 18 MR DICKER: Turning now to 1986. One starts with the 19 legislative materials leading up to the Act. Can I just 20 show your Lordship how this is dealt with by Wentworth 21 and the administrators. So far as Wentworth is 22 concerned, their skeleton argument is paragraphs 12 and 23 14. My Lord, they refer in paragraph 12 to 24 the Cork Report, paragraph 1392, concluding: 25 "There should be one set of rules relating to</p> <p style="text-align: center;">Page 31</p>
<p>1 MR DICKER: Yes. 2 MR JUSTICE DAVID RICHARDS: It's in the rules, is it, or is 3 it in the Act? 4 MR DICKER: No, it's in the legislation. 5 MR JUSTICE DAVID RICHARDS: Is it in very similar terms? 6 MR DICKER: Yes. 7 MR JUSTICE DAVID RICHARDS: Thank you. 8 MR DICKER: It's also in very similar terms in relation to 9 winding up as well. My Lord, it's 328 in relation to 10 bankruptcy. 11 MR JUSTICE DAVID RICHARDS: Thank you. 12 MR DICKER: My Lord, can I -- 13 MR JUSTICE DAVID RICHARDS: Yes, that's helpful. Thank you. 14 MR DICKER: I'll come back to this in a moment, but just to 15 emphasise a point which I hope I have made. 16 We say Bower v Marris isn't simply the application 17 of a contractual entitlement. 18 MR JUSTICE DAVID RICHARDS: No. 19 MR DICKER: That's not how Lord Hardwicke -- that's not how 20 Lord Cottenham dealt with it in Bower v Marris. 21 Your Lordship may remember him saying, "It's not 22 a question of appropriation, it's a question of how 23 I construe the statutory scheme". 24 We say it's effectively a judge-made rule as to how 25 the insolvency scheme works which -- one of the</p> <p style="text-align: center;">Page 30</p>	<p>1 interest on debts in all forms of insolvency 2 proceedings. In preparing the rules, simplicity and 3 certainty are essential." 4 In line with that sentiment it recommended, 5 paragraph 1394, that in the event of being a surplus 6 after the payment of all admitted debts and liabilities, 7 "... interest should run on all such debts and 8 liabilities until a final dividend has occurred, the 9 rate being that currently applicable to judgment debts 10 at the commencement of the insolvency." 11 Then you will see in 14 they emphasise the words 12 "until a final dividend is declared" saying: 13 "The essence of the recommendation that interest 14 should run 'until a final dividend is declared' was 15 enacted, with a slight variation that interest under 16 rule 2.88(7) runs until the final dividend has been 17 paid..." 18 So that's what they say in relation to the Cork 19 Report. 20 The administrators, in paragraphs 87 to 92, refer in 21 87 to the Cork committee, set out the changes which were 22 made in 88 and then say, in 91: 23 "As a result of the Cork Committee's recommendation, 24 the mandatory direction that the surplus be applied in 25 paying interest (rather than principal), which had</p> <p style="text-align: center;">Page 32</p>

<p>1 formed part of the bankruptcy legislation since 1883, 2 became part of the winding-up legislation. For the 3 first time, the corporate liquidation regime was brought 4 into line with bankruptcy regime." 5 Then 92, the last sentence: 6 "As a result of the introduction of the mandatory 7 direction requiring the surplus to be applied ... 8 a default rule could no longer apply as it was plainly 9 not what the legislature's choice of words indicated its 10 intention to be." 11 So the administrators' position is essentially 12 Bower v Marris had been abolished by the 1883 Act. What 13 the Cork Report says is we need to bring company 14 liquidation in line with bankruptcy, we need to include 15 a mandatory direction. As a result of including 16 a mandatory direction, Bower v Marris disappeared from 17 company liquidation as well. 18 MR JUSTICE DAVID RICHARDS: Yes. 19 MR DICKER: My Lord, that's what they say the Cork Report 20 was doing. We respectfully invite your Lordship to look 21 at the terms of the discussion. It's in bundle 4, 22 tab 3. My Lord, obviously this is not a statute. 23 MR JUSTICE DAVID RICHARDS: No. 24 MR DICKER: It would be unfair of the authors to construe it 25 as if it was. Looking at what they discussed. There</p> <p style="text-align: center;">Page 33</p>	<p>1 "This section was believed not to be applicable and 2 was therefore never applied in companies winding up. 3 This belief was shown to be erroneous in 1967." 4 1369, the second sentence: 5 "The section is now applied in companies winding up 6 and since for many years ...(reading to the words)... 7 secondly, on the liquidation of an ordinary trading 8 company which has an overdraft with its bank." 9 The long of the short of it is summarised at 1378: 10 "No doubt section 66 has proved impracticable to 11 apply in companies winding up ... is a source of delay, 12 expense and embarrassment ... highly unsatisfactory ... 13 not only is the law unclear but that in particular 14 recent interpretations have found to be virtually 15 unworkable." 16 Essentially the exercise of stripping out the sum 17 above 5 per cent was too time-consuming and so expensive 18 that it was almost impossible for liquidators to 19 perform. 20 MR JUSTICE DAVID RICHARDS: Yes. 21 MR DICKER: In 1379, the last sentence: 22 "Now that money lending transactions and all 23 credit...(reading to the words)... retaining this 24 section in personal insolvency." 25 1380, the last sentence, firmly of the view this</p> <p style="text-align: center;">Page 35</p>
<p>1 are three main sections to the report. Just identifying 2 them. The first starts just above 1363, 3 "Interest-bearing debts", which deals with section 66(1) 4 of the 1914 Act. I'll come back to that. 5 The second your Lordship will see at 1382, 6 "Non-interest-bearing debts". That deals with the 7 position up to the date of the receiving order or 8 commencement of the winding-up. 9 MR JUSTICE DAVID RICHARDS: Yes. 10 MR DICKER: So pre-insolvency. 11 The third, "Statutory interest out of surplus 12 assets" obviously deals with our situation, but one 13 needs to look at all three. 14 So far as the first is concerned, there is a long 15 discussion about the effect of section 66(1) of the Act 16 of 1914. Your Lordship may recall, if you look at 1364 17 the last sentence summarises the effect of 66.1: 18 "The interest in excess of 5 per cent is postponed 19 and ranks for dividend only after the debt which have 20 been proved have been paid in full." 21 1365: 22 "Sub-section 2 designed to prevent avoidance by 23 creditors." 24 Then there's a reference to that. 25 1368, the second sentence:</p> <p style="text-align: center;">Page 34</p>	<p>1 section has long outlived its usefulness and needs 2 complete repeal. 3 1381: 4 "The repeal of section 66 would enable exorbitant 5 rates of interest ...(reading to the words)... 6 exorbitant credit agreements on the application of the 7 liquidator." 8 As your Lordship knows, that indeed is what 9 happened. 10 The next paragraph, 1382, as I said, deals with 11 pre-insolvency interest: 12 "In cases where there is no express provision for 13 interest ...(reading to the words)... [and they say] 14 this rate has been in force since 1883." 15 Then dealing with the surplus: 16 "Section 33(8) of the Act of 1914 provides that if 17 after all the proving creditors have been paid in full, 18 the bankrupt's estate still has a surplus it is to be 19 applied first in paying interest from after the date of 20 the receiving order at the rate of 4 per cent per annum 21 on all debt proved in the bankruptcy, any balance 22 belonging to the bankrupt." 23 Then they draw the distinction between bankruptcy 24 and companies winding up: 25 "There is no similar provision in the winding-up</p> <p style="text-align: center;">Page 36</p>

<p>1 code." 2 In other words, no provision or interest on debts 3 that don't otherwise carry interest. 4 They make the point section 66 of the ct of 1914 -- 5 sorry: 6 "Unlike section 66, the provisions of section 33(8) 7 are not imported into the Companies Act." 8 That's effectively Rolls-Royce. 9 MR JUSTICE DAVID RICHARDS: Hmm, hmm. 10 MR DICKER: Dropping four lines: 11 "Provided that there is a surplus after the proving 12 creditors have been paid in full, therefore the company 13 is to be treated as no longer insolvent. This means 14 that the creditor who is entitled to interest on the 15 debt for which he has proved may recover interest 16 accruing after the presentation of the winding-up 17 petition as if there had been no winding-up at all." 18 In 1385 they make the point that: 19 "It is essentially unfair that interest is not 20 payable on debts that do not otherwise carry interest." 21 There's a reference to the Vice Chancellor in 22 Rolls-Royce saying he reached the conclusion with some 23 regret: 24 "It seems fair a creditor should be compensated for 25 being kept out of his money."</p> <p style="text-align: center;">Page 37</p>	<p>1 which is what Wentworth say, or that the authors of the 2 Cork Report wanted to assimilate company winding-up to 3 bankruptcy and thereby abolish the rule in 4 Bower v Marris, we say receives no support from anything 5 in the report at all. 6 My Lord, there's one other document which is at 7 tab 1 of the same file which is the DTI Revised 8 Framework for Insolvency Law, presented in 1984. 9 My Lord, paragraphs 85 to 88. 85: 10 "The review committee identified numerous instances 11 where ...(reading to the words)... subject to the 12 discretion of the court as to excessive agreements." 13 My Lord, so far as the 86 Act and rules are 14 concerned, there was obviously no change in the 15 fundamental features of the collective -- the process of 16 collective execution. By that I mean there was nothing 17 in the 86 Act that affected how payments of dividends as 18 part of that process were to be treated. It simply 19 continued to say: the assets of the debtor are to be 20 pari passu in respect of proved debts. So nothing that 21 might mean that a payment of a dividend had a different 22 effect after 1986 than it did before. Nothing to 23 suggest that if there were previously general payment on 24 account, somehow they were no longer. 25 What the Act did do was, as recommended, repeal</p> <p style="text-align: center;">Page 39</p>
<p>1 1386: 2 "Our attention has been drawn to this anomaly 3 ...(reading to the words)... in the same way both 4 administrations, and we agree." 5 Then their proposals, 1395. They recommend. 6 "Firstly, section 66 should be repealed. Secondly, 7 the court's power ...(reading to the words)... 8 applicable to judgment debts at the commencement of the 9 insolvency." 10 E: 11 "These rules should be applicable in all forms of 12 insolvency proceedings." 13 MR JUSTICE DAVID RICHARDS: Yes. 14 MR DICKER: My Lord, we say it's perfectly clear what the 15 authors of the report had in mind. What they had in 16 mind was getting rid of section 66(1) which was 17 unworkable and embarrassing. They recommended that the 18 entitlement of interest on debts that didn't otherwise 19 carry interest present in bankruptcy was extended to 20 corporate insolvency, and they recommended the same 21 rules should apply in both sets of insolvency 22 proceedings. 23 MR JUSTICE DAVID RICHARDS: Yes. 24 MR DICKER: My Lord, the suggestion that the authors wanted 25 either to cap interest as at the date of final dividend,</p> <p style="text-align: center;">Page 38</p>	<p>1 section 66(1) and insert instead a provision for 2 challenging extortionate credit transactions, which is 3 section 343. 4 Secondly, giving a right to interest at the 5 Judgments Act rate into corporate insolvency. Again, 6 copying across the position in bankruptcy into corporate 7 insolvency. 8 Thirdly, amending the rules so the same provisions 9 applied in each, obviously updating and revising the 10 language as necessary. 11 MR JUSTICE DAVID RICHARDS: Yes. 12 MR DICKER: My Lord, we say no fundamental change, certainly 13 not in either bankruptcy or particularly corporate 14 insolvency, and certainly not in the way that my learned 15 friends suggest. 16 My Lord, I mention Wentworth saying that no evidence 17 the drafters of the Cork Report or the 1986 legislation 18 had Bower v Marris in mind at all. Just in that 19 respect, your Lordship may like to note one of the 20 members of the committee, David Graham QC, was obviously 21 counsel in re Lines Brothers number 2 who shortly 22 afterwards argued Bower v Marris. 23 My Lord, coming to the operation of the rule in 24 2.88(7) and (9), we say its operation is straightforward 25 and it works in the way as it did prior to the 1986 Act,</p> <p style="text-align: center;">Page 40</p>

<p>1 subject right to changes I've mentioned.</p> <p>2 Firstly, all creditors are entitled to interest at</p> <p>3 a minimum of the Judgments Act rate, whether or not</p> <p>4 their debts carry interest. That's compensation for the</p> <p>5 moratorium.</p> <p>6 Secondly, creditors that have a right to interest at</p> <p>7 a greater rate are entitled to interest at that rate.</p> <p>8 This ensures the creditors' claims to interest are</p> <p>9 satisfied in full in accordance with their full package</p> <p>10 of rights before any surplus is distributed to</p> <p>11 shareholders.</p> <p>12 Thirdly, we say nothing in the changes to suggest</p> <p>13 that interest would not be calculated in the same way as</p> <p>14 it had been since 1743.</p> <p>15 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>16 MR DICKER: We say nothing in the language of rule 2.88</p> <p>17 which means that the calculation cannot be performed in</p> <p>18 exactly the same way as it had been performed for the</p> <p>19 last 250 years.</p> <p>20 It may help if your Lordship were just to take rule</p> <p>21 2.88. My Lord, starting with 2.88(7), there are three</p> <p>22 points. The first is the rule says:</p> <p>23 "Any surplus remaining after payment of the debts</p> <p>24 proved shall, before being applied for any purpose, be</p> <p>25 applied in paying interest on those debts ..."</p> <p style="text-align: center;">Page 41</p>	<p>1 calculate it in the following way", namely by treating</p> <p>2 prior dividends as having applied first in relation to</p> <p>3 interest. No reason why you can't do exactly the same</p> <p>4 under 2.88(7).</p> <p>5 The third point is that 2.88(7) says, "Well, you pay</p> <p>6 interest in respect of the periods during which they</p> <p>7 have been outstanding since the relevant date".</p> <p>8 My Lord, similarly, we say: nor does this cause any</p> <p>9 difficulty. You obviously pay interest depending on the</p> <p>10 periods for which the debts have been outstanding. The</p> <p>11 question is how do you calculate the amount of interest</p> <p>12 which is payable? My Lord, again, equally a point which</p> <p>13 arose in relation to earlier legislation or earlier</p> <p>14 interpretation of how the statutory scheme worked. It</p> <p>15 gave rise, so far as Mr Justice Mervyn Davies was</p> <p>16 concerned, to a point he raised at the end of his</p> <p>17 judgment. It was essentially the same point. He said,</p> <p>18 "Well, you have paid proved debts in full. How is it</p> <p>19 that interest could continue running? There's nothing</p> <p>20 left outstanding". To which the response was, "That's</p> <p>21 simply not how you calculate the amount of interest</p> <p>22 payable". So there's nothing in this either.</p> <p>23 Now, my Lord, there's a danger in looking simply at</p> <p>24 2.88(7) and ignoring 2.88(9). Your Lordship knows</p> <p>25 2.88(9) includes the phrase "the rate applicable to the</p> <p style="text-align: center;">Page 43</p>
<p>1 My Lord, we say this simply reflects the basic</p> <p>2 ranking of claims; in other words, the waterfall</p> <p>3 is: proved debts followed by interest followed by</p> <p>4 non-provable claims and then any residue to the</p> <p>5 shareholders. That has been a feature of the statutory</p> <p>6 regime since 1542.</p> <p>7 My Lord, secondly, 2.88(7) requires the surplus to</p> <p>8 be applied in paying interest on those debts.</p> <p>9 My Lord, we say, again, there's absolutely nothing</p> <p>10 new in that. Obviously the surplus is to be applied in</p> <p>11 paying interest on the debts which have been proved.</p> <p>12 What is said, however, is that the reference to</p> <p>13 "those debts" is to the proved debts and the argument is</p> <p>14 that because those proved debts have been repaid, you</p> <p>15 can't apply the rule in <i>Bower v Marris</i>.</p> <p>16 My Lord, that argument was equally an argument which</p> <p>17 arose under the earlier legislation. Interest was being</p> <p>18 paid on the debts, and the debts under the earlier</p> <p>19 legislation were equally the proved debts. This is no</p> <p>20 more than an aspect of what I've called the</p> <p>21 appropriation fallacy. Put another way, the rule</p> <p>22 doesn't say how interest is to be calculated. It simply</p> <p>23 says, "You pay interest in respect of proved debts".</p> <p>24 Under the previous legislation the authorities held,</p> <p>25 "Fine, pay interest in respect of proved debts but you</p> <p style="text-align: center;">Page 42</p>	<p>1 debt apart from the administration", and so far as that</p> <p>2 is concerned, as your Lordship knows, our submission is</p> <p>3 this can naturally be read as encompassing every factor</p> <p>4 which determines the total amount of interest payable</p> <p>5 as, indeed, the administrators' skeleton so clearly</p> <p>6 confirms.</p> <p>7 If those words "naturally encompass every factor,</p> <p>8 including the default rule" i.e. the rule in</p> <p>9 <i>Bower v Marris</i>, what on earth is the difficulty in</p> <p>10 applying rule 2.88(7) and (9) in exactly the same way as</p> <p>11 it had operated for the last 250 years? Equally, what</p> <p>12 on earth is the reason why Parliament wanted to change</p> <p>13 the rule, if they had wanted to change it? Why on earth</p> <p>14 change it in such a subtle manner as the administrators</p> <p>15 and <i>Wentworth</i> effectively contend it was changed? If</p> <p>16 you want to change the position, in our submission, you</p> <p>17 would not have done it in this way.</p> <p>18 My Lord, I wonder whether that's a convenient time</p> <p>19 for the break?</p> <p>20 MR JUSTICE DAVID RICHARDS: Yes, certainly. I'll rise for</p> <p>21 five minutes.</p> <p>22 (11.45 am)</p> <p>23 (Short break)</p> <p>24 (11.50 am)</p> <p>25 MR DICKER: I now need to deal, finally, with the two</p> <p style="text-align: center;">Page 44</p>

<p>1 arguments that are made against us and the third 2 possibility which your Lordship identified.</p> <p>3 The first argument is that the statute required 4 dividends to be applied in respect of proved debts and 5 thus discharged principal and interest therefore has to 6 be calculated on that basis.</p> <p>7 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>8 MR DICKER: In other words, payments of dividend amounted to 9 an actual appropriation of principal.</p> <p>10 My Lord, I mentioned to your Lordship that was 11 Wentworth's position in its reply position paper. It 12 also appears to be the administrators' position. The 13 answer to it in our submission is very short. All of 14 the authorities, back to Bromley v Goodere, hold that 15 payments of dividends do not amount to an actual 16 appropriation in respect of principal. In the event of 17 a surplus, they are treated as having constituted 18 payments generally on account and the amount of interest 19 is calculated on that basis.</p> <p>20 My Lord, as I'm sure Mr Smith will develop, one 21 obvious consequence of an argument that dividends 22 actually discharge principal arises if you are dealing 23 with a co-obligor whose liabilities are necessarily 24 co-extensive with those of the debtor.</p> <p>25 So that argument, in our submission, is wrong. It's</p> <p style="text-align: center;">Page 45</p>	<p>1 to proceed effectively as if principal had been 2 discharged.</p> <p>3 My Lord, I have already answered the submission that 4 the 1986 Act was intended to be a complete and 5 exhaustive code in part. There was one point in 6 particular I did want to just make and it's this. One 7 might ask where does Wentworth get the fact that the 8 rule is a complete and exhaustive code from? The answer 9 appears to be that they rely on the fact that it "cuts 10 across creditors' rights". That's the only basis that 11 we can identify they rely on for saying it's a complete 12 and exhaustive code. We say that's incorrect. No 13 reason to regard the provisions in 2.88 as in any way 14 different from all the other provisions in the statutory 15 insolvency regime; in other words, they provide 16 creditors with rights in the event of an insolvency but 17 they don't affect, they don't discharge, they don't 18 extinguish creditors' underlying rights.</p> <p>19 In a sense, one could equally say the same about 20 every provision of the Insolvency Act. It cuts across 21 creditors' rights. Now, in one sense that's obviously 22 correct. One's ability to enforce against an insolvent 23 company is restricted by the effect of the moratorium. 24 You only get payments of dividend pari passu. But one 25 doesn't conclude from that that creditors' rights have</p> <p style="text-align: center;">Page 47</p>
<p>1 essentially the one repeatedly raised in the 2 authorities -- raised, I think, three or four times by 3 Mr Jessel QC -- and rejected.</p> <p>4 So that's the first.</p> <p>5 The second is the complete and exhaustive code or 6 the "occupy the field" argument. I confess it took us 7 a little time to understand quite how this argument 8 works but, as we understand it, it works as follows. 9 Firstly, Wentworth accepts that in the event of 10 a surplus, the court treats the dividends as having been 11 paid generally on account. In other words, it's not 12 suggesting that the effect of the scheme is that there 13 has been an actual appropriation to principal, thereby 14 trying to avoid the co-obligor problem. In other words 15 it accepts, at least in this court -- I think there's 16 a footnote reserving its rights -- that Bower v Marris 17 was correctly decided, at least to that extent, but it 18 says this is irrelevant and it's irrelevant because rule 19 2.88 contains a complete and exhaustive code as to the 20 calculation of interest. Its terms require interest to 21 be calculated on the basis that dividends discharged 22 principal.</p> <p>23 So, in other words, this isn't an argument that 24 principal was in fact discharged; it's an argument that 25 on the construction of the rule, the rule requires you</p> <p style="text-align: center;">Page 46</p>	<p>1 otherwise been extinguished. Far from it. There's 2 absolutely no reason why this cutting across idea should 3 operate differently in the event of a surplus.</p> <p>4 My Lord, just to echo a comment your Lordship made 5 in a paragraph 110 in the Waterfall 1 judgment. 6 Your Lordship said:</p> <p>7 "Contractual rights are compromised by the 8 insolvency regime only for the purpose of achieving 9 justice among creditors thorough a pari passu 10 distribution."</p> <p>11 They're not intended effectively to enable the 12 debtor to benefit.</p> <p>13 My Lord, your Lordship might also like to note that 14 so far as this -- the argument based on cutting across 15 rights are concerned, in substance none of the changes 16 referred to in 86 were new. They had all existed in one 17 form or other in one or other of the previous regimes. 18 None of the changes actually prejudiced creditors, so if 19 there was prejudice to creditors, it's only a result of 20 the change alleged by my learned friends. One can 21 overstate the extent to which, in substance, they 22 provided any actual benefit to creditors over and above 23 that outside of the insolvency. One has the obvious 24 point that although creditors have a right to interest, 25 even on debts that didn't otherwise carry interest, as</p> <p style="text-align: center;">Page 48</p>

<p>1 the cases indicate, one can regard that simply as 2 compensation for preventing them from obtaining their 3 own individual judgments carrying such interest. 4 My Lord, I made the point that in our submission the 5 complete exhaustive code argument, occupy the field, is 6 contrary to the overarching principles applicable to the 7 scheme. Your Lordship may like to note Wentworth's 8 skeleton seeks to deal with Wight v Eckhardt at 9 paragraph 20. The submission made there is 10 Lord Hoffmann was only concerned with the position if 11 the company was insolvent. In effect, when he said 12 creditors' rights aren't affected he was only dealing 13 with an insolvent company. The implication being it is 14 entirely consistent with Lord Hoffmann to say, "Yes, but 15 in the event of a surplus their rights are affected". 16 That seems, with the greatest respect, topsy turvy. You 17 don't affect their right in the event of an insolvency. 18 Underlying rights remain. It's only when you get to 19 a situation where there's a surplus, not mentioned by 20 Lord Hoffmann, but suddenly creditors lose their rights. 21 My Lord, Wentworth relies only, I think in this 22 respect, on Danka Systems. Your Lordship may recall 23 that's a case which effectively holds if you have 24 a contingent claim, you can't reserve the full amount 25 and simply wait indefinitely for what happens.</p> <p style="text-align: center;">Page 49</p>	<p>1 knowingly the creditor can end up with less than his 2 full entitlement. 3 MR JUSTICE DAVID RICHARDS: Yes. 4 MR DICKER: My Lord, those are the two arguments that, as we 5 understand it, are made. 6 The third is the argument your Lordship identified 7 which I think I described as a theoretical possibility. 8 MR JUSTICE DAVID RICHARDS: Hmm, hmm. 9 MR DICKER: The argument is that, as I understand it, the 10 suggestion is that Wentworth does not need to argue the 11 rules provide a complete and exhaustive code. They 12 could just argue that rule 2.88 did not incorporate 13 Bower v Marris, leaving open the possibility of 14 a non-provable claim for the shortfall. 15 Now, obviously one reason Wentworth don't run that 16 argument is because to the extent it would give rise to 17 a non-provable claim, their economic position isn't 18 assisted, but there are, in our submission, more serious 19 analytical problems with the argument. 20 They are these. One could understand a legislature 21 that decided as a matter of policy, "We think a debtor 22 ought to be entitled to apply payments first in respect 23 of principal, rather than interest". One may not agree 24 with the policy but if that's what the legislature 25 decided, then that's what would have to happen.</p> <p style="text-align: center;">Page 51</p>
<p>1 MR JUSTICE DAVID RICHARDS: Yes. 2 MR DICKER: My Lord, all that -- that is entirely consistent 3 with the insolvency regime. Obviously if you are going 4 to have a liquidation, you have to estimate contingent 5 claims, otherwise all you have is a run-off. 6 MR JUSTICE DAVID RICHARDS: Yes. I mean, Danker was 7 a solvent company, wasn't it? 8 MR DICKER: Yes. 9 MR JUSTICE DAVID RICHARDS: It's consistent with 10 a liquidation regime for a solvent, as much as for an 11 insolvent, company. 12 MR DICKER: Your Lordship is quite right, but if you're 13 going to give companies the ability to wind up their 14 affairs and to do so otherwise than by way of a run-off, 15 then logically you need a process of estimation. 16 MR JUSTICE DAVID RICHARDS: Yes. 17 MR DICKER: My Lord, it remains the case that what you are 18 trying to do is produce the best estimation you can of 19 the value of the claim and pay that estimation. You may 20 or may not ultimately get it right. Hindsight will help 21 you deal with changes in the meantime. If it hasn't 22 happened by the time of eventual distribution, it's too 23 late. There is nothing in Danka Systems which suggests 24 that rather than try and making the best estimate you 25 can, the regime can lead to a position in which</p> <p style="text-align: center;">Page 50</p>	<p>1 Now, if that was the view the legislature had taken, 2 the logical position would be to say Bower v Marris is 3 abolished. The rules do provide a complete and 4 exhaustive code. They occupy the field. There's no 5 non-provable claim. 6 What would be necessary for the theoretical argument 7 to work is a very different legislature intention. What 8 the legislature would effectively have to intend was 9 that what you want to do is adjust the priority regime. 10 We're entirely happy for contractual rights so far as 11 they relate to numerical percentage, compounding or 12 anything else, to rank equally under 2.88(9), but we're 13 effectively going to subordinate the right to the 14 creditor to interest calculated on the basis payments, 15 applied defer in respect of interest. 16 MR JUSTICE DAVID RICHARDS: Yes. 17 MR DICKER: My Lord, we say that makes absolutely no sense 18 at all. You can easily imagine a situation in which you 19 have two creditors, the first of which says, "I'm happy 20 to bargain for a simple rate of interest and I'm happy 21 to do so on the basis that I will be able to apply 22 payments in respect of interest first". You could 23 equally imagine a creditor who says, "I want a right to 24 compound interest", and you can also imagine a situation 25 in which economically those two results will produce</p> <p style="text-align: center;">Page 52</p>

<p>1 exactly the same outcome.</p> <p>2 Why on earth would the legislature effectively want</p> <p>3 to say, "We're going to carve one thing and one thing</p> <p>4 only out of rule 2.88 and that one thing which we're</p> <p>5 going to subordinate is the ability of a creditor to</p> <p>6 apply payments first to interest"? My Lord, there's no</p> <p>7 logic in it. It doesn't make commercial sense and there</p> <p>8 is absolutely no indication anywhere that that is what</p> <p>9 the legislature had in mind.</p> <p>10 My Lord, that's why we say. No doubt Wentworth and</p> <p>11 the administrators, as we understand it, are not running</p> <p>12 that argument. And why, in any event, it is incorrect.</p> <p>13 My Lord, one further and final point. Whichever of</p> <p>14 the two -- whichever of the second and the third</p> <p>15 argument are adopted, they both share the same -- this</p> <p>16 feature: they both proceed on the basis that dividend</p> <p>17 payments were not in fact applied in respect of</p> <p>18 principal and didn't in fact discharge principal, so</p> <p>19 they are both methods of calculation. The first</p> <p>20 occupies the field. The second leaves open the</p> <p>21 possibility of a non-provable claim, but they're both</p> <p>22 methods of calculation.</p> <p>23 Now, the only difference between that method of</p> <p>24 calculation and that which existed for the previous</p> <p>25 250 years is previously the method of calculation said</p> <p style="text-align: center;">Page 53</p>	<p>1 they been cited in this context or for other</p> <p>2 propositions?</p> <p>3 MR DICKER: No, I can't say that, but what I can say is that</p> <p>4 when Lord Hoffmann summarised the effect of the</p> <p>5 statutory regime in <i>Wight v Eckhardt</i> and no doubt had</p> <p>6 <i>Humber Ironworks</i> in mind, it would be extraordinary if</p> <p>7 he summarised the effect of the scheme in the way he did</p> <p>8 if he didn't at least proceed on the basis that</p> <p>9 <i>Humber Ironworks</i> was correct, both in relation to the</p> <p>10 insolvent position and also the solvent position.</p> <p>11 MR JUSTICE DAVID RICHARDS: Shall we just look at</p> <p>12 <i>Wight v Eckhardt</i> in the light of that.</p> <p>13 MR DICKER: My Lord, it's 1D at 132. If my Lord goes to</p> <p>14 paragraph 27 -- sorry, I should just start at 148:</p> <p>15 "The cases referred to in the opinion of their</p> <p>16 Lordships ..."</p> <p>17 Your Lordship will note <i>Humber Ironworks</i>.</p> <p>18 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>19 MR DICKER: At 27:</p> <p>20 "The winding up leaves the debts of the creditors</p> <p>21 untouched ...(reading to the words)... can result in the</p> <p>22 company being restored for the process to continue."</p> <p>23 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>24 MR DICKER: My Lord, one might think it's a remarkable state</p> <p>25 of affairs if my learned friends are right. One has an</p> <p style="text-align: center;">Page 55</p>
<p>1 you apply payments first in respect of interest.</p> <p>2 Wentworth's argument is essentially now for some reason</p> <p>3 the legislature decided to change the method of</p> <p>4 calculation and to say, "I'm sorry, although that's how</p> <p>5 it was done for the previous 250 years, now you're going</p> <p>6 to have to calculate it in a different way". My Lord in</p> <p>7 other words, all of the early steps in the argument are</p> <p>8 effectively identical. We're both talking about</p> <p>9 a method of calculation. The only difference is we say</p> <p>10 it should be done in the way it's been done for the last</p> <p>11 250 years. Wentworth say, "I'm sorry, everything</p> <p>12 changed in 1986. It now needs to be done in the reverse</p> <p>13 of the way it had previously been done". My Lord,</p> <p>14 again, we say nothing to indicate that that was</p> <p>15 intended.</p> <p>16 My last word on question 2 is this: there is no</p> <p>17 subsequent case after the 1986 Act that gives any</p> <p>18 support to such a change having occurred. There are</p> <p>19 a large number of cases which have continued to cite</p> <p>20 cases such as <i>Humber Ironworks</i>, <i>Joint Stock Discount</i></p> <p>21 <i>Company</i>, re <i>Lines Brothers</i>, at the highest level. We</p> <p>22 refer to some of them in paragraph 148 and paragraph 149</p> <p>23 of our skeleton. <i>Wight v Eckhardt</i> is an obvious</p> <p>24 example.</p> <p>25 MR JUSTICE DAVID RICHARDS: Yes, but have they been -- have</p> <p style="text-align: center;">Page 54</p>	<p>1 underlying debt. Central to that underlying debt is the</p> <p>2 interest which it accrues. On my learned friend's case</p> <p>3 that is the one aspect which the legislature have</p> <p>4 decided effectively to in part extinguish. There's no</p> <p>5 similar extinguishment, apparently, about any other</p> <p>6 non-provable claims.</p> <p>7 Again, it simply doesn't make sense.</p> <p>8 The final reference to one textbook is to</p> <p>9 <i>Gore-Browne</i>. It's bundle 2, tab 7. If you have tab 7,</p> <p>10 it's 18F, if my Lord has that? The relevant bit is, if</p> <p>11 your Lordship just goes six lines down, there's</p> <p>12 a sentence towards the end beginning:</p> <p>13 "Such interest is itself provable if part of the</p> <p>14 debt to the extent it is payable in respect of a period</p> <p>15 preceding the commencement of the liquidation".</p> <p>16 Then the relevant bit is footnote 3. There's</p> <p>17 a reference:</p> <p>18 "A dividend paid in respect of principal and</p> <p>19 interest is attributed first to the interest: <i>Joint</i></p> <p>20 <i>Stock Discount Company</i>."</p> <p>21 So it's not perhaps the clearest of references but</p> <p>22 the editors of <i>Gore-Browne</i> appear to regard that aspect</p> <p>23 of <i>Joint Stock Discount Company</i> as still good law.</p> <p>24 MR JUSTICE DAVID RICHARDS: So rule 4.93(1) is -- yes, where</p> <p>25 a debt -- yes, I see. It's the equivalent for</p> <p style="text-align: center;">Page 56</p>

<p>1 winding-up, isn't it? Yes.</p> <p>2 MR DICKER: My Lord, subject to my Lord --</p> <p>3 MR JUSTICE DAVID RICHARDS: Paid in respect of principal --</p> <p>4 yes, thank you.</p> <p>5 MR DICKER: My Lord, on any basis it's an odd state of</p> <p>6 affairs. If we have ended up in a position where</p> <p>7 creditors' claims aren't satisfied in full, one might</p> <p>8 have expected that to be a major discussion in the</p> <p>9 textbooks, in learned articles, as to what is the reason</p> <p>10 for this exception to the otherwise overarching</p> <p>11 principle that applies. No indication of that. To the</p> <p>12 extent there are indications, everyone seems to think</p> <p>13 we're carrying on as we have always done.</p> <p>14 MR JUSTICE DAVID RICHARDS: My recollection is that</p> <p>15 Robin Potts used to write the section on liquidations in</p> <p>16 Gore-Browne.</p> <p>17 MR DICKER: Your Lordship would know.</p> <p>18 MR JUSTICE DAVID RICHARDS: Just interesting, given that he</p> <p>19 was counsel in re Lines Brothers.</p> <p>20 MR DICKER: Yes. It's also interesting -- I think that, if</p> <p>21 I may say this, it is remarkable, your Lordship may</p> <p>22 think, how consistent the approach is throughout the</p> <p>23 Commonwealth on this issue over the last 200 years.</p> <p>24 It's also, when one gets to re Lines Brothers,</p> <p>25 interesting again, your Lordship might think, it was</p> <p style="text-align: center;">Page 57</p>	<p>1 MR JUSTICE DAVID RICHARDS: It will be said it's a remission</p> <p>2 to rights type of case. I just wanted to be clear about</p> <p>3 that. Thank you.</p> <p>4 MR DICKER: Yes.</p> <p>5 My Lord, question 3 I've already, I think, dealt</p> <p>6 with and I wasn't proposing to say any more about.</p> <p>7 My learned friend, Mr Trower, referred to</p> <p>8 a subsidiary issue about whether compounding continues</p> <p>9 beyond the date of the final dividend, which</p> <p>10 your Lordship may remember.</p> <p>11 MR JUSTICE DAVID RICHARDS: Yes, I do remember.</p> <p>12 MR DICKER: It's essentially on -- the well, the issue</p> <p>13 assumes a creditor entitled to compound interest, either</p> <p>14 as a matter of contract or otherwise, and the</p> <p>15 administrators ask: does the interest continue to</p> <p>16 compound in full under rule 2.88(9), following payment</p> <p>17 in full of principal, or, if not, does the creditor have</p> <p>18 a non-provable claim for the shortfall?</p> <p>19 Our first submission is the point simply doesn't</p> <p>20 arise because it assumes they're right on question 2.</p> <p>21 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>22 MR DICKER: But if the issue does arise, our submission is</p> <p>23 of course interest must continue to compound. Interest</p> <p>24 has been compounding right up to the date of final</p> <p>25 dividend. It's common ground, given the answer to</p> <p style="text-align: center;">Page 59</p>
<p>1 a matter of common ground between the very experienced</p> <p>2 counsel in that case.</p> <p>3 My Lord, that's all I was proposing to say in</p> <p>4 relation to question 2.</p> <p>5 MR JUSTICE DAVID RICHARDS: Just so it doesn't completely</p> <p>6 slip my mind. In re Lines Brothers the state of the</p> <p>7 rules at that stage -- I've just forgotten -- did the</p> <p>8 rules make express provision for the payment of</p> <p>9 contractual and similar interest?</p> <p>10 MR DICKER: There was no similar express provision.</p> <p>11 MR JUSTICE DAVID RICHARDS: There was no express provision</p> <p>12 dealing with it at all?</p> <p>13 MR DICKER: Absolutely.</p> <p>14 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>15 MR DICKER: That's the reason for the administrators'</p> <p>16 distinction between 1883 --</p> <p>17 MR JUSTICE DAVID RICHARDS: I was just trying to remember</p> <p>18 because it was -- what was said to be a solvent</p> <p>19 liquidation, therefore the bankruptcy rules didn't apply</p> <p>20 and there was just nothing express applicable.</p> <p>21 MR DICKER: One had to effectively go back to almost</p> <p>22 Bromley v Goodere: how does the scheme work as a whole?</p> <p>23 The general operation of the scheme by reference to the</p> <p>24 principles governing it are: members come last; how do</p> <p>25 we achieve that? Creditors have to be paid in full.</p> <p style="text-align: center;">Page 58</p>	<p>1 question 3. Why on earth would it cease to compound?</p> <p>2 Why on earth would you cease to be entitled to interest</p> <p>3 on the accrued interest after the payment of final</p> <p>4 dividend? What magic is there in payment of final</p> <p>5 dividend to stop that occurring? That's the short</p> <p>6 point.</p> <p>7 We also say that if that's not right, and mirroring</p> <p>8 the structure of our submissions elsewhere, there must</p> <p>9 be a non-provable claim for the shortfall. My Lord, we</p> <p>10 deal with it, just so your Lordship knows, fairly</p> <p>11 briefly in paragraphs 187 to 189 of our skeleton</p> <p>12 argument.</p> <p>13 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>14 MR DICKER: My Lord, that only leaves question 39.</p> <p>15 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>16 MR DICKER: I can deal with that, I hope, relatively</p> <p>17 shortly. Question 39 arises after one has answered what</p> <p>18 rule 2.88(7) and (9) provide, and also other questions.</p> <p>19 It asks whether a creditor may have been entitled to</p> <p>20 any further compensation for delay and, if so, what form</p> <p>21 this compensation takes? Obviously the importance of</p> <p>22 this question depends in part on the answers to the</p> <p>23 earlier ones. As my learned friend Mr Trower mentioned</p> <p>24 if Bower v Marris doesn't apply, then the amount of the</p> <p>25 shortfall potentially subject to a non-provable claim,</p> <p style="text-align: center;">Page 60</p>

<p>1 the subject matter of question 39, is much larger than 2 it otherwise would have been.</p> <p>3 One can make a similar point in relation to 4 question 3. If the rate applicable to the debt doesn't 5 include Bower v Marris either, then, again, the 6 shortfall is bigger and this question becomes more 7 important.</p> <p>8 My Lord, just so your Lordship knows, it is also 9 potentially relevant in the context of questions 6 10 and 8, which your Lordship hasn't yet seen. But again, 11 for similar reasons, if the operation of the rule for 12 estimating contingent claims, discounting future claims, 13 providing interest on those claims gives creditors less 14 than they otherwise would have been entitled to, again 15 the question arises: is there any other claim they may 16 have effectively as a non-provable claim?</p> <p>17 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>18 MR DICKER: My Lord, the starting point, of course, are the 19 fundamental principles which we set out in the 20 introduction to our skeleton argument and I am not going 21 to repeat those.</p> <p>22 We divide our answer to question 39 in two parts. 23 The first part concerns a situation in which 24 a creditor says, "I have an underlying right to payment 25 which has not been satisfied in full and involves him</p> <p style="text-align: center;">Page 61</p>	<p>1 statutory, tortious or whatever.</p> <p>2 The third point is the underlying claim which has 3 not been satisfied may therefore be a claim for 4 compensation for delay. So to take your Lordship's 5 example, a creditor who has a contractual right of 6 interest, if for whatever reason he doesn't receive full 7 amount that he is entitled to receive as a matter of 8 contract, there is a shortfall and on general principle 9 he should have a non-provable claim for the amount of 10 that shortfall.</p> <p>11 MR JUSTICE DAVID RICHARDS: Yes. I mean, that's simply his 12 contractual right to interest giving credit for what he 13 has previously received.</p> <p>14 MR DICKER: Absolutely. Your Lordship will no doubt recall 15 in Waterfall 1 your Lordship gave admittedly a slightly 16 unusual situation in which this may occur, where there 17 is effectively a lacuna in the rules.</p> <p>18 MR JUSTICE DAVID RICHARDS: Oh, yes.</p> <p>19 MR DICKER: Paragraph 127 of your Lordship's judgment.</p> <p>20 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>21 MR DICKER: As your Lordship just mentioned, the claim is 22 based on the underlying right, and obviously all the 23 creditor is essentially saying is, "I have a contractual 24 or other right to interest. This is how much it amounts 25 to. I haven't been paid it in full. I therefore have</p> <p style="text-align: center;">Page 63</p>
<p>1 making a non-provable claim for any shortfall".</p> <p>2 The second concerns the entitlement to interest at 3 the Judgments Act rate under 2.88(9) which is a right 4 derived from a statutory scheme itself. What I can't 5 say in respect of that I have a right outside of the 6 insolvency and the analysis therefore is different in 7 relation to each.</p> <p>8 Starting first, and hopefully the position will 9 become clear, with non-provable claims in respect of 10 what I've called underlying rights. The starting point 11 is that where the sums paid to a creditor pursuant to 12 the insolvency process have not satisfied his claims in 13 full, he has a non-provable claim for the shortfall.</p> <p>14 MR JUSTICE DAVID RICHARDS: So is this postulating that he 15 has a contractual or other right to interest which is 16 not fully satisfied?</p> <p>17 MR DICKER: Correct. Absolutely.</p> <p>18 MR JUSTICE DAVID RICHARDS: I see.</p> <p>19 MR DICKER: One starts with the basic architecture of the 20 scheme which is if you don't receive what you're 21 otherwise entitled to through the collective process at 22 level 1, you have a non-provable claim after interest 23 has been paid. As your Lordship just mentioned, the 24 reason for the shortfall is irrelevant. It doesn't 25 matter whether the underlying right is contractual,</p> <p style="text-align: center;">Page 62</p>	<p>1 a claim".</p> <p>2 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>3 MR DICKER: The insolvency process in a sense is irrelevant, 4 save that it provides the measure of the delay which 5 gives rise -- which has to be taken into account in 6 working out how much the claim is.</p> <p>7 My Lord, the next point is a more significant one. 8 Because the basis for the non-provable claim doesn't 9 matter, it doesn't matter whether it's contract, tort, 10 et cetera, it can also include a claim for damages for 11 delay. So one starts with the fact that a court has 12 a common law jurisdiction to award interest as damages 13 on claims for non-payment of debts, as well as on other 14 claims for breach of contract or tort. So following 15 Sempra Metals, a creditor may therefore have a claim for 16 damages for his actual losses caused by the late payment 17 of his debt.</p> <p>18 My Lord, I'm sure your Lordship is familiar with 19 Sempra Metals. I don't know whether I need to turn it 20 up.</p> <p>21 MR JUSTICE DAVID RICHARDS: Well, let's look at it. It's 22 not something that I've actually come across in -- I'm 23 aware of it, but it's not something I've come across.</p> <p>24 MR DICKER: My Lord, it's in 1E at tab 146. My Lord, taking 25 this as shortly as I can, held, at the bottom of</p> <p style="text-align: center;">Page 64</p>

<p>1 page 561, is that: 2 "The anomalous and unprincipled exception with 3 regard to interest losses by way ...(reading to the 4 words)... non-payment of debts as well as on other 5 claims for breach of contract and tort." 6 My Lord, two passages from the speeches of their 7 Lordships. First, from Lord Hope at page 581. It may 8 be quickest if your Lordship were simply to read 9 paragraphs 16 through to 18. 10 MR JUSTICE DAVID RICHARDS: Certainly. (Pause) 11 18 is concerned with the restitutionary cause of 12 action. 13 MR DICKER: Yes. 14 MR JUSTICE DAVID RICHARDS: Are we -- 15 MR DICKER: Not in detail. The only point is obviously you 16 can have a claim in damages regardless of the 17 underlying. 18 MR JUSTICE DAVID RICHARDS: Yes, I see. 19 MR DICKER: But no. 20 MR JUSTICE DAVID RICHARDS: Okay. No, absolutely. 21 MR DICKER: 41, if your Lordship just turns to that, just to 22 note Lord Hope saying, 41: 23 "Compound interest is a necessary and very familiar 24 fact of commercial life. As the Law Commission said, 25 the obvious reason for awarding compound interest is</p> <p style="text-align: center;">Page 65</p>	<p>1 Then at 97: 2 "Common law's unwillingness to presume interest 3 losses where payment delayed ...(reading to the words) 4 is to be found in the statutory provisions." 5 Then at paragraph 100: 6 "For these reasons, I consider the court has 7 a common law jurisdiction to award interest, simple and 8 compound, as claims on damages for non-payment of debts, 9 as well as on other claims for breaches of contract and 10 in tort." 11 My Lord, Lords Scott, Walker and Mance also gave 12 speeches but I don't think I need to show your Lordship 13 those. 14 Now, we obviously accept that to the extent that 15 such a damages claim is measured solely by the time 16 value of money and relates to the period after the date 17 of administration, it's not provable. The cut-off rule 18 in respect of post-insolvency interest must plainly 19 cover claims for damages measured by the time value of 20 money for that subsequent period, but the consequence is 21 we say that the creditors' underlying claim for loss and 22 damage is nevertheless unaffected by the insolvency 23 process. That's Lord Hoffmann in <i>Wight v Eckhardt</i>. If 24 he's not been satisfied in full, he has a non-provable 25 claim for the shortfall.</p> <p style="text-align: center;">Page 67</p>
<p>1 that it reflects economic reality." 2 Then a reference to the Scottish Law Commission 3 endorsing the view of the Law Society in their response 4 that: 5 "Simple interest never provides a full indemnity for 6 the loss to the litigant." 7 MR JUSTICE DAVID RICHARDS: Hmm, hmm. 8 MR DICKER: That's all I think from Lord Hope. 9 If your Lordship goes to Lord Nicholls, there is 10 a lengthy discussion. If your Lordship goes to 11 paragraph 74, a section dealing generally with interest 12 losses and damages. 84, a discussion of previous 13 decision of the House of Lords in <i>La Pintada</i>. Then, at 14 92, the restrictive common law exception today. 15 Picking it up at 93, if I may: 16 "In <i>La Pintada</i> the House made clear that, contrary 17 to the general understanding of the effect ...(reading 18 to the words)... whether the borrowing costs comprise 19 simple interest or compound interest." 20 Then 94: 21 "To this end, if your Lordships agree, the House 22 should now ...(reading to the words)... such as 23 remoteness, failure to mitigate", and so forth. 24 Then a discussion of remoteness, causation and the 25 various ways in which those points may be addressed.</p> <p style="text-align: center;">Page 66</p>	<p>1 One can test it this way. Imagine a creditor who is 2 faced with a breach of contract shortly before the 3 company goes into administration and has a claim from 4 damages for late payment of money, part of which 5 pre-dates the administration, part of which post-dates 6 it. He's plainly entitled to prove in respect of the 7 prior period. What is it in the insolvency scheme we 8 say that extinguishes his claim for damages in respect 9 of the period after the commencement of the 10 administration? What is it that prevents him from 11 saying if there is a surplus, "I have a claim for 12 damages which has not been satisfied in full; that is 13 a right I have, according to the House of Lords in 14 <i>Sempre Metals</i>, it hasn't been satisfied in full and I'm 15 now entitled to shortfall". 16 It may be in many cases such a claim will be of 17 limited commercial importance because the creditor 18 either can't establish such loss, hasn't incurred it or 19 whatever, all because the Judgments Act rate already 20 provides adequate compensation. But if that is not the 21 case, then we say there is a non-provable claim for 22 damages in respect of the shortfall. 23 MR JUSTICE DAVID RICHARDS: I mean, I don't know if we one 24 has actually advanced such claim in the administration 25 of Lehmans. I mean, I don't know for sure, but I'm not</p> <p style="text-align: center;">Page 68</p>

<p>1 aware that Sempra Metals-type claims for damages for 2 late payment are very common. I have remarked that 3 I don't think I've come across one, but I'm not just 4 from general awareness, it's not at any rate as yet 5 I think something that crops up very much. 6 MR DICKER: My Lord, from my experience, for what it's 7 worth, is along the same lines. There may be 8 a number of practical reasons for that; one of which may 9 be that the Judgments Act rate at the moment -- 10 MR JUSTICE DAVID RICHARDS: The Judgments Act rate only 11 takes you from judgment. It doesn't take you from the 12 date of breach until the judgment. 13 MR DICKER: Although section 35 gives you a right to 14 pre-Judgment Act interest. 15 MR JUSTICE DAVID RICHARDS: To an award of interest by the 16 court you mean? 17 MR DICKER: Yes. So you can get that from the date the 18 cause of action accrued. 19 MR JUSTICE DAVID RICHARDS: But it tends to be at a sort of 20 ordinary sort of borrowing rate at -- but simple, of 21 course, not compound. 22 MR DICKER: Yes. 23 MR JUSTICE DAVID RICHARDS: Anyway, yes. You're right here 24 in practice it may be that save in very exceptional 25 circumstances, even if -- if Wentworth and the</p> <p style="text-align: center;">Page 69</p>	<p>1 apply to a claim denominated in a foreign currency. If 2 the creditor has a contractual or statutory right to 3 interest which for any reason has not been satisfied in 4 full, then he has a non-provable claim for the 5 shortfall. It doesn't matter if his underlying claim 6 for interest is pursuant to some foreign contract, 7 foreign judgment, foreign statute. 8 Similarly, if the creditor with a claim denominated 9 in a foreign currency has a claim for damages for 10 non-payment of his debt when it fell due for payment, 11 then equally he has a non-provable claim for any 12 shortfall. It doesn't matter whether the claim is 13 governed by English law or some foreign law. 14 Now, the only answer, as we understand it, to this 15 point by the administrators and Wentworth is the occupy 16 the field; in other words, "Fine, outside of insolvency 17 I entirely accept you have such claim but, I'm sorry, 18 it's disappeared because the rules have effectively 19 operated to extinguish it once and for all". 20 My Lord, I said there's a separate analysis required 21 in relation to interest at the Judgments Act rate. The 22 reason for that is of course that the right is one 23 provided by the statute itself. So one can't begin the 24 analysis by referring to the rights of a creditor 25 outside of the insolvency. They're simply not relevant.</p> <p style="text-align: center;">Page 71</p>
<p>1 administrators are right about how 2.88 works, 2 nonetheless the amount of interest that creditors will 3 get would really extinguish any possible claim they 4 might have of a Sempra Metals type, unless there were 5 some very special factors. 6 MR DICKER: And the point is simply this: as a matter of 7 analysis, assuming such special facts, there is 8 absolutely nothing in the scheme that would exclude such 9 a claim and so the right of the creditors, like any 10 other, which, according to Lord Hoffmann, continues 11 unaffected and subject only to the complete and 12 exhaustive code point, no reason why it shouldn't be 13 payable as a non-provable claim. And, if one goes back 14 to the basic position, why not? Creditors are entitled 15 to have their claim satisfied in full. This is such 16 a claim. There is a surplus. Why should the debtor be 17 entitled to benefit from having gone into insolvency, 18 getting rid of a liability for damages which it would 19 otherwise have had to bear? Certainly nothing as 20 a policy reason based on the fact that such a claim for 21 damages may include a claim for compound interest, as 22 the House of Lords indicate. There's nothing as 23 a matter of principle objectionable to compound interest 24 claims. 25 My Lord, exactly the same analysis, we say, can</p> <p style="text-align: center;">Page 70</p>	<p>1 The analysis therefore must depend on the terms of the 2 rule and the operation of the scheme as a whole. 3 So what your Lordship is concerned with here is how 4 creditors' entitlement in respect of statutory interest 5 is intended to work. We say two points one has to take 6 into account. First, the starting point is the 7 legislature provided that creditors are entitled to 8 a minimum of 8 per cent interest on their debts. 9 Obviously, as I submitted earlier, if interest stops 10 running effectively on the date of final dividend, at 11 the date of each dividend more accurately, for the 12 relevant amount of the dividend, and the interest is 13 only paid some years later, then the effective rate that 14 the creditor receives is not 8 per cent but some lesser 15 rate, depending on how long it's taken him to pay it. 16 That's just a consequence of the time value of money. 17 You have accrued entitlement to, say, £100 interest. If 18 it's not paid for five years, the £100 in effect is no 19 longer worth 8 per cent. It's been diminished over 20 time. We say it would be very odd if the legislature 21 had intended to provide for interest at 8 per cent in 22 the way for which the administrators and Wentworth 23 contend, given the consequence of delay; in other words, 24 without accounting for it. 25 The second point again I've already mentioned is the</p> <p style="text-align: center;">Page 72</p>

<p>1 possibility of unequal treatment between creditors. 2 MR JUSTICE DAVID RICHARDS: Yes. 3 MR DICKER: Again, it's the same argument at the sort of 4 non-provable level. Assume a creditor with 5 a contractual right to interest. If we're right in our 6 earlier submissions, he is entitled to compensation for 7 the time it takes to distribute the surplus. He may be 8 entitled because he's got an underlying contractual 9 right to interest. He may be entitled because he has 10 a claim for damages. It doesn't matter. If, however, 11 Wentworth and the administrators are right that the 12 amount of interest payable to a creditor who is only 13 entitled to interest at the Judgments Act rate is 14 effectively fixed forever with each payment of 15 dividend -- so you get to the final dividend, you have 16 a fixed sum, it can never go up; those creditors 17 effectively will not be treated equally. They will not 18 receive any compensation for the delay in the 19 distribution of the surplus. Other creditors will. 20 They won't. 21 We say the legislature can't have intended that 22 result either, so the only question is how does the 23 statutory scheme avoid it? 24 Now, the way it avoids it, we say, is as follows. 25 The first point is the creditors' right to interest at</p> <p style="text-align: center;">Page 73</p>	<p>1 MR JUSTICE DAVID RICHARDS: Yes. I mean, to be clear, that 2 was a question of the construction of the subordination 3 agreement. 4 MR DICKER: Yes. Well, echoing that, if I may, applying 5 that here, we say that the same point can be made in 6 relation to 2.88(7). It gives creditors rights and it 7 imposes an obligation on LBIE. The right is to 8 distribution of the surplus on payment of final 9 dividend. That effectively is the stage, we say, at 10 which the obligation arises on LBIE. 11 Now, it might be said, "Well, how does that work? 12 You're not suggesting, are you, that the administrators 13 were in breach of duty for failing to distribute the 14 surplus on payment of final dividends?" The short 15 answer to that is, "No, of course not", but we're 16 dealing with two different things. Just as we are in 17 relation to the underlying insolvency, there's no 18 problem in saying that when LBIE went into 19 administration it owed sums of money. It's perfectly 20 consistent to say that at the same time as saying but of 21 course the administrators weren't in breach for failing 22 to pay a dividend on day two. The two issues are 23 different. 24 Now, the next stage is we say the mere fact that 25 there is a dispute as to how the surplus should be</p> <p style="text-align: center;">Page 75</p>
<p>1 the Judgments Act rate is a right which they are given 2 pursuant to rule 2.88(7). It's a statutory right like 3 any other. What 2.88(7) requires is that any surplus 4 remaining after payment of the debts proved be applied 5 in paying interest on those debts; in other words, it 6 requires the surplus to be applied in payment of 7 interest after you have paid proved debts in full. 8 The second point is that the right, as I have 9 already submitted, is a form of contingent right 10 conferred on creditors at the commencement of the 11 administration. It's a right to interest contingent on 12 there being a surplus. 13 Thirdly, the right we say is also a liability of 14 LBIE's. My Lord, in making that submission we're 15 echoing the approach your Lordship took in the 16 Waterfall 1 judgment. 17 MR JUSTICE DAVID RICHARDS: Yes. 18 MR DICKER: It's paragraph 71 where your Lordship dealt with 19 an argument of: is the obligation an obligation on LBIE 20 or is it simply a duty of the administrators? 21 MR JUSTICE DAVID RICHARDS: Yes. 22 MR DICKER: Your Lordship said, effectively, well, it can be 23 both. There's no reason it can't be an obligation on 24 the part of LBIE and also involve a duty on the part of 25 the administrators.</p> <p style="text-align: center;">Page 74</p>	<p>1 applied, which requires determination by the court, 2 doesn't mean the debt or liability doesn't exist. So 3 one could test it this way: the creditors could have 4 issued proceedings the day after final dividend had been 5 paid, seeking a declaration that they were entitled to 6 the surplus and seeking an order for payment by LBIE of 7 the amount due. 8 Now, it's true the court would have to decide the 9 dispute. Having decided the dispute, the court would 10 effectively be declaring what the rights of the parties 11 were as at the date of final dividend. The court would 12 be declaring that as at that date, final dividend having 13 been paid, these creditors were entitled to the 14 following so far as surplus was concerned. 15 We say the consequence of this is essentially to 16 give rise to another non-provable claim for damages. If 17 we're right in our analysis of how the statutory scheme 18 works, creating rights and obligations, and if we're 19 right that the obligation effectively arose, so far as 20 LBIE was concerned, on the date of final dividend, in 21 the sense that's when LBIE came under an obligation to 22 apply the surplus, one has another non-provable claim 23 for damages for any subsequent delay . 24 Now, the answer that's put forward, as we understand 25 it, is essentially, "Hang on, rule 2.88(7) doesn't</p> <p style="text-align: center;">Page 76</p>

<p>1 actually say when the surplus is to be distributed". So 2 if there isn't a particular date when the surplus is to 3 be distributed, there can't be an obligation on LBIE to 4 distribute it and there can't therefore be a breach of 5 that obligation and there can't be any question of 6 a damages claim for delay in payment.</p> <p>7 Now, it's perfectly true, of course, that 2.88(7) 8 doesn't specify a day when the surplus has to be 9 applied, but what it says is it has to be applied after 10 payment of the final dividend. We know when the final 11 dividend occurred so there's no difficulty effectively 12 of identifying the relevant date.</p> <p>13 My Lord, the final point is this: one alternative 14 would have been for the creditors to have applied for 15 permission to commence proceedings for a declaration 16 that they were entitled to payment of the surplus and 17 for an order for payment.</p> <p>18 MR JUSTICE DAVID RICHARDS: Payment of the surplus ...? 19 MR DICKER: And for an order for payment. Payment 20 essentially for the amount to which they were entitled; 21 in other words, to seek an order that when the dispute 22 is resolved it will be found that they were entitled to 23 the surplus and should be paid. The only reason it's 24 not being distributed is because there is this dispute 25 that needs to be resolved.</p> <p style="text-align: center;">Page 77</p>	<p>1 ought to construe the scheme in the way I've submitted; 2 in other words, construe it as saying on payment of 3 final dividend LBIE came under an obligation to 4 distribute the surplus and essentially interest should 5 run from that date.</p> <p>6 The reason for this is, just going back to the 7 underlying position, at the moment we have a situation 8 where there may be 6 billion sitting with the 9 administrators. According to the administrators and 10 Wentworth, the amount of interest to which creditors are 11 entitled is fixed so they will receive the same amount 12 however long it takes to distribute that surplus. We 13 say that needs to be addressed and this is the way in 14 which it can be addressed and plainly it should be 15 addressed. Parliament can't have intended essentially 16 the debtor, the shareholders, to benefit from this 17 delay, to receive the interest earned on that money 18 until it becomes possible to distribute the surplus.</p> <p>19 My Lord, I think it's York in its skeleton refers to 20 the sort of perverse incentive that might give 21 shareholders to delay the eventual distribution of the 22 surplus. If creditors and their entitlement to interest 23 was fixed and if any money earned on the surplus would 24 go to them, rather than creditors, it would effectively 25 give them, one might say, a free ride. Indeed, one may</p> <p style="text-align: center;">Page 79</p>
<p>1 MR JUSTICE DAVID RICHARDS: Yes. 2 MR DICKER: So one alternative for creditors would be to 3 issue -- everyone to issue proceedings and then to say 4 either, "I am entitled to pre-judgment interest from the 5 date I commenced my proceedings". As your Lordship 6 says, there may be an issue about precisely what the 7 rate of interest would be. That would be a way of 8 creditors alternative of getting some form of 9 compensation for this delay.</p> <p>10 Alternatively, if your Lordship thought that wasn't 11 necessarily sufficient, to say, "Well, at the moment 12 there's the moratorium but I can lift the moratorium and 13 effectively I can permit judgment to be entered into". 14 The difficulty with that, of course, is it's quite 15 difficult to work out what the terms of the judgment 16 would be.</p> <p>17 The final stage then is this: the whole process of 18 the insolvency scheme is to avoid creditors having to 19 take those sorts of steps, actually to issue 20 proceedings, given the cost, delay, et cetera, that's 21 involved. Again, applying the same logic that applies 22 to the statutory interest provision in the first place, 23 namely it's compensation for not having had judgment 24 yourself, you can apply exactly the same reasoning at 25 this point and say this is another justification why we</p> <p style="text-align: center;">Page 78</p>	<p>1 say it's worse than that. It would effectively reward 2 them for the journey and pay them per mile.</p> <p>3 MR JUSTICE DAVID RICHARDS: Well, I mean, I think the main 4 point I'm taking from this submission is that there will 5 inevitably be a delay between the date of the payment of 6 the final dividend and the payment of interest under 7 rule 2.88. You say, well, if we apply the 8 Bower v Marris principle, that deals with that issue.</p> <p>9 MR DICKER: Yes.</p> <p>10 MR JUSTICE DAVID RICHARDS: I think these alternative ways 11 of putting it are much more difficult because you would 12 only be entitled to an award of interest from the date 13 on which the interest became payable, but it may be 14 right that interest is due from the date of the final 15 dividend but it's not going to be payable from that date 16 precisely because the administrators have to take 17 various steps before they can make payment. So I'm not 18 sure you have a complete cause of action for payment 19 from that date.</p> <p>20 MR DICKER: My Lord, your Lordship is entirely right that 21 this is an alternative argument. If am right on 22 Bower v Marris, I don't need this.</p> <p>23 MR JUSTICE DAVID RICHARDS: I appreciate that, yes.</p> <p>24 MR DICKER: Can I just add this final word on your 25 Lordship's point.</p> <p style="text-align: center;">Page 80</p>

<p>1 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>2 MR DICKER: It goes back to a comment made in a series of</p> <p>3 Canadian cases, including Attorney General of</p> <p>4 Canada v Confederation Trust. Picking up the words of</p> <p>5 Lord Justice Selwyn that no one should be prejudiced by</p> <p>6 the time taken to realise the assets, they add the</p> <p>7 additional point that of course no one should be</p> <p>8 prejudiced either by the time taken to distribute them.</p> <p>9 That they regard as the underlying principle for the</p> <p>10 operation of the insolvency scheme.</p> <p>11 We say one needs to try and construe rule 2.88 in</p> <p>12 a way that gives effect to that. Your Lordship is</p> <p>13 absolutely right, what in effect one does need to do is</p> <p>14 to say this money needs to be treated as effectively</p> <p>15 having become payable. Then creditors shouldn't be</p> <p>16 prejudiced simply because there's a dispute with the</p> <p>17 shareholders as to whether or not they're entitled to it</p> <p>18 and therefore, if it's not paid, they ought to be</p> <p>19 treated as having a claim for damages for late payment.</p> <p>20 Your Lordship is right, our primary argument is</p> <p>21 question 2.</p> <p>22 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>23 MR DICKER: My Lord, I'm conscious I've taken slightly</p> <p>24 longer than the about a day I indicated but --</p> <p>25 MR JUSTICE DAVID RICHARDS: That completes your submission.</p> <p style="text-align: center;">Page 81</p>	<p>1 MR SMITH: My Lord, perhaps I can begin by gratefully</p> <p>2 adopting everything Mr Dicker has said. I intend to</p> <p>3 emphasise a few points and add some additional points in</p> <p>4 relation to issues 2 and 3. I'm not proposing to add</p> <p>5 anything in these submissions in relation to issue 39.</p> <p>6 We rely on our written materials for that and also on</p> <p>7 Mr Dicker's submissions.</p> <p>8 MR JUSTICE DAVID RICHARDS: Right.</p> <p>9 MR SMITH: I'm going to endeavour not to repeat Mr Dicker</p> <p>10 and I won't, with one or two small exceptions, take your</p> <p>11 Lordship back to the authorities Mr Dicker has taken you</p> <p>12 to.</p> <p>13 MR JUSTICE DAVID RICHARDS: Right.</p> <p>14 MR SMITH: My Lord, perhaps if I can begin just by making</p> <p>15 some general remarks on the rule in Bower v Marris.</p> <p>16 Mr Dicker has obviously explained the policy reasons why</p> <p>17 the Bower v Marris approach should be applied for the</p> <p>18 purposes of calculating interest payable under</p> <p>19 rule 2.88.</p> <p>20 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>21 MR SMITH: The first point in our submission is the rule</p> <p>22 makes commercial sense. It treats the principal on</p> <p>23 which interest continues to run as having been paid</p> <p>24 last. Therefore, by operation of the rule, it ensures</p> <p>25 that a creditor is compensated for any late payment that</p> <p style="text-align: center;">Page 83</p>
<p>1 on these issues.</p> <p>2 MR DICKER: It does.</p> <p>3 MR JUSTICE DAVID RICHARDS: So I hear next from Mr Smith</p> <p>4 Mr Smith, how long do you anticipate being?</p> <p>5 MR SMITH: Perhaps a couple of hours, my Lord.</p> <p>6 MR JUSTICE DAVID RICHARDS: Can I just say -- I hesitate to</p> <p>7 move everyone around and it slightly depends on how long</p> <p>8 everyone is going to be. I appreciate Mr Zacaroli will</p> <p>9 be a little while tomorrow. It's much easier for me if</p> <p>10 the counsel on his feet is here, as it were, rather than</p> <p>11 down there (Indicated) so if you're going to be much of</p> <p>12 the afternoon, it doesn't necessarily mean your entire</p> <p>13 teams need to switch over, but it's a help to me anyway.</p> <p>14 MR DICKER: I was certainly proposing to move down. I do</p> <p>15 recall, I think, the McKillen trial in front of</p> <p>16 your Lordship, trying to cross-examine the witness.</p> <p>17 MR JUSTICE DAVID RICHARDS: It wasn't terrific, was it? On</p> <p>18 the whole I managed with McKillen to move people around</p> <p>19 so I had that in mind actually, Mr Dicker. Good. Thank</p> <p>20 you. 2 o'clock.</p> <p>21 (1.00 pm)</p> <p>22 (Luncheon Adjournment)</p> <p>23 (2.00 pm)</p> <p>24 Opening submissions by MR SMITH</p> <p>25 MR JUSTICE DAVID RICHARDS: Yes, Mr Smith.</p> <p style="text-align: center;">Page 82</p>	<p>1 is made as whole as possible. In our submission there's</p> <p>2 an inherent commercial sense to that.</p> <p>3 Similarly, it places the creditor as close as</p> <p>4 possible to the position he would have been in if the</p> <p>5 same payments had been made by a solvent debtor. That</p> <p>6 of course is one of the main points made by</p> <p>7 Lord Cottenham in Bower v Marris itself.</p> <p>8 Now, the way in which Wentworth and the</p> <p>9 administrators have put their case as to why the</p> <p>10 Bower v Marris approach should not be followed in</p> <p>11 relation to rule 2.88 seems to us to raise two related</p> <p>12 issues. The first is the extent to which Bower v Marris</p> <p>13 and the other authorities which have applied the same</p> <p>14 approach are relevant authorities for the purposes of</p> <p>15 rule 2.88. That, it seems to us, is principally</p> <p>16 a question of understanding the relevant statutory</p> <p>17 schemes and other distribution schemes which were in</p> <p>18 place at the time of those authorities and seeing if</p> <p>19 there are or are not relevant points of distinction in</p> <p>20 relation to the position under rule 2.88.</p> <p>21 Obviously the technique of Wentworth and the</p> <p>22 administrators is to seek to distinguish the authorities</p> <p>23 as far as they can until they reach a residue they can't</p> <p>24 distinguish which they then say are wrongly decided. On</p> <p>25 the other hand, what we would say is that subject to</p> <p style="text-align: center;">Page 84</p>

<p>1 actually some fairly minor differences, the authorities 2 have all concerned schemes for the distribution of 3 estates which are materially the same as that which 4 applies under the 1986 Act and the 1986 rules. 5 So, my Lord, that's the first issue. 6 The second principal issue, as we see it, is the 7 extent to which the terms of rule 2.88 itself can be 8 said to exclude the application of the Bower v Marris 9 approach and actually require a different approach to be 10 taken to the calculation of statutory interest. So that 11 is obviously principally a question of the construction 12 of the rule, but in approaching construction we suggest 13 it's approached against the background of the existing 14 authorities and also the forms of the statutory 15 provisions which have been considered in those cases. 16 So, my Lord, I'm going to focus on those two issues 17 in these submissions. 18 The starting point is perhaps to understand the 19 legal basis of Bower v Marris approach itself; in other 20 words, how does it work legally? In our submission it 21 can be summarised as follows. First and foremost, it 22 rests on the foundation that dividend payments made in 23 respect of proved debts are not treated as having been 24 appropriated to the proved debt when they are made. 25 That is essentially the argument which was put in</p> <p style="text-align: center;">Page 85</p>	<p>1 subsequently found to be a surplus so that a right to 2 that interest arises. Now, in our submission the 3 authorities very clearly demonstrate that for these 4 purposes dividend payments are treated as ordinary 5 payments on account. That's a point we would suggest is 6 fairly conclusively shown by the authorities. Mr Dicker 7 has shown you, I think, Humber Ironworks, page 645, 8 Lord Justice Selwyn, which is in tab 27 of the 9 authorities bundle 1A. There's also Lord Rommily, 10 Master of the Rolls, in re Joint Stock Discount Company 11 number 2, which is in tab 14, authorities bundle 1A. 12 There's Whittingstall v Grover, Mr Justice Chitty, which 13 we'll come to. And of course re Lines Brothers 14 number 2, where it was common ground between everyone, 15 and the judge agreed, that the payments were treated as 16 ordinary payments on account. 17 My Lord, in addition there's also a Scottish case, 18 Gourlay v Watson, which Mr Dicker took your Lordship to 19 briefly yesterday. 20 MR JUSTICE DAVID RICHARDS: Yes. 21 MR SMITH: I was just going to take your Lordship back to 22 that, if I may. 23 MR JUSTICE DAVID RICHARDS: Just so I understand it, I've 24 just opened up what Lord Justice Selwyn said in 25 Humber Ironworks.</p> <p style="text-align: center;">Page 87</p>
<p>1 Bower v Marris and which was roundly rejected by 2 Lord Cottenham. 3 Secondly, rather, such payments are treated as 4 having been ordinary payments on account made by the 5 debtor. They're not treated as having been appropriated 6 between principal or interest when they are made. 7 Accordingly, and this is the third point, if and 8 when there is a surplus such that a right to 9 post-insolvency interest arises at that point, for the 10 purposes of calculating such interest the creditor is 11 then entitled to treat the dividend payments previously 12 made as having been applied first in discharge of 13 interest before discharge of principal. 14 Now, in our submission that isn't an overly 15 complicated approach. It's also not a rule which 16 depends on a contractual right to have the proceeds 17 applied in a normal way or on the fact that the right to 18 interest is a contractual right, rather in our 19 submission it reflects the ordinary way in which 20 payments made by a debtor to his creditor fall to be 21 treated where there is no appropriation by the debtor. 22 Now, my Lord, following from that, an important 23 point at the outset is to identify what is the correct 24 treatment of dividend payments for the purpose of 25 calculating post-insolvency interest, whether</p> <p style="text-align: center;">Page 86</p>	<p>1 MR SMITH: Yes. 2 MR JUSTICE DAVID RICHARDS: Sorry, tab -- 3 MR SMITH: 1A, tab 27. It's the passage at the bottom of 4 page 645. 5 MR JUSTICE DAVID RICHARDS: What I see him as saying is 6 really that it's -- in the event of there being an 7 ultimate surplus, the account must be taken as between 8 the company and the creditors in the ordinary way; that 9 is, as pointed out in Bower v Marris. 10 MR SMITH: Yes. 11 MR JUSTICE DAVID RICHARDS: I mean, it seems to me idle to 12 say that when the payments are made they're not payments 13 of principal. 14 MR SMITH: Yes, I don't think -- 15 MR JUSTICE DAVID RICHARDS: Clearly they are. 16 MR SMITH: No. 17 MR JUSTICE DAVID RICHARDS: It's more that ex post facto, 18 isn't it, they are deemed -- this is the argument -- to 19 be ordinary payments on account? 20 MR SMITH: Yes. Your Lordship says "deemed". I think the 21 word we have used is "treated". It's for the purposes 22 of calculating insolvency interest they are treated as 23 ordinary payments on account, absolutely. 24 MR JUSTICE DAVID RICHARDS: Yes, I see. 25 MR SMITH: Now, I was just mentioning to your Lordship the</p> <p style="text-align: center;">Page 88</p>

<p>1 cases where I think that point is picked up and 2 essentially repeated and reiterated. 3 There's also the Scottish decision in 4 Gourlay v Watson which your Lordship will see in 5 authorities bundle 1B at tab 51. My Lord, I think the 6 easiest place to probably pick up the facts are on 7 page 764. 8 MR JUSTICE DAVID RICHARDS: Right. 9 MR SMITH: Your Lordship will see, on page 764, there's 10 a rather long footnote which basically sets out the 11 opinion of the Lord Ordinary who was the judge below. 12 MR JUSTICE DAVID RICHARDS: Just before we get to that, just 13 remind me what this concerned, in the sense of -- it was 14 a trust deed -- 15 MR SMITH: It was. 16 MR JUSTICE DAVID RICHARDS: -- for the proof of creditors? 17 MR SMITH: It was. It was a slightly unusual set of facts. 18 What happened was that three brothers had established 19 a trust over their shares of the estate of their 20 deceased father, and the purpose of the trust was 21 essentially to meet the liabilities of the estate. 22 MR JUSTICE DAVID RICHARDS: Right. 23 MR SMITH: Their own liabilities, and then with the residue 24 back to them. So that was the nature of it. It was 25 essentially a trust for the benefit of creditors.</p> <p style="text-align: center;">Page 89</p>	<p>1 paragraph, there's a reference to Messrs James 2 Watson & Co. They say: 3 "The payments made to account made by the trustees 4 ...(reading to the words)... is still due to them." 5 So essentially they were making a Bower v Marris 6 point and saying actually there's still outstanding 7 interest owed us to because it falls to be calculated in 8 accordance with the Bower v Marris principle. 9 My Lord, the claim for interest is described further 10 over the page on page 765. Your Lordship sees how it 11 was put. At the top of the page, it sets out: 12 "James Watson & Co did so and argued..." 13 Then the basis on which it was put appears towards 14 the end of that paragraph, where it's said: 15 "Even in a sequestration if there should ultimately 16 be a ...(reading to the words)... after the date of the 17 sequestration." 18 Then there's reference in the footnote at the bottom 19 of the page to section 52 of the Bankruptcy (Scotland) 20 Act 1856 which basically set out the rights of 21 a creditor. It's really the last bit of that which is 22 relevant. If your Lordship sees right at the bottom of 23 the page, it says: 24 "And if there be any residue of the estate [over the 25 page] after discharging the debts ranked, he should be</p> <p style="text-align: center;">Page 91</p>
<p>1 MR JUSTICE DAVID RICHARDS: Right. 2 MR SMITH: I think your Lordship probably picks that up -- 3 MR JUSTICE DAVID RICHARDS: It's in the headnote, I see. 4 MR SMITH: It is in the headnote. It's also on page 764, 5 the first paragraph. 6 MR JUSTICE DAVID RICHARDS: Right, yes. 7 MR SMITH: The first paragraph in the opinion of the 8 Lord Ordinary he refers to the three brothers of the 9 name Wilson: 10 "... the disponent assigns to the trustees their 11 respective shares of the estate left ...(reading to the 12 words)... and these creditors all signed a document 13 consenting to the arrangement which the deed embodied." 14 Then, my Lord, there's this point, the terms of the 15 trust deed conferred certain powers on the trustee, 16 including all powers and privileges competent to the 17 office of a trustee under a sequestration. 18 Then the Lord Ordinary said this: 19 "I gather that the kind of arrangement contemplated 20 was a gradual liquidation in which it was ...(reading to 21 the words)... the hands of the trustees a surplus £9,500 22 which forms the fund in medio in this action." 23 Then he then goes on in the next paragraph to 24 describe essentially the claims on that fund. 25 Your Lordship will see, towards the end of that</p> <p style="text-align: center;">Page 90</p>	<p>1 entitled to claim out of such residue the full amount of 2 the interest on his debt in terms of law." 3 MR JUSTICE DAVID RICHARDS: So a sequestration, because the 4 trustees had all the powers and privileges competent to 5 the office of a trustee under a sequestration, that is 6 a bankruptcy? 7 MR SMITH: It is, yes, the equivalent. 8 MR JUSTICE DAVID RICHARDS: So effectively he's saying he's 9 got all the powers of a trustee in bankruptcy. 10 MR SMITH: Exactly. Although it's formally established as 11 a trust, how it's worked is that the powers applicable 12 in a sequestration or a bankruptcy have been 13 incorporated in. So for all intents and purposes it 14 works as if it was a bankruptcy. 15 Your Lordship sees, just going back to the text in 16 page 765, it says: 17 "The creditors are accordingly entitled, there being 18 a surplus, to principal and legal interest, unless they 19 had done something to disentitle them." 20 MR JUSTICE DAVID RICHARDS: I'm awfully sorry, just repeat 21 what you said then. 22 MR SMITH: So I'm back in the actual main body of the text 23 on 765. The last sentence of the main body of the text. 24 MR JUSTICE DAVID RICHARDS: Yes. 25 MR SMITH: Your Lordship sees it says:</p> <p style="text-align: center;">Page 92</p>

<p>1 "The creditors are accordingly entitled there being 2 a surplus, to principal and legal interest, unless they 3 had done something to disentitle them." 4 MR JUSTICE DAVID RICHARDS: Yes. 5 MR SMITH: Now, there is just a point on the reference to 6 "legal interest" which I ought to just explain. It's 7 actually dealt with in a much later Scottish case which 8 your Lordship will find in bundle 1E. It's 1E, 9 tab 158A. It might be worth your Lordship turning it 10 up. It's just one paragraph. It's tab 158A in that 11 bundle. It's a decision of the Outer House Court of 12 Session, in the cause of the official liquidation of 13 Weir Construction (Contracts) Limited. 14 The facts don't matter at all but there is, at 15 paragraph 8 of the opinion of Lord Hodge, an explanation 16 of what legal interest is. Essentially it appears to be 17 the position under Scottish law that essentially it was 18 an interest rate of 5 per cent a year which was due as 19 a matter of law in the absence of a contractual rate. 20 MR JUSTICE DAVID RICHARDS: Yes, I see. 21 MR SMITH: So, my Lord, that is relevant because in our 22 submission the 5 per cent interest which was the subject 23 of Gourlay v Watson was on analysis not a contractual 24 rate, in the sense of a rate provided for under the 25 contract but was interest allowed at law or legal</p> <p style="text-align: center;">Page 93</p>	<p>1 "The rule of law which applies is too 2 well-established to have gone back on." 3 Then he says: 4 "My difficulty, however, has arisen on the view the 5 trustee were not entitled ...(reading to the words)... 6 creditors' interests and to the advantage of the 7 debtors." 8 Then he says this: 9 "I agree with Lord Moncrieff, whose opinion I have 10 read, that this case must be ...(reading to the 11 words)... cannot appropriate those payments to any 12 specific part of those claims." 13 So that's his approach and essentially he agrees 14 with Lord Moncrieff and then elaborates on the point, as 15 your Lordship sees at the bottom of page 769. He also 16 begins by saying: 17 "This case must be treated as that of a trust for 18 the distribution of an estate which was actually in all 19 likelihood insolvent at the commencement of the trust." 20 Then he refers to the view of the Lord Ordinary, who 21 considered there was an appropriation by the debtor. 22 Then he says this, and Mr Dicker may I think have 23 taken your Lordship to this passage yesterday. 24 MR JUSTICE DAVID RICHARDS: Yes. 25 MR SMITH: He begins by saying:</p> <p style="text-align: center;">Page 95</p>
<p>1 interest. 2 MR JUSTICE DAVID RICHARDS: Yes. 3 MR SMITH: Now, my Lord, just looking at the decision 4 itself, there's first of all a speech of Lord Young 5 which your Lordship sees at the bottom of page 766. 6 Just turning over to page 767, the final paragraph at 7 the bottom of that page, he basically said, as your 8 Lordship sees from the first sentence of that paragraph: 9 "The doctrine of appropriation of payment by 10 a debtor making it in my opinion inapplicable." 11 Essentially his view was that because in that case 12 the debt plus interest was a single and indivisible 13 debt, there was no room for appropriation. His analysis 14 was basically it was a single debt. That was the 15 correct construction of the debt and because it was 16 a single debt no question of appropriation arose. 17 He therefore had a slightly different analysis to 18 the other two judges who approached it in a different 19 way. The way they approached it is set out firstly in 20 the speech of Lord Traynor which your Lordship sees at 21 the bottom of the page, page 768. He says: 22 "First of all, I think the payments made to 23 Watson & Co by Wilson's ...(reading to the words)... 24 I would have agreed with the Lord Ordinary." 25 Then he says:</p> <p style="text-align: center;">Page 94</p>	<p>1 "I do not think that is a correct view of the case. 2 If a solvent debtor is desirous ...(reading to the 3 words)... their being appropriated towards extinction of 4 principal." 5 So he's basically saying there's no appropriation 6 because at the time they're made there's no claim to 7 interest or any contemplation of a claim to interest so 8 almost by definition there can't be any appropriation. 9 MR JUSTICE DAVID RICHARDS: Yes. 10 MR SMITH: The he goes on to say: 11 "But if it transpires that there is a surplus 12 sufficient to pay ...(reading to the words)... of his 13 debts in terms of the law." 14 MR JUSTICE DAVID RICHARDS: The Bankruptcy Act 1856, is that 15 a Scottish Act? 16 MR SMITH: That's the Scottish one I think we looked at in 17 the footnote. 18 MR JUSTICE DAVID RICHARDS: Oh is it? Right. 19 MR SMITH: That's the one back in the footnote on page 765. 20 So it's the Bankruptcy (Scotland) Act 1856. 21 MR JUSTICE DAVID RICHARDS: Thank you, yes. 22 MR SMITH: Your Lordship sees the terms of that. 23 MR JUSTICE DAVID RICHARDS: Yes. 24 MR SMITH: Of course we make the point section 52 is not 25 dissimilar to rule 2.88.</p> <p style="text-align: center;">Page 96</p>

<p>1 Your Lordship will see he also refers to Warrant 2 Finance Company's case which is actually 3 re Humber Ironworks, the first re Humber Ironworks 4 decision of 1869. 5 MR JUSTICE DAVID RICHARDS: Right. 6 MR SMITH: My Lord, one other small point which might be 7 worth making in relation to Gourlay v Watson. It 8 obviously post-dates the 1883 Bankruptcy Act but there's 9 no suggestion there that Bower v Marris had ceased to be 10 part of the bankruptcy law of England following that 11 Act. On the contrary, reference is made specifically to 12 the analogy of the law of bankruptcy, both here and in 13 England. 14 So, my Lord, that was the first additional case 15 I wanted to show your Lordship. 16 There is a second one, also mentioned by Mr Dicker, 17 which is the re Calgary Medicine Hat Land Company case, 18 which your Lordship will find in the same authorities 19 bundle, tab 58. 20 MR JUSTICE DAVID RICHARDS: Lord Traynor didn't think that 21 Humber Ironworks had much to do with it. Still, there 22 we are. They took different views. Sorry, the next one 23 is ...? 24 MR SMITH: The next one is re Calgary Medicine Hat Land 25 Company, which is another one Mr Dicker referred to.</p> <p style="text-align: center;">Page 97</p>	<p>1 "Counsel for the appellants, the company, the 2 contend that the effect of the orders was ...(reading to 3 the words)... no complete appropriation of the payments 4 as between principal and interest." 5 Then he goes on to say: 6 "I cannot treat them as finally appropriating the 7 dividends ...(reading to the words)... stated in the 8 Master's certificate. That is all." 9 I don't think we need the judgment of 10 Lord Justice Fletcher Moulton, but then one gets to the 11 final judgment which is Lord Justice Farwell. If your 12 Lordship goes to page 66 in the middle of the page. He 13 says this: 14 "When the Master made his certificate it was 15 believed by all the parties ...(reading to the words)... 16 the only account taken accordingly was that of capital." 17 Then over on page 663 at the top of the page, he 18 then went on to conclude: 19 "In the present case each order for payment was made 20 as a step towards final distribution ...(reading to the 21 words)... to that inherent right of adjustment which 22 always exists in cases of this nature." 23 So, my Lord, that was obviously a slightly different 24 factual scenario, but it's a similar principle in my 25 submission. Where payments are made in a state of</p> <p style="text-align: center;">Page 99</p>
<p>1 It's at tab 58. It's a decision of the Court of Appeal 2 in 1908. Basically it was a debenture case. It 3 concerned a debenture holder's action. It probably 4 makes sense for your Lordship just to read the headnote 5 actually. It's a relatively short headnote which 6 summarises the facts quite neatly. (Pause) 7 MR JUSTICE DAVID RICHARDS: Yes. 8 MR SMITH: Your Lordship sees it concerned a debenture. 9 Essentially what had happened is that the Master had 10 certified the sums in respect of principal but he hadn't 11 certified anything in respect of interest, and payments 12 had then been made accordingly pursuant to the Master's 13 certification. There then was a surplus and the 14 question was whether the payment which had been made 15 previously had been appropriated to principal or not. 16 If your Lordship goes to page 656, your Lordship 17 will see in the middle of the page the argument made by 18 Mr Hughes KC for the debenture holders he said: 19 "These are merely payments on account generally. 20 Ordinary payments on ...(reading to the words)... 21 interest at the date of dividend and then in reduction 22 of capital (see Bower v Marris)." 23 Then, my Lord, page 658, there's the judgment of the 24 Master of the Rolls, where he sets out in the middle of 25 the page:</p> <p style="text-align: center;">Page 98</p>	<p>1 insolvency, there's no question of those payments being 2 appropriated to interest at that time. That essentially 3 reinforces the point which was decided in Bower v Marris 4 itself, but your Lordship sees how it's applied and has 5 been applied in our submission fairly consistently 6 across the different contexts. 7 Now, my Lord, one then comes to the question of what 8 is the case of the administrators and Wentworth on how 9 dividends in respect of proved debts are to be treated 10 for the purposes of calculating post-administration 11 interest? 12 Now, like Mr Dicker, we understand that the 13 administrators proceed on the basis that payments are 14 appropriated to principal when they're made. If your 15 Lordship has their skeleton argument, which 16 your Lordship should have in bundle 6, tab 4, 17 paragraph 35 first of all. Your Lordship sees first of 18 all in paragraph 35: 19 "Rule 2.88(7) is a clear" -- 20 MR JUSTICE DAVID RICHARDS: Sorry, paragraph ...? 21 MR SMITH: 35. 22 MR JUSTICE DAVID RICHARDS: This is the administrators'?? 23 MR SMITH: Yes, it should be tab 4 for your Lordship. 24 MR JUSTICE DAVID RICHARDS: Yes, it is. Thank you. 25 MR SMITH: First of all, paragraph 35:</p> <p style="text-align: center;">Page 100</p>

<p>1 "Rule 2.88(7) is a clear and mandatory direction as 2 to how the surplus is to be applied. In circumstances 3 where the debts proved have been paid, and a surplus 4 remains ... the surplus must be applied in paying 5 interest ..."</p> <p>6 So it says there it applies where the debt has been 7 proved to be paid. Similarly, paragraph 37(1), the 8 first line:</p> <p>9 "Rule 2.88(7) proceeds on the basis that the debt 10 proved have already been paid ..."</p> <p>11 Then one has paragraph 107, sub-paragraph 2, which 12 is the paragraph Mr Dicker referred to where the point 13 may be put slightly more clearly because that's where 14 they say:</p> <p>15 "When dividends are applied to pay the debts proved, 16 the principal is discharged in part."</p> <p>17 So at least, as we understand it, the 18 administrators' case is that the dividend payments, when 19 made, are appropriated to the proved debt.</p> <p>20 Now, obviously the problem with that case is that it 21 is directly contrary to Bower v Marris and not only 22 Bower v Marris but the Court of Appeal cases in 23 Humber Ironworks and Joint Stock Discount Company which 24 held that the dividend payments are not appropriated to 25 principal. So, my Lord, in our submission, that's</p> <p style="text-align: center;">Page 101</p>	<p>1 by 107(1), which again refers to rule 2.88.</p> <p>2 MR SMITH: Yes.</p> <p>3 MR JUSTICE DAVID RICHARDS: I agree if you read 107(2) on 4 its own, yes -- anyway.</p> <p>5 MR SMITH: The point for present purposes is merely to 6 identify what they say is the correct treatment of the 7 dividend payments when one comes to calculate statutory 8 interest.</p> <p>9 MR JUSTICE DAVID RICHARDS: Yes. Exactly.</p> <p>10 MR SMITH: As we understand it, it is their case in that 11 context that they say they are effectively treated as 12 having been appropriated to the proved debts or having 13 discharged proved debts.</p> <p>14 Now, the problem in our submission obviously with 15 that case is it's directly contrary to Bower v Marris. 16 It's also directly contrary to Humber Ironworks and the 17 Joint Stock Discount Company because the point of 18 principle which on any view we suggest one gets from 19 those cases is that dividend payments are not treated as 20 having been appropriated to principal when one comes to 21 calculate statutory interest.</p> <p>22 Now, the administrators' position is also 23 inconsistent or different to Wentworth's position. As 24 Mr Dicker said, Wentworth has changed its position. 25 They had originally said in their reply position paper,</p> <p style="text-align: center;">Page 103</p>
<p>1 a short answer to that case.</p> <p>2 It's also inconsistent with Wentworth's position.</p> <p>3 MR JUSTICE DAVID RICHARDS: Sorry, just let me follow this.</p> <p>4 The second -- I have paragraph 35. I just didn't -- 5 what was the other paragraph you referred to?</p> <p>6 MR SMITH: There were two other paragraphs. It's 7 paragraph 37(1) and then paragraph 107(2). It's 8 probably clearest in paragraph 107(2).</p> <p>9 MR JUSTICE DAVID RICHARDS: Let me just re-read that. 10 (Pause)</p> <p>11 MR SMITH: At least, as we understand it --</p> <p>12 MR JUSTICE DAVID RICHARDS: So, sorry, it's dangerous to 13 take sub-paragraphs out of the overall context.</p> <p>14 MR SMITH: It is.</p> <p>15 MR JUSTICE DAVID RICHARDS: But paragraph 35 is clearly 16 a submission based on the terms of rule 2.88.</p> <p>17 MR SMITH: Exactly, yes.</p> <p>18 MR JUSTICE DAVID RICHARDS: So the pre-existing law, or even 19 if admissible as background is ultimately, Mr Trower 20 would say, beside the point because it must give way to 21 the proper construction of rule 2.88.</p> <p>22 MR SMITH: Yes.</p> <p>23 MR JUSTICE DAVID RICHARDS: The same, I think, is true of 24 37(1), but just looking at it on its own -- well, 25 I suppose the only thing, 107(2) is preceded of course</p> <p style="text-align: center;">Page 102</p>	<p>1 paragraph 13, that the dividend payments are 2 appropriated to principal. I don't think we need to 3 turn it up. They have changed their position since 4 then.</p> <p>5 The current position is set out in their reply 6 skeleton, first of all, at paragraph 17 of their reply 7 skeleton which your Lordship will see in bundle 6, 8 tab 6. It's page 5 of their skeleton, where they 9 summarise what they say is the principle which was 10 applied in Bower v Marris. They say:</p> <p>11 "... the principle which was applied in 12 Bower v Marris is merely a negative one: that payments 13 made pursuant to a statutory scheme such as 14 distributions of a bankruptcy estate are not 15 appropriated towards principal ..."</p> <p>16 So we would not disagree with that.</p> <p>17 Then they elaborate on that a little then in 18 paragraph 25, in particular sub-paragraph 3 of 19 paragraph 25, which your Lordship will find on page 8 of 20 the skeleton.</p> <p>21 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>22 MR SMITH: Where they say this:</p> <p>23 "The SCG is mistaken in asserting that Wentworth's 24 argument is one that was rejected in Bower v Marris. 25 The argument rejected in Bower v Marris was that the</p> <p style="text-align: center;">Page 104</p>

<p>1 payments of dividends did constitute an appropriation 2 towards principal. Wentworth's case does not depend on 3 showing that there has been any particular 4 appropriation." 5 So they seem to accept the Bower v Marris principle 6 and they say their case doesn't depend on any such 7 appropriation, but it does then raise the question of 8 what do they say is the correct treatment of dividend 9 payments in the hands of the creditor when you come to 10 calculate post-insolvency interest. The logic, we would 11 suggest, of their position appears to be that when one 12 comes to the time of calculating post-insolvency 13 interest, one is approaching it on the footing at that 14 time that the payments are to be treated as payments on 15 account. They say they're not appropriated to 16 principal; they don't say they're appropriated to 17 interest. So it seems their position is that when one 18 comes to the moment of calculating statutory interest, 19 what has gone before is treated as being -- having been 20 payments on account. 21 But, my Lord, if they accept that, then we suggest 22 it's very difficult indeed to see what is the reason for 23 not then applying the approach in Bower v Marris. 24 Now, if payments haven't been previously 25 appropriated to principal, then it's not clear why one</p> <p style="text-align: center;">Page 105</p>	<p>1 Now, just to pick up a couple of points here, one of 2 the points which Wentworth make is a sort of 3 quid pro quo point, if I can put it like that. What 4 they say is that there is a reason to think the 5 legislature intended to have a different approach and 6 that's because it effectively gave something new in the 7 1986 rules. It gave a right to interest to persons 8 whose debts didn't previously bear interest and, 9 therefore, because it gave something new, it's not 10 necessary surprising that it took something away at the 11 same time, namely the right to rely on the rule in 12 Bower v Marris. 13 Now, there's two points we make in answer to that. 14 The first is there's nothing to suggest that that was 15 the intention of the legislation. It's a slightly odd 16 intention to attribute to the legislature that it gives 17 with one hand a creditor a right to interest. 18 Presumably in the case of a creditor whose debt doesn't 19 bear interest for the purpose of putting that creditor 20 in the position he would have been in if he'd been able 21 to obtain a judgment. But, at the same time, it's 22 taking something away from that creditor as part of 23 a quid pro quo. There's nothing to suggest that was the 24 intention of the legislature. 25 MR JUSTICE DAVID RICHARDS: It wouldn't be taking anything</p> <p style="text-align: center;">Page 107</p>
<p>1 wouldn't approach post-insolvency interest by 2 calculating it in the usual way, by applying the usual 3 rule that payments are treated as having been received 4 in discharge of interest before principal. One is 5 approaching statutory interest from the context that one 6 has previous payments that are payments on account. 7 The normal rule would be to treat those payments as 8 being discharged first in interest rather than 9 principal. One asks oneself, against that context, why 10 would the legislature want to impose a different 11 approach and, in particular, an approach which 12 prejudices the creditor? 13 Now, there's no suggestion that the legislation did 14 intend to impose such a different approach. Indeed, in 15 our submission, one would need to find something very 16 clear in the rule which led one to that conclusion, 17 because not only is one approaching the calculation of 18 statutory interest against the footing that these are 19 payments on account, that there is a usual rule that 20 applies, but one is also approaching it against the 21 context of the preceding authorities. Now, in our 22 submission, there is nothing in the rule that one could 23 find that the legislature intended the calculation of 24 insolvency interest to be approached other than in the 25 usual way.</p> <p style="text-align: center;">Page 106</p>	<p>1 away from that creditor because that creditor didn't 2 have anything. 3 MR SMITH: He didn't in the case of corporate insolvency. 4 MR JUSTICE DAVID RICHARDS: Correct. 5 MR SMITH: But one then comes to the second point which is 6 how it applies to bankruptcy, where in that case 7 obviously the creditor did have a right to get interest 8 on non-interest-bearing debts. If we're right about the 9 1883 Act and the question of whether there was 10 a fundamental change in the law in 1883, but assume we 11 are right about the 1883 Act and the rule in 12 Bower v Marris did continue to apply, then the effect is 13 that that creditor was deprived of something. 14 MR JUSTICE DAVID RICHARDS: Yes, I see. 15 MR SMITH: Because in his case -- in fact he's not receiving 16 anything new because he already has a right to interest, 17 but he's having the rule in Bower v Marris taken away. 18 MR JUSTICE DAVID RICHARDS: Yes. 19 MR SMITH: Now, that was the first point. 20 The second point I just wanted to address briefly at 21 this point is the idea of the non-provable claim which 22 is the notion, well, the legislature took away 23 Bower v Marris in relation to rule 2.88 but the 24 consequence of that is a creditor in effect has 25 a non-provable claim to the extent required to vindicate</p> <p style="text-align: center;">Page 108</p>

<p>1 his contractual rights.</p> <p>2 Now, there's three points we make about that is that</p> <p>3 stage. First, it's a very odd intention on the part of</p> <p>4 Parliament, we would suggest, to abolish the rule in</p> <p>5 Bower v Marris for statutory interest but instead then,</p> <p>6 at the same time, to insert a non-provable claim further</p> <p>7 down the waterfall. It's very difficult to identify any</p> <p>8 obvious policy reason for that or any reason of</p> <p>9 principle. That first point.</p> <p>10 The second point is the effect of that would, at</p> <p>11 least potentially, be to prejudice creditors whose debts</p> <p>12 did not bear interest as a matter of contract.</p> <p>13 Now, assume there's no Sempra Metals-type claim for</p> <p>14 damages for late payment. Those creditors would not</p> <p>15 appear to have a non-provable claim for the vindication</p> <p>16 of their rights. They have no contractual rights to</p> <p>17 vindicate. That, however, is in the context where</p> <p>18 obviously the reason for conferring interest on the</p> <p>19 right to interest on those creditors in the first place</p> <p>20 was to put them in the same place as they would have</p> <p>21 been in if they had a judgment. That's the -- one of</p> <p>22 the points I think your Lordship made in the first</p> <p>23 Waterfall decision at paragraph 163.</p> <p>24 MR JUSTICE DAVID RICHARDS: I think, again, one shouldn't</p> <p>25 read too much into points like that. I think the point</p> <p style="text-align: center;">Page 109</p>	<p>1 Secondly, we would submit that off the back of that</p> <p>2 it's a somewhat odd intention for the legislature to</p> <p>3 confer a judgment rate on a creditor whose debt doesn't</p> <p>4 bear interest, presumably seeking to put him as far as</p> <p>5 possible in the position he would have been in if he had</p> <p>6 obtained a judgment but which he couldn't because of the</p> <p>7 winding-up. It's very odd that if that's the intention</p> <p>8 on the one part, but then, at the same time, to deprive</p> <p>9 the creditor of one of the normal rights he would have</p> <p>10 if he had obtained Judgments Act interest which would be</p> <p>11 the right to apply the rule in Bower v Marris.</p> <p>12 So that's second point.</p> <p>13 Indeed, it goes slightly further because on the</p> <p>14 non-provable claim analysis, not only is the right</p> <p>15 removed at the level of statutory interest but that</p> <p>16 creditor doesn't even have a non-provable claim to</p> <p>17 vindicate his rights.</p> <p>18 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>19 MR SMITH: So, my Lord, we say that would be a very odd</p> <p>20 intention.</p> <p>21 The third point is this, that in our submission it</p> <p>22 would actually involve a perverse intention on the part</p> <p>23 of the legislature. Obviously one of the main points of</p> <p>24 the Cork Report was to remove the anomaly in corporate</p> <p>25 insolvency between debts which bore interest and debts</p> <p style="text-align: center;">Page 111</p>
<p>1 I was making there is that is why judgment rate has been</p> <p>2 chosen.</p> <p>3 MR SMITH: Yes.</p> <p>4 MR JUSTICE DAVID RICHARDS: It may extend from that the</p> <p>5 intention is to put them in the same position as they</p> <p>6 would be in if they had a judgment, but I don't think</p> <p>7 I was actually addressing that part of that.</p> <p>8 MR SMITH: I think it may be worth your Lordship looking at</p> <p>9 it, rather than me misquoting it to your Lordship. It's</p> <p>10 bundle 1E, tab 167, paragraph 163, I think, at page 55</p> <p>11 of the judgment.</p> <p>12 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>13 MR SMITH: It's in the middle of the page, the relevant</p> <p>14 passage against letter D.</p> <p>15 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>16 MR SMITH: Your Lordship says:</p> <p>17 "The justification for statutory interest, even in</p> <p>18 those cases where the debts do not already carry a right</p> <p>19 to interest, is that the creditors are prevented by the</p> <p>20 liquidation regime from obtaining a judgment against the</p> <p>21 company which would then carry interest at a judgment</p> <p>22 rate."</p> <p>23 MR JUSTICE DAVID RICHARDS: I see.</p> <p>24 MR SMITH: Now, my Lord, we obviously submit -- well,</p> <p>25 firstly, we respectfully agree with that.</p> <p style="text-align: center;">Page 110</p>	<p>1 which didn't. That's one of the main reasons of the</p> <p>2 report and obviously the changes made in consequence of</p> <p>3 the report did remove that anomaly in relation to</p> <p>4 statutory interest. So both of them are treated</p> <p>5 equally. But if the position is that Bower v Marris</p> <p>6 doesn't apply but there's a non-provable claim for</p> <p>7 creditors who have a contractual right to interest, then</p> <p>8 the effect of that is to re-insert exactly the same</p> <p>9 anomaly, just further down the waterfall. Because one's</p> <p>10 in the position then of having exactly the same anomaly</p> <p>11 at the level of non-provable claims, because on this</p> <p>12 analysis creditors with contractual interest would have</p> <p>13 a non-provable claim to vindicate those rights but</p> <p>14 creditors without a right to contractual interest</p> <p>15 wouldn't have any such claim.</p> <p>16 So one has exactly the same anomaly which</p> <p>17 a legislature has just reversed at the level of</p> <p>18 statutory interest. So that does seem to us to be</p> <p>19 a rather unlikely and, indeed, perverse intention on the</p> <p>20 part of the legislature.</p> <p>21 My Lord, the next topic I was going to deal with is</p> <p>22 the idea which is put forward by Wentworth that</p> <p>23 Bower v Marris is dependent on an appropriation being</p> <p>24 made to interest at the time the dividends are paid.</p> <p>25 One of the themes that's put forward by Wentworth is</p> <p style="text-align: center;">Page 112</p>

<p>1 actually Bower v Marris is no more than an application 2 of the general rules of appropriation and in effect all 3 that is happening under the Bower v Marris approach is 4 that a creditor is appropriating dividend payments to 5 interest when those payments are made. 6 One sees that in their first skeleton argument, 7 bundle 6, tab 2, paragraphs 49 to 50. Your Lordship 8 sees they say first of all in paragraph 49: 9 "... the ... 'rule' is no more than an application 10 of the general rule applicable between solvent parties 11 that enables the creditor, entitled to receive both 12 principal and interest, to appropriate payments made to 13 it in discharge of interest before principal." 14 Then on the back of that, they say, in paragraph 50: 15 "... the application of principal to the calculation 16 of interest payable from an insolvency surplus depends 17 upon the fact that the relevant legislation preserved 18 the underlying right of a creditor with an 19 interest-bearing debt to be paid in full ..." 20 Then related to that, if your Lordship just go goes 21 back a few pages, and sorry to move your Lordship around 22 the document, but at paragraph 29, they say this: 23 "... the operation of the principle of appropriation 24 in Bower v Marris depends on there being an accrued 25 right to interest at the time of the payment of the</p> <p style="text-align: center;">Page 113</p>	<p>1 see it in the context of paragraph 29 because they set 2 out -- your Lordship is right, they set out the general 3 principle in paragraphs 49 and 50, but then it's linked 4 in paragraph 29 to the idea that there is an accrued 5 right to interest at the time of the payment of the 6 dividend. 7 MR JUSTICE DAVID RICHARDS: Depends on there being, yes. 8 MR SMITH: Depends on there being. 9 MR JUSTICE DAVID RICHARDS: Yes. 10 MR SMITH: So they said: 11 "... the operation of the principle of appropriation 12 in Bower v Marris depends on there being an accrued 13 right to interest at the time of the payment of the 14 dividend." 15 MR JUSTICE DAVID RICHARDS: Yes. 16 MR SMITH: Now, what it seems to me what they're in effect 17 saying is that the Bower v Marris approach works on the 18 basis that at the time the dividend payment is made 19 there are accrued rights in respect of both principal 20 and interest and the dividend payment as at that time is 21 effectively appropriated by the creditor to interest. 22 MR JUSTICE DAVID RICHARDS: Not necessarily -- I don't read 23 it as being at that time. 24 MR SMITH: Well, at the very least there has to be an 25 accrued right to interest at the time of payment.</p> <p style="text-align: center;">Page 115</p>
<p>1 dividend." 2 MR JUSTICE DAVID RICHARDS: Is that not a different point? 3 This is the point that Mr Dicker touched on. You 4 married them up, I see. 5 MR SMITH: I understand that they're related. 6 MR JUSTICE DAVID RICHARDS: I see. So the so-called 7 principle is just the general rule. 8 MR SMITH: Yes. 9 MR JUSTICE DAVID RICHARDS: But the general rule can't apply 10 because there is no accrued right to interest; is that 11 the point? 12 MR SMITH: That's what they say is the position under the 13 1986 Act and rules, yes. As I understand it, what they 14 basically say is that Bower v Marris -- the conceptual 15 approach in Bower v Marris is it works on the idea that 16 the creditor appropriates to interest at the time the 17 dividend payment is received. They say that can't -- 18 MR JUSTICE DAVID RICHARDS: Or thereafter? It doesn't have 19 to do it at the time. It can treat it as a payment on 20 account so that the creditor is free at any time 21 thereafter to appropriate it, as I understood it. 22 MR SMITH: Well, I'm not sure because they -- 23 MR JUSTICE DAVID RICHARDS: The appropriation really can't 24 take place until there's a surplus. 25 MR SMITH: Well, but this is why it seems to me one has to</p> <p style="text-align: center;">Page 114</p>	<p>1 MR JUSTICE DAVID RICHARDS: That's right. Yes, that 2 I understand. 3 MR SMITH: It may be that's the limitation, but certainly at 4 the very least they say there has to be an accrued right 5 to interest at the time the dividend payment is made. 6 That, they say, is the foundation for the rule and, as 7 I understand it, they then seek to distinguish that 8 position with what they says the position under the 1986 9 Act. 10 MR JUSTICE DAVID RICHARDS: Yes. 11 MR SMITH: Now, in my submission that isn't the correct 12 analysis. The rule has never depended on the existence 13 of an accrued right to interest at the time of the 14 dividend payment. That isn't position either under the 15 present statutory scheme or under the statutory scheme 16 as it existed at the time of the decision in 17 Bower v Marris. 18 Now, my Lord, in our submission the correct analysis 19 is as follows: firstly, under the statutory scheme the 20 creditor has a right to post-insolvency interest in the 21 event of a surplus. That is a right which is conferred 22 by the statute. It is a right to payment from the 23 estate administered by the office holder in accordance 24 with the statutory scheme. So that's first point, the 25 nature of the right.</p> <p style="text-align: center;">Page 116</p>

<p>1 The second point is that at the time dividend 2 payments are made, the creditor only has a contingent 3 right to such interest under the statutory scheme. He 4 only becomes entitled to receive payment of the interest 5 and he only has an accrued right to such interest when 6 the contingency is satisfied. So, in other words, where 7 there's a surplus after paying 100p in the pound on the 8 proved debts.</p> <p>9 That's a point which was made quite neatly by 10 Mr Justice Buckley in a case called WW Duncan which 11 your Lordship will find at tab 55, bundle 1B. If your 12 Lordship -- I don't think we need the facts of the case. 13 I just want to pick up one particular statement by 14 Mr Justice Buckley at page 315. In the middle of the 15 page, he's talking about what you admit to proof for 16 dividend in the winding-up of a company. He says: 17 "It's the amount of the debt at the commencement of 18 the winding-up. That has nothing whatever to do with 19 the payment of interest accruing due after the 20 winding-up. If the company turns out to be solvent, 21 there could not until the fact of the solvency was 22 ascertained be right to claim that interest." 23 So, my Lord, the position we suggest is that under 24 the statutory scheme actually as it exists now, as it 25 existed also then, is that at the time the dividend</p> <p style="text-align: center;">Page 117</p>	<p>1 Bower v Marris, they're all -- well, apart from 2 Lord Cottenham -- Bower v Marris is a difficult -- is in 3 one sense a special case, but in general these are cases 4 where there is a contractual right to interest. 5 Bower v Marris is a case actually concerned with 6 contractual interest. 7 MR SMITH: It is. 8 MR JUSTICE DAVID RICHARDS: I mean, as a general proposition 9 if on 1 March the debtor pays £1,000 and on 1 March only 10 principal is payable, there is no outstanding interest, 11 well, there can't be an appropriation to interest 12 because there is no interest outstanding. 13 MR SMITH: Yes. 14 MR JUSTICE DAVID RICHARDS: So as a general proposition, 15 applying these rules to a contractual position, the 16 proposition that there must be interest accrued at the 17 date of payment is right, isn't it? 18 MR SMITH: In terms for there to be an appropriation? 19 MR JUSTICE DAVID RICHARDS: Yes. 20 MR SMITH: Yes, indeed. 21 MR JUSTICE DAVID RICHARDS: I think that is the point. 22 I have to hear Mr Zacaroli but it may be he's not making 23 any bigger point than that. 24 MR SMITH: As I understand the point that's made -- the 25 point that's essentially made is to say that the</p> <p style="text-align: center;">Page 119</p>
<p>1 payments are made the creditor doesn't have an accrued 2 right to interest. At most he has a contingent right to 3 interest but ultimately whether that right accrues 4 depends whether or not there's a surplus. My Lord -- 5 MR JUSTICE DAVID RICHARDS: He must here be talking about 6 contractual interest because at this time, 1905, there 7 clearly wasn't, was there, any entitlement to interest 8 if you didn't have a right to it, apart from the 9 liquidation. 10 MR SMITH: You didn't, but -- you certainly didn't have 11 a right to interest from the estate unless you had 12 a contractual right, that's true, but the right to 13 interest from the estate only arose in the event of 14 a surplus. 15 MR JUSTICE DAVID RICHARDS: That's true, as it were, as part 16 of the liquidation process. As a matter of legal right, 17 interest was accruing, you just weren't entitled to 18 payment of it. 19 MR SMITH: Yes, but the question for these purposes, which 20 is what is the correct right to interest, in our 21 submission the right to interest is one that's conferred 22 by the statutory scheme. 23 MR JUSTICE DAVID RICHARDS: I mean, I think that as 24 I understand the point which is being made, which you're 25 now addressing, if you go back to cases like</p> <p style="text-align: center;">Page 118</p>	<p>1 rationale -- the juridical basis of Bower v Marris is 2 that it turns on the doctrine of appropriation and 3 essentially in order for the doctrine of appropriation 4 to apply, you need both accrued rights to principal and 5 interest at the time the dividend is paid. 6 MR JUSTICE DAVID RICHARDS: Yes. 7 MR SMITH: What he basically says is, "Well, how it works is 8 that the dividend payment is treated as being 9 appropriated to the accrued right in respect of 10 interest". Now, in my submission that's the point I'm 11 addressing. And in my submission that's not basis of 12 the rule, because so far as the right to interest is 13 concerned, that's a right to interest which arises under 14 the statutory scheme. 15 MR JUSTICE DAVID RICHARDS: Are you talking here about 16 contractual interest or interest which doesn't arise, 17 save under the statutory scheme? 18 MR SMITH: I'm talking about both. I'll come shortly to 19 section 132 of the 1925 Act, but certainly what we say 20 in relation to that is that the right to interest is 21 a statutory right. 22 MR JUSTICE DAVID RICHARDS: Sorry? The 1825 Act, yes. 23 MR SMITH: Yes. My Lord, I will also come after that to 24 Humber Ironworks because one of the things one needs to 25 look at quite closely in the case of Humber Ironworks is</p> <p style="text-align: center;">Page 120</p>

<p>1 how actually the Companies Act worked at that time and 2 how the right to interest out of the assets worked. 3 MR JUSTICE DAVID RICHARDS: Okay. 4 MR SMITH: My Lord, certainly our submission is that it's 5 not based on an accrued right to interest because the 6 relevant right is the right that arises under the 7 statutory scheme. That right only accrues due where 8 there is a surplus. 9 MR JUSTICE DAVID RICHARDS: Can I just put it this way, jus 10 so you can deal with it: if we start using this language 11 of debtors and creditors appropriating payments to 12 certain debts and so on, this is going into -- going out 13 of insolvency, just into the general position about 14 payments from debtors to creditors; that was the 15 Privy Council case that Mr Dicker took me to this 16 morning, and so on. So that's all operating in an area 17 where, on the date of payment by the debtor, there are 18 two elements to the debt which are then payable. 19 MR SMITH: Yes, correct. 20 MR JUSTICE DAVID RICHARDS: Now, insofar as the judges in 21 the Bower v Marris type of cases used that approach, 22 they are, it may be said, assuming that at the date of 23 payment there are accrued rights to payment of principal 24 and interest. If there aren't, then the judges are 25 going much further than that. They're actually creating</p> <p style="text-align: center;">Page 121</p>	<p>1 MR JUSTICE DAVID RICHARDS: Sorry, I have Bower v Marris 2 here. Let's just have a look at that very point, if we 3 may, in Bower v Marris. I think page 335. 4 MR SMITH: Yes exactly. So the passage I obviously had in 5 mind is the bottom of page 355. 6 MR JUSTICE DAVID RICHARDS: Yes. 7 MR SMITH: Where he says this: 8 "As this mode of payment is regulated by Acts of 9 Parliament ...(reading to the words)... cannot have any 10 place in the consideration of the present question." 11 So, my Lord, what he seems to be saying there is 12 it's not a question of the doctrine of appropriation 13 because that turns on the intention of the debtor or 14 creditor, rather it's a question of how the Act applies. 15 Then, ultimately, he deals with it on that basis. 16 I think we have put together, probably in the 17 skeleton argument, the other various dicta one gets 18 where they say throughout the succeeding cases it's 19 nothing to do with the doctrine of appropriation. 20 MR JUSTICE DAVID RICHARDS: Well, okay. I see. So if 21 that's right, then obviously whether or not it's accrued 22 due for payment at the relevant date is really neither 23 here nor there. 24 MR SMITH: Yes. It's a very similar -- it's very similar, 25 I would suggest, to the approach your Lordship saw in</p> <p style="text-align: center;">Page 123</p>
<p>1 a new doctrine that doesn't depend upon simply an 2 application of appropriation in the ordinary course and 3 so on. 4 MR SMITH: Yes. 5 MR JUSTICE DAVID RICHARDS: I mean, that's not a reason why 6 it's not good law, but it's no -- it is carrying the 7 doctrine quite a lot further. 8 MR SMITH: I see the distinction and obviously your 9 Lordship, I think, starts from the proposition that in 10 Bower v Marris, I think Lord Cottenham said in terms 11 that this is nothing to do with the doctrine of 12 appropriation. 13 MR JUSTICE DAVID RICHARDS: Well, I need to look closely at 14 what he said. 15 MR SMITH: It's very important, and that point is then 16 picked up in two or three of the other cases, where they 17 say it's nothing to do with doctrine of appropriation. 18 My Lord the reason I suggest it's nothing to do with 19 doctrine of appropriation is that the statutory right to 20 interest isn't a right that's accrued at the time the 21 payment is made. 22 MR JUSTICE DAVID RICHARDS: No. 23 MR SMITH: That's why it's distinct. So, my Lord, it's not 24 an example of the application of the normal rules of 25 appropriation.</p> <p style="text-align: center;">Page 122</p>	<p>1 Gourlay v Watson actually because what they say there is 2 the payments are made pursuant to principal at a time 3 when there's no conception there's going to be any 4 interest payable. How it works is that those payments 5 are not appropriated. There can't be any question of 6 appropriation because no interest has yet accrued due, 7 but what does happen is where you then get a surplus 8 which arises, the creditor is entitled then to treat 9 payments as having been applied first in interest, 10 rather than in discharge of principal. 11 So, my Lord, that's in our submission how it works. 12 MR JUSTICE DAVID RICHARDS: Right. Thank you. 13 MR SMITH: My Lord, that analysis, we suggest, applies 14 equally in the context of the statutory scheme under the 15 86 Act and the 86 rules as it did to the 1825 16 Bankruptcy Act, and as it did to all other statutory 17 schemes. Contrary to Wentworth's analysis, the rule 18 isn't dependent on the debtor having accrued rights in 19 respect of both principal and interest at the time the 20 dividend payments were made. 21 My Lord, I'm not sure what time your Lordship -- 22 MR JUSTICE DAVID RICHARDS: If it's a convenient moment 23 I'll rise. We'll have a five-minute break now. 24 (3.10 pm) 25 (Short break)</p> <p style="text-align: center;">Page 124</p>

<p>1 (3.15 pm) 2 MR SMITH: My Lord, I am going to deal next very briefly 3 with section 132 of the 1825 Act -- 4 MR JUSTICE DAVID RICHARDS: Yes. 5 MR SMITH: -- which your Lordship will find in bundle 3A 6 tab 10. Obviously your Lordship will have well in mind 7 the 1825 Act established the familiar sort of statutory 8 scheme for bankruptcy, creditors are entitled to proof 9 for the debts and demands which they had contracted for 10 when the commission was issued. 11 So far as section 132 itself is concerned, I think 12 Mr Dicker has already pointed out to you the similar 13 language to rule 2.88. It provides that interest is 14 payable after the creditors who have proved under the 15 commission have been paid. So it's looking at the 16 position after payment of their proved debts. Once that 17 happened, the bankrupt was entitled to recover the 18 surplus, but that was subject to the assignees first 19 paying post-bankruptcy interest. 20 That's obviously relevant to the point the 21 administrators make, that the difference with rule 2.88 22 is it contains a mandatory direction to apply for the 23 surplus. But, in our submission, in substance, that was 24 exactly the position also under section 132. 25 Then, my Lord, also section 132 provides for the</p> <p style="text-align: center;">Page 125</p>	<p>1 the authorities. It's Lord Cairns at page 18 and 2 Sir William Page Wood at page 19 of that report. 3 MR JUSTICE DAVID RICHARDS: Right. 4 MR SMITH: My Lord, there's some significance to that 5 because it means that the first category of interest 6 under section 132 was not limited to a purely 7 contractual rate, in the sense of a rate bargained for 8 under the contract. It also extended to the rate which 9 could have been awarded by a court at an action of law 10 in relation to a debt which was repayable on demand. 11 MR JUSTICE DAVID RICHARDS: Yes. 12 MR SMITH: So, my Lord, the first category does go, we would 13 suggest, somewhat broader than pure contractual 14 interest. 15 The second category of interest -- sorry, the second 16 category of claims on which interest bore plainly did 17 extend to cases where the creditor had no contractual 18 entitlement to interest; that was the whole purpose of 19 that category. 20 Now, Wentworth say directly that that second 21 category wasn't at issue in Bower v Marris itself 22 directly, which was true, but the implication of their 23 argument seems to be that there would have been 24 a different approach in relation to the first category 25 of interest versus the second category, where I think on</p> <p style="text-align: center;">Page 127</p>
<p>1 payment of interest upon their debts. Your Lordship 2 sees that in the middle of the passage. So, again, like 3 rule 2.88(7), it provides specifically for the payment 4 of interest on accrued debts. 5 MR JUSTICE DAVID RICHARDS: Yes. 6 MR SMITH: Now, my Lord, so far as the treatment of those 7 debts are concerned, they obviously fell into two 8 categories. The first category was where there was 9 a rate of interest reserved or by law payable on the 10 debt. 11 MR JUSTICE DAVID RICHARDS: Yes. 12 MR SMITH: Then essentially the second category, which was 13 ranked lower in priority, was all other debts. 14 Rate of interest probably doesn't require any 15 explanation. "By law payable thereon" appears to have 16 been intended to capture the position where a creditor 17 had a debt which wasn't -- which was payable on demand 18 but where the instrument did not provide for interest. 19 The legal position at the time being appears to be that 20 when that creditor brought an action on the debt he 21 would be entitled as a matter of law to interest at 22 a rate of 5 per cent from the date of the demand. I am 23 not going to take your Lordship to it, but for 24 your Lordship's note that's explained in a case called 25 re East of England Banking Company which is in tab 26 of</p> <p style="text-align: center;">Page 126</p>	<p>1 their case they say Bower v Marris applies to the first 2 category but wouldn't apply, they would say, to the 3 second category. I'm not sure what their position would 4 be in relation to debts which bore the 5 per cent 5 interest at law within the first category. But, 6 my Lord, it would be very odd, we would say, if there 7 had been that difference in treatment and, as Mr Dicker 8 pointed out yesterday, Bower v Marris did not 9 distinguish -- the Lord Chancellor in Bower v Marris did 10 not distinguish between the two categories of debt in 11 his judgment. He did not seem to think there was any 12 real distinction. 13 Now, my Lord, just on section 132, obviously it was 14 part of the statutory scheme which we say was 15 essentially the same as the scheme which is in place 16 today under the current Act. Statutory rights to 17 interest arose under that scheme where there was 18 a surplus. So in the same way as under the current Act, 19 once there was a surplus there was a statutory right to 20 interest. Those rights were statutory rights in our 21 submission. One way to test that is to think how 22 a creditor might have pleaded an action if the assignees 23 had failed to make payment of interest. In our 24 submission what the creditor would have been doing is 25 claiming against the assignee, relying on his statutory</p> <p style="text-align: center;">Page 128</p>

<p>1 right under section 132.</p> <p>2 Now, at the time any dividend payments were made,</p> <p>3 entitlement to interest pursuant to such rights was</p> <p>4 purely contingent. It was dependent on there being</p> <p>5 a subsequent surplus. My Lord, consistent with the</p> <p>6 statutory nature of the rights, as I pointed out to your</p> <p>7 Lordship, they plainly encompassed a right to interest</p> <p>8 which went beyond that, provided for in the contract</p> <p>9 itself, and in my submission one sees that in relation</p> <p>10 to both categories of right.</p> <p>11 So, my Lord, in our submission, looking at the way</p> <p>12 section 132 worked, looking at the rights which were</p> <p>13 conferred under 132, it's inconsistent with the way</p> <p>14 Wentworth seeks to analyse the decision in</p> <p>15 Bower v Marris as being based on this idea of doctrine</p> <p>16 of appropriation and based on the idea of remission to</p> <p>17 contractual rights. In our submission that's not how it</p> <p>18 works.</p> <p>19 My Lord, I'm not going to go back to the decision in</p> <p>20 Bower v Marris itself. Obviously subsequent case law</p> <p>21 has applied Bower v Marris. There's three main points</p> <p>22 we would emphasise to your Lordship which are really all</p> <p>23 relevant to the question of whether these authorities</p> <p>24 bear on the position under rule 2.88.</p> <p>25 The first is clearly a number of those cases have</p> <p style="text-align: center;">Page 129</p>	<p>1 Whittingstall v Grover, which is in tab 43 of the first</p> <p>2 authorities bundle. Again, I'm afraid it's a slightly</p> <p>3 complicated and unusual set of facts. It's probably --</p> <p>4 MR JUSTICE DAVID RICHARDS: Sorry, where?</p> <p>5 MR SMITH: Tab 43, my Lord.</p> <p>6 MR JUSTICE DAVID RICHARDS: Sorry, I have got out the wrong</p> <p>7 bundle.</p> <p>8 MR SMITH: Bundle 1A.</p> <p>9 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>10 MR SMITH: Your Lordship sees it begins in the right-hand</p> <p>11 column, the headnote. My Lord, essentially what it was</p> <p>12 concerned with was the administration of an estate of</p> <p>13 a deceased partner in a banking business. Your Lordship</p> <p>14 sees from the headnote:</p> <p>15 "For many years prior to 1856 A carried on a banking</p> <p>16 ...(reading to the words)... for the administration of</p> <p>17 the estate of A."</p> <p>18 So it was a relatively complex situation where one</p> <p>19 had a testamentary estate on the one hand and a bankrupt</p> <p>20 estate on the other. The questions really related to</p> <p>21 the manner in which the testamentary estate was to be</p> <p>22 administered.</p> <p>23 One of the main questions related to the position of</p> <p>24 separate creditors vis-a-vis joint creditors, in</p> <p>25 particular their priority in the estate of A.</p> <p style="text-align: center;">Page 131</p>
<p>1 been concerned with interest other than as provided for</p> <p>2 under the terms of the contract. There are cases where</p> <p>3 the rule applies where the relevant obligation to pay</p> <p>4 interest arises because of a judgment rate, for example</p> <p>5 rather than merely a contractual rate. So, for example,</p> <p>6 where a creditor has obtained a judgment debt.</p> <p>7 Mr Dicker, I think, showed your Lordship the Supreme</p> <p>8 Court of New South Wales decision in Tahore.</p> <p>9 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>10 MR SMITH: But, importantly, the second category, there are</p> <p>11 also cases where the rules applicable to the</p> <p>12 administration of the relevant estate itself gave rise</p> <p>13 to an entitlement to statutory interest. So, in other</p> <p>14 words, a number of the cases where the rule has been</p> <p>15 applied are where the debt did not otherwise itself bear</p> <p>16 interest but the right to interest was in effect</p> <p>17 conferred by the statutory scheme.</p> <p>18 My Lord, those cases, which we would suggest on</p> <p>19 analysis would include Bower v Marris, make the idea</p> <p>20 that Bower v Marris is founded on the concept of</p> <p>21 remission to contractual rights rather difficult to</p> <p>22 maintain.</p> <p>23 Now, Mr Dicker, I think, showed your Lordship</p> <p>24 a number of examples. One other example he didn't show</p> <p>25 your Lordship is Mr Justice Chitty in</p> <p style="text-align: center;">Page 130</p>	<p>1 Your Lordship sees that's dealt with really in the</p> <p>2 second and third paragraph of the headnote.</p> <p>3 Then in the fourth paragraph, it said this:</p> <p>4 "The result of the actions to administer the estate</p> <p>5 of A ...(reading to the words)... ascertaining the</p> <p>6 amount of the interest due."</p> <p>7 It's obviously that last point which is of</p> <p>8 particular interest to us.</p> <p>9 Then, my Lord, the two holdings:</p> <p>10 "Held firstly, that the question of interest should</p> <p>11 be decided in accordance with the established rule as to</p> <p>12 the principal and as a consequence the separate</p> <p>13 creditors are entitled to take their interest in</p> <p>14 priority to the joint creditors."</p> <p>15 Then this:</p> <p>16 "Also that the dividends received ought to be</p> <p>17 accounted for ...(reading to the words)... to the</p> <p>18 reduction of the principal."</p> <p>19 So, again, one sees the language of ordinary</p> <p>20 payments on account and then applying dividends first in</p> <p>21 payment of the interest calculated and then in reduction</p> <p>22 of the principal.</p> <p>23 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>24 MR SMITH: Now, so far as the judgment of Mr Justice Chitty</p> <p>25 is concerned, one can probably pick it up, I think, at</p> <p style="text-align: center;">Page 132</p>

<p>1 page 217, which is the last page of the report, where he 2 begins in the second sentence at the top of the page: 3 "The next question which arises relates to 4 interest ..." 5 MR JUSTICE DAVID RICHARDS: So that's on page ...? 6 MR SMITH: Page 217, the last page of the report. 7 MR JUSTICE DAVID RICHARDS: Yes. 8 MR SMITH: Column 1, the left-hand column. 9 MR JUSTICE DAVID RICHARDS: The left-hand column. 10 MR SMITH: It begins the second sentence: 11 "The next question which arises relates to 12 interest ..." 13 MR JUSTICE DAVID RICHARDS: I see. 14 MR SMITH: Having dealt with a rather complicated question 15 about separate and joint debts, he now moves on to the 16 interest point. 17 MR JUSTICE DAVID RICHARDS: Right. 18 MR SMITH: He says: 19 "After payment of 20 shillings in the pound to the 20 joint and separate creditors ...(reading to the 21 words)... the testate for separate creditors ..." 22 Then this point is important: 23 "... whose debts did not by law or special contract 24 carry interest." 25 So he's dealing, amongst other things, with</p> <p style="text-align: center;">Page 133</p>	<p>1 "The orders of 1841 relating to interest are in 2 substance repeated in the consolidated orders of 1861 3 and are now embodied in the subsisting rules of court, 4 order 55, rules 62 and 63." 5 My Lord, it makes it worth just having a look at 6 those because it's helpful in understanding what the 7 case decided. Your Lordship will wish to leave 8 Whittingstall v Grover open. The rules themselves are 9 in bundle 3D, tab 57. Your Lordship sees the relevant 10 rules are rules 62 and 63. Firstly, rule 62: 11 "Where a judgment award is made directly ...(reading 12 to the words)... from the date of judgment or order." 13 Then 63: 14 "A creditor whose debts do not carry interest 15 ...(reading to the words)... as by law carry judgment." 16 So it's essentially providing for two things. 17 Firstly, a contractual right to interest would be 18 recovered, but, in addition, the creditor of the debt 19 didn't carry interest and is entitled to recover that, 20 subject to establishing his debt. 21 MR JUSTICE DAVID RICHARDS: Yes. 22 MR SMITH: So, my Lord, essentially it covered both 23 non-contractual -- contractual and non-contractual 24 interest. 25 MR JUSTICE DAVID RICHARDS: Yes.</p> <p style="text-align: center;">Page 135</p>
<p>1 creditors whose claims did not carry interest. 2 Then he goes on to refer to decision in ex parte 3 Reeve, and a decision in ex parte Findlay. 4 Then he says: 5 "As between the separate creditors of the testator 6 whose debt ...(reading to the words)... who do not by 7 law carry interest on the other hand." 8 So there's a question of priority between the joint 9 creditors and the separate creditors who didn't have 10 interest as a matter of law. 11 Then he sets out the relevant arguments, just in the 12 middle of that page, as to the contentions of the two 13 creditors. Then if your Lordship picks it up, my Lord 14 will just see in the middle of the page, left-hand 15 column, he says: 16 "The orders of 1841 relating to interest were in 17 substance repeated in the consolidated orders of 1861 18 and are now embodied" -- 19 MR JUSTICE DAVID RICHARDS: I am sorry, I've lost you again 20 MR SMITH: It's just in the middle of the page. 21 MR JUSTICE DAVID RICHARDS: In the left-hand column? 22 MR SMITH: Yes. Your Lordship will see, about halfway down, 23 the sentence beginning, "The orders of 1841 ..." 24 NEW SPEAKER: Yes, I have it. 25 MR SMITH: I was picking it up there:</p> <p style="text-align: center;">Page 134</p>	<p>1 MR SMITH: I've shown your Lordship it's clear from the 2 report that Mr Justice Chitty was considering both. 3 Now, moving back to the report, page 217, the 4 right-hand column, where he gets to on the question of 5 priority is about halfway down, two-thirds of the way 6 down. He says this: 7 "The sound rule therefore appears to me to be that 8 as between the joint and separate creditors the question 9 of interest should be decided in accordance with 10 established rules to principal." 11 Then this is the important part for our purposes: 12 "The remaining question relates to the manner in 13 which the dividends received ought to be accounted for 14 in ascertaining the amount of interest due. All the 15 dividends have been paid in process of law and the 16 account ought to be taken in the manner pointed out in 17 Bower v Marris and the Warrant Finance Company's case by 18 treating the dividends as ordinary payments on account 19 and applying each dividend in the first place to the 20 payment of interest calculated to the day of such 21 dividend and the surplus, if any, to the reduction in 22 principal." 23 So, my Lord, that again is clearly an example of the 24 application of the Bower v Marris principle. It was 25 concerned not only with contractual interest but also</p> <p style="text-align: center;">Page 136</p>

<p>1 with the right to interest arising under statutory 2 rules. It was also concerned as per rule 63 with 3 a situation where interest was only payable where assets 4 remained after satisfying the debts established. 5 So in many ways it was rather similar scheme to 6 rule 2.88. It also, obviously, post-dates the 1883 Act. 7 Mr Dicker has also pointed to perhaps another 8 passage I should draw your Lordship's attention to which 9 is just slightly further up in page 217, the right-hand 10 column. It's immediately preceding the bit I showed 11 your Lordship. You can see a sentence: 12 "Nor can I find any reason which in regard to 13 subsequent interest ...(reading to the words)... which 14 appears on the face of the general orders themselves." 15 So that emphasises the point that he was clearly 16 dealing both with contractual interest and also interest 17 which arose as a matter of law under rule 63. 18 So, my Lord, that, we suggest, is a good example of 19 the approach of treating the dividend payments as 20 payments on account. It's an example where one is 21 looking not merely at contractual interest and it's an 22 example where one is looking at a right to interest 23 which arises where there is a surplus. 24 Now, my Lord, that's the first category of cases. 25 The second category of cases is there are a large</p> <p style="text-align: center;">Page 137</p>	<p>1 MR SMITH: For these purposes I think we can probably just 2 start with section 98 which your Lordship hopefully has 3 on the first page of the tab. 4 MR JUSTICE DAVID RICHARDS: Yes. 5 MR SMITH: Your Lordship sees that that provided that as 6 soon as may be after making an order for the winding-up 7 of a company, the court should settle a list of 8 contributories and then: 9 "... should cause the assets of the company to be 10 collected and applied in discharge of its liabilities." 11 Now, that obviously on its face just refers to the 12 liabilities of the company generally. It's not -- the 13 statute itself didn't provide for a cut-off date. There 14 was, in addition, to section 98, rule 26 of the order 15 of November 1862 which your Lordship will see at the 16 back of that tab. 17 MR JUSTICE DAVID RICHARDS: Sorry, where is that? 18 MR SMITH: It's the order of court, rule 26. 19 MR JUSTICE DAVID RICHARDS: Yes. 20 MR SMITH: I think Mr Dicker showed you. It's the rule, 21 part of which was declared ultra vires, but 22 your Lordship sees that that in effect informs or 23 supplemented section 98 because it said what could be 24 recovered and essentially it was interest on such dates 25 as claimed --</p> <p style="text-align: center;">Page 139</p>
<p>1 number of cases which concern payment of interest out of 2 a surplus after payment order discharge of the principal 3 debts. That's the scheme which your Lordship will see 4 in a number of these cases. It the position in 5 Bower v Marris itself. Whittingstall v Grover is that 6 sort of case. Gourlay v Watson was that sort of case as 7 well, and Mr Dicker has also shown you, I think, the two 8 Canadian cases and the Irish case. So, my Lord, again 9 one sees in effect the same submission arising in 10 Bower v Marris being applied in relation to those cases. 11 Now, my Lord, the final category of cases I just 12 want to refer to are the company liquidation cases, such 13 as Humber Ironworks in particular. 14 MR JUSTICE DAVID RICHARDS: Hmm, hmm. 15 MR SMITH: I think one of the points that's sort of made is 16 that actually the position at the time of 17 Humber Ironworks was there wasn't a statutory provision 18 dealing with the payment of interest from the insolvency 19 surplus as such and, therefore, it was entirely 20 a question of remission to the contractual rights. 21 Now, in my submission that's not accurate. One has 22 to start with the 1863 Companies Act which was the Act 23 which was in force at the time of Humber Ironworks, 24 which your Lordship will see in bundle 3A, tab 18. 25 MR JUSTICE DAVID RICHARDS: Yes.</p> <p style="text-align: center;">Page 138</p>	<p>1 MR JUSTICE DAVID RICHARDS: My eye has been caught, although 2 I don't think it's in point, by rule 2.1. 3 MR SMITH: Rule 2.1? 4 MR JUSTICE DAVID RICHARDS: Yes. I hadn't previously seen 5 legislation referring to Lincoln's Inn Hall. It's 6 a very proper addition. 7 MR SMITH: I remember noticing that, yes. No, quite. 8 MR JUSTICE DAVID RICHARDS: Anyway, sorry. 9 MR SMITH: Back to rule 26. Obviously that in effect 10 informed what could be recovered from the assets of the 11 company pursuant to section 98 and it provided in the 12 part that wasn't held to be ultra vires that the rate 13 the debts carried could be recovered. 14 Now, just going back to section 98 for a moment. 15 Section 98 obviously on its face allowed all the 16 liabilities of the company to be paid out of the assets. 17 What it didn't do on the face of the statute was to 18 impose a cut-off date. Now, how that obviously 19 subsequently worked is there was a judge-made rule 20 developed in Humber Ironworks which in my submission 21 effectively superimposed on top of section 98 and 22 essentially qualified the position by holding that 23 a creditor was to prove in the first instance for 24 principal and interest at the date of the winding-up and 25 only claim after that date if there was a surplus. So,</p> <p style="text-align: center;">Page 140</p>

<p>1 as we analyse it, that in effect is judge-made rule that 2 superimposed on top of section 98.</p> <p>3 Obviously once there was a surplus, that judge-made 4 rule would cease to apply. The position then was the 5 creditor was in effect back to his rule -- his 6 position -- his right under section 98. So in effect 7 once the judge-made rule had ceased to operate because 8 there was a surplus, the creditor was then entitled to 9 recover his post-insolvency interest pursuant to 10 section 98.</p> <p>11 Now, my Lord, in those submissions -- in those 12 circumstances what we submit is the right to 13 post-insolvency interest was in essence a statutory 14 right. It was a right that arose under section 98. 15 Moreover, it was a right that only arose where there was 16 a surplus. That's the effect of the judge-made rule in 17 Humber Ironworks. The extent of the right was 18 delineated by statute. Moreover, my Lord, looking at 19 the position under section 98 in light of Humber 20 Ironworks, there was no accrued right to interest 21 pursuant to section 98 at the time the dividend payments 22 were made. The accrued right to interest only arose 23 once there was a surplus and once the judge-made 24 restriction on claiming under section 98 was lifted. 25 So, my Lord, as we see it, it's not really accurate</p> <p style="text-align: center;">Page 141</p>	<p>1 it is only if you're entitled to interest by contract.</p> <p>2 MR SMITH: It is. So there's that difference, but in terms 3 of the basic shape and outline of the right, we say it's 4 a right conferred by statute, it's a right that only 5 arises where there is a surplus, and it's a right the 6 extent of which is delineated by the statute itself.</p> <p>7 MR JUSTICE DAVID RICHARDS: I can see that you can say there 8 is conferred a statutory right to participate in 9 a distribution of the estate --</p> <p>10 MR SMITH: Yes.</p> <p>11 MR JUSTICE DAVID RICHARDS: -- in respect of 12 post-liquidation contractual interest --</p> <p>13 MR SMITH: Yes.</p> <p>14 MR JUSTICE DAVID RICHARDS: Which would suggest that that 15 would rank ahead of non-provable claims.</p> <p>16 MR SMITH: Yes.</p> <p>17 MR JUSTICE DAVID RICHARDS: I'm not sure it goes beyond 18 that.</p> <p>19 MR SMITH: Well, it does in the sense it's also a right that 20 only arises where there is a surplus, because that's the 21 effect of the judge-made rule in Humber Ironworks. What 22 that rule does is effectively say you're limited until 23 there is a surplus to claiming your principal and 24 accrued interest to the date of the winding-up. Once 25 there is a surplus, that limitation is lifted and you</p> <p style="text-align: center;">Page 143</p>
<p>1 to say there's no statutory provision for interest at 2 the time of Humber Ironworks. The position obviously 3 not spelt out on the face of the statute in the way it 4 is now, but, as a matter of concept, what the creditor 5 was doing was exercising a right to claim under the 6 statute which only arose once there was a surplus in 7 this case.</p> <p>8 My Lord, what the creditor wasn't doing was 9 enforcing a contractual course of action against the 10 company. Rather, what he had was a right to payment 11 from the liquidation state administered by the 12 liquidator. And in modern terminology in effect his 13 right was a right conferred by the statutory scheme for 14 payment from the estate held by the liquidator on the 15 statutory trusts.</p> <p>16 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>17 MR SMITH: So, my Lord, when one sees the reference to 18 "remission to the contractual rights" and similar terms 19 in the speech of Lord Justice Giffard, in particular, we 20 suggest some care needs to be taken about taking those 21 too literally. Actually when one drills down and 22 analyses the nature of the rights, we suggest actually 23 it's little different from the right which exists under 24 2.88.</p> <p>25 MR JUSTICE DAVID RICHARDS: Well, 2.88 insofar -- well, but</p> <p style="text-align: center;">Page 142</p>	<p>1 then have your full right under section 98.</p> <p>2 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>3 MR SMITH: So, my Lord, we do submit that actually it's 4 essentially statutory. My Lord, that was the position 5 under the 1862 Act. It appears to have remained 6 essentially the same under the 1948 Act and the 1949 7 rules which were in place at the time of 8 re Lines Brothers. The only differences we can see is 9 that section 98 became replaced by section 257 of the 10 1948 Act and rule 26 was replaced by rule 100 of the 11 1949 rules.</p> <p>12 MR JUSTICE DAVID RICHARDS: The section was section 2 ...?</p> <p>13 MR SMITH: It became section 257 and rule 26 became rule 100 14 of the 1949 rules.</p> <p>15 MR JUSTICE DAVID RICHARDS: Thank you.</p> <p>16 MR SMITH: So, my Lord, that's what I wanted to say about 17 the cases.</p> <p>18 My Lord, a very short point on the 1883 Act. 19 I think Mr Dicker mentioned there were a couple of 20 textbooks.</p> <p>21 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>22 MR SMITH: I should just show your Lordship briefly, they're 23 both in the second authorities bundle. The first is at 24 tab 12. I'm sorry, we don't seem to have the 25 frontispiece in the bundle. It is actually a textbook</p> <p style="text-align: center;">Page 144</p>

<p>1 by someone called Robson. It's called a Treatise on the 2 Law of Bankruptcy. This is its seventh edition and it 3 was 1894. 4 MR JUSTICE DAVID RICHARDS: It would be quite helpful to 5 have that. 6 MR SMITH: I will get that, my Lord. 7 The relevant passage is at page 201. 8 MR JUSTICE DAVID RICHARDS: Sorry, this is tab ...? 9 MR SMITH: I am sorry, 291. My apologies. 10 MR JUSTICE DAVID RICHARDS: Yes. 11 MR SMITH: Your Lordship sees he's dealing here with 12 section 40. The relevant bit is in footnote G at the 13 bottom of page 291. It begins right at the bottom of 14 the left-hand column. He says: 15 "As to the mode of calculating interest under the 16 old law, where there was a surplus (see <i>Bower v Marris</i> 17 <i>overruling re Higginbottom</i>)." 18 Then he also refers to <i>Whittingstall v Grover</i>. 19 Now, we rely on that because we suggest that what 20 that is indicating is that the <i>Bower v Marris</i> approach 21 continued to apply. I think <i>Wentworth</i> say, well, the 22 fact he referred to the old law means he was drawing 23 a point of distinction. We would suggest that's not 24 really the tenor of what he's saying here and really, 25 looking at that, what he is more likely saying is the</p> <p style="text-align: center;">Page 145</p>	<p>1 My Lord, those are just two references from the 2 textbook. 3 So far as the construction -- 4 MR JUSTICE DAVID RICHARDS: Was <i>Williams on Bankruptcy</i> in 5 its various editions silent on the point? 6 MR SMITH: <i>Williams on Bankruptcy</i> I don't think says 7 anything on this point. 8 MR JUSTICE DAVID RICHARDS: No. 9 MR SMITH: I think that's true in any of its editions 10 actually. 11 MR JUSTICE DAVID RICHARDS: Right. 12 MR SMITH: So these are the only ones we were able to find. 13 MR JUSTICE DAVID RICHARDS: Yes. 14 MR SMITH: My Lord, turning then to the 1986 Act. Obviously 15 our primary submission is the wording at face value 16 doesn't exclude the operation of the rules at all. 17 Mr Dicker has dealt with that. There's one point we 18 would just like to emphasise in response to the 19 suggestion, I think made in particular by the joint 20 administrators, that the Act and the rules are a code. 21 That's a suggestion, I think, appears particularly in 22 the joint administrators' skeleton. We would 23 respectfully submit the Act and rules are not a code. 24 There's a large number of examples of equitable 25 principles operating alongside the statute.</p> <p style="text-align: center;">Page 147</p>
<p>1 same approach continued to apply. 2 That's one textbook. 3 The other textbook is tab 16 in the same bundle, 4 where we do have the frontispiece. It's a textbook by 5 a gentleman called Henry Wace. Your Lordship sees over 6 the page -- sorry, this is dated 1904 so slightly later 7 and, again, after the 1883 Act. 8 MR JUSTICE DAVID RICHARDS: Yes. 9 MR SMITH: Your Lordship sees, over the page, the very last 10 paragraph of the commentary, before he gets on to 11 section 41, he says: 12 "It is conceived that the interest is to be computed 13 as running interest, treating the dividends as ordinary 14 payments on account and applying each dividend in the 15 first place to the payment of the interest which would 16 have been due at the date of the dividend if there had 17 been no bankruptcy, and the surplus only, if any, in 18 reduction of the principal; <i>Bromley v Goodere</i>, 19 <i>ex parte Morris</i> and <i>Bower v Marris</i>, disapproving 20 <i>re Higginbottom</i>." 21 So that's another textbook post the 1883 Act which 22 we say seems to suggest <i>Bower v Marris</i> remains good law, 23 which also chimes with <i>Whittingstall v Grover</i> and the 24 Scots case, <i>Gourlay v Watson</i>, which seems to have 25 proceeded on the same basis.</p> <p style="text-align: center;">Page 146</p>	<p>1 If I can invite your Lordship just to take 2 bundle 1E. There's a good example in the decision of 3 the Supreme Court in the <i>Mills v HSBC</i> case which your 4 Lordship will find at tab 156A of volume 1E. 5 Your Lordship sees, I think, paragraph 1 of the judgment 6 of Lord Walker. This decision itself concerned the rule 7 in <i>Cherry v Boulton</i>. 8 All I'm relying on it for is the general description 9 your Lordship finds in paragraph 1 of the judgment. 10 You'll see Lord Walker describes in the first sentence: 11 "The appeal is concerned with the long-standing 12 principle of insolvency law, known as the rule against 13 double proof." 14 Then he goes on to make the point, one sentence on: 15 "Like the anti-deprivation rule recently considered 16 by the ...(reading to the words)... implicit in the 17 <i>Insolvency Act 1986</i>." 18 So there are a number of examples of quite important 19 rules, such as the rule against double proof, such as 20 the anti-deprivation rule, which one doesn't find 21 necessarily articulated in express words on the face of 22 the statute but nevertheless exist as part of the 23 insolvency scheme. 24 There's one other good example of that which 25 your Lordship will find in <i>Stein v Blake</i> which is in</p> <p style="text-align: center;">Page 148</p>

<p>1 authorities bundle 1C, tab 120.</p> <p>2 The example Lord Hoffmann gives is against the</p> <p>3 letter D on page 253. He is dealing here with the</p> <p>4 operation of the insolvency set-off rules in bankruptcy.</p> <p>5 The point he makes here is that, well, if you look at</p> <p>6 the wording of the statute, any creditor of the bankrupt</p> <p>7 proving or claiming to prove for a bankruptcy debt, you</p> <p>8 might think, not perhaps unfairly, that the operation of</p> <p>9 the section actually depended on the lodging of a proof,</p> <p>10 but, as per the established principles and the case law,</p> <p>11 that's not the case, and, notwithstanding that wording,</p> <p>12 the way the words are construed is to mean any creditor</p> <p>13 who would have been entitled to poof for a bankruptcy</p> <p>14 debt.</p> <p>15 So, my Lord, in those two ways the Insolvency Act</p> <p>16 isn't a code. There are equitable principles which</p> <p>17 exist alongside it and which, if necessary, qualify the</p> <p>18 wording of both the Act and the rules.</p> <p>19 My Lord, I'm not going to repeat what Mr Dicker said</p> <p>20 about the construction of the rules. We gratefully</p> <p>21 adopt what he said about that.</p> <p>22 In our submission there is nothing in the rule</p> <p>23 itself which excludes the operation of Bower v Marris,</p> <p>24 both as a matter of looking at the rules in isolation</p> <p>25 but also particularly when one looks at the very similar</p> <p style="text-align: center;">Page 149</p>	<p>1 when you're dealing with the position of co-obligors,</p> <p>2 then that calls for a different approach?</p> <p>3 MR SMITH: Well --</p> <p>4 MR JUSTICE DAVID RICHARDS: You're not bound by sort of</p> <p>5 insolvency principles. I mean, I'm thinking, for</p> <p>6 example, you can prove in the estates of two co-obligors</p> <p>7 for the full amount of your claim.</p> <p>8 MR SMITH: Yes.</p> <p>9 MR JUSTICE DAVID RICHARDS: You don't have to give credit</p> <p>10 for distributions in one or the other.</p> <p>11 MR SMITH: Yes.</p> <p>12 MR JUSTICE DAVID RICHARDS: Which would, on one view, seem</p> <p>13 to run contrary to --</p> <p>14 MR SMITH: But there's two points in relation to that.</p> <p>15 Obviously what one is concerned with there is treating</p> <p>16 in effect a payment which is received by the creditor so</p> <p>17 it's not -- it's not quite the same as the creditor is</p> <p>18 simply asserting a right. One is looking for these</p> <p>19 purposes at what is the effect of the payment the</p> <p>20 creditor receives. If he's required to treat that as</p> <p>21 being appropriated to the principal in the case of the</p> <p>22 insolvent co-obligor, it is a little difficult to see,</p> <p>23 pursuant to the principle of co-extensiveness, how one</p> <p>24 has a different position if he's a solvent co-obligor.</p> <p>25 MR JUSTICE DAVID RICHARDS: So if we were to take not</p> <p style="text-align: center;">Page 151</p>
<p>1 provisions in the other cases where the rules have been</p> <p>2 held to apply.</p> <p>3 My Lord, there is then a point -- a separate point</p> <p>4 and a practical point in relation to the position of</p> <p>5 co-obligors and how the various arguments work where one</p> <p>6 is dealing with co-obligor situation.</p> <p>7 The facts of Bower v Marris itself obviously</p> <p>8 concerned co-obligors. The point which the</p> <p>9 Lord Chancellor made in that case is why should the</p> <p>10 rights of the creditor against the solvent co-obligor be</p> <p>11 diminished by payments from the insolvent co-obligor</p> <p>12 being treated as having been appropriated to principal.</p> <p>13 Obviously what he had in mind there was the principle of</p> <p>14 the co-extensive liability between the joint and several</p> <p>15 creditors.</p> <p>16 Now, that was obviously a powerful point in favour</p> <p>17 of the Lord Chancellor reaching the conclusion which he</p> <p>18 did in Bower v Marris. In our submission that</p> <p>19 continued -- that point continues to create a very</p> <p>20 significant difficulty for any argument based on</p> <p>21 dividend payments being appropriated in respect of</p> <p>22 approved debt because on that argument one runs into</p> <p>23 exactly the same problem in relation to the position of</p> <p>24 a co-obligor --</p> <p>25 MR JUSTICE DAVID RICHARDS: You could say, couldn't you,</p> <p style="text-align: center;">Page 150</p>	<p>1 actually the Bower v Marris case of a contractual right</p> <p>2 to interest but -- no, sorry. No, sorry, I think I was</p> <p>3 going to give a bad example.</p> <p>4 MR SMITH: My Lord, on that point we suggest really the same</p> <p>5 point which the Lord Chancellor made in Bower v Marris</p> <p>6 continues to hold good and is a serious practical</p> <p>7 obstacle to any argument based on dividend payments</p> <p>8 being appropriated in respect of the proved debt.</p> <p>9 So far as we can see, similar difficulties would</p> <p>10 arise on Wentworth's complete code argument because in</p> <p>11 that case, as we understand it, the calculation of</p> <p>12 statutory interest on the basis that dividend payments</p> <p>13 are treated as having been appropriated to principal</p> <p>14 first and then there would in effect be a complete</p> <p>15 discharge of the insolvent co-obligor vis-a-vis the</p> <p>16 creditor. That, as I understand it, is their complete</p> <p>17 code point.</p> <p>18 Again, it's very difficult to see how that wouldn't</p> <p>19 also work vis-a-vis the solvent co-obligor. If it's</p> <p>20 right that the insolvent co-obligor has been discharged</p> <p>21 pursuant to the complete code, why isn't the same true</p> <p>22 to the solvent co-obligor? So one has the same</p> <p>23 difficulty.</p> <p>24 Indeed, it also seems that exactly the same</p> <p>25 difficulty arises on the third argument which is simply</p> <p style="text-align: center;">Page 152</p>

<p>1 the calculation without the complete code because there, 2 again, one is in a situation where the creditor is 3 receiving from the insolvent co-obligor a payment which 4 has been calculated on the footing of appropriation, 5 dividend payments to principal prior to interest. 6 Again, it's very difficult to see why that wouldn't 7 apply equally vis-a-vis the solvent co-obligor. 8 So, whichever way one looks at it, the point 9 essentially is the Lord Chancellor's point in 10 Bower v Marris continues to hold good and is a powerful 11 reason as to why the arguments put forward on the other 12 side must be wrong. 13 So, my Lord, that's the co-obligor's point. 14 The only final point I just wanted to make relates 15 to issue 3 and, in particular, the concession made by 16 the administrators and Wentworth in respect of issue 3. 17 That concession is that the reference to the rate 18 applicable in rule 2.88(9) encompasses compound 19 interest. So that's essentially the concession which 20 has been made. 21 Now, there's two points of substance which arise 22 from this. Firstly, the concession necessarily means 23 that Wentworth and the administrators accept that the 24 surplus can be used not only to pay interest on the 25 proved debts but also interest on interest. That is</p> <p style="text-align: center;">Page 153</p>	<p>1 that determines the total amount of money that is 2 payable by way of interest for a particular period of 3 time, including the numerical percentage and the way in 4 which that numerical percentage is to be applied ..." 5 Now, my Lord, we agree with that. That is the 6 reason why one is allowed compound interest, but, 7 obviously, that reasoning applies equally to the rule in 8 Bower v Marris. The rule in Bower v Marris is another 9 method or mode of applying a particular interest rate. 10 Now, the way Mr Trower sought to deal with this 11 yesterday was to say, well, actually compound interest 12 all goes to the computation of the rate. If your 13 Lordship has the transcript of yesterday -- 14 MR JUSTICE DAVID RICHARDS: Hmm, hmm. 15 MR SMITH: -- it's page 15, my Lord. He just touched on 16 this point when he was opening to your Lordship. It's 17 page 4 of the document, page 15 in the top right corner. 18 MR JUSTICE DAVID RICHARDS: Is this page 15 -- yes. 19 MR SMITH: So page 15 of the Min-U-Script transcript. 20 MR JUSTICE DAVID RICHARDS: Yes, thank you. 21 MR SMITH: He said this, beginning at line 5: 22 "I just want to say this: for the avoidance of any 23 doubt we don't accept -- it won't surprise your Lordship 24 to hear -- that the fact that compounding is appropriate 25 when calculating the rate for the purposes of</p> <p style="text-align: center;">Page 155</p>
<p>1 what compound interest is. So by conceding one can have 2 compound interest, that necessarily means they also 3 accept that the wording in 2.88(7) allows the surplus to 4 be used to pay matters other than the proved debt. 5 Essentially in this instance it's allowed to be used to 6 pay interest on interest. 7 Now, that, we suggest, directly undermines one of 8 the main points they make in relation to rule 2.88(7) 9 which is that there's no room of the operation of the 10 rule in Bower v Marris because that rule by the notional 11 re-allocation involves using the surplus to ultimately 12 discharge a sum of notional principal which is left 13 outstanding once one has re-allocated the dividend 14 payments in discharge of prior interest, but exactly the 15 same point arises in relation to compound interest. 16 It's no bar, obviously, to the availability of 17 compounding under rule 2.88. 18 So, my Lord, that's the first point. 19 The second point is really to ask oneself what is 20 the logic which underpins this concession? What's the 21 reason it's being made? If one goes back to the joint 22 administrators' skeleton argument at paragraph 115, 23 which is in bundle 6, tab 4, your Lordship sees what is 24 said there in 115: 25 "... the word 'rate' is apt to include every factor</p> <p style="text-align: center;">Page 154</p>	<p>1 rule 2.88(9) has any effect on the rule in Bower v 2 Marris. They are two quite different questions. 3 Compounding is available as a matter of construction of 4 rule 2.88(9) [and then this] because it is a factor 5 which goes to the computation of the rate that is 6 permitted by rule 2.88 and properly falls within the 7 words." 8 In our submission that's not how compounding works. 9 Compounding has nothing to do with the computation of 10 the rate or the change of the rate. The rate of 11 interest actually remains the same but what does change 12 is how that rate is applied and, in particular, the 13 amount on which the interest rate is charged. 14 Specifically compound interest you apply the same rate 15 but on an ever-increasing mass comprising the original 16 principal and accrued but unpaid principal. 17 So that isn't an explanation which deals with the 18 concession. In my submission the original logic in the 19 skeleton argument, which gave the reasons for the 20 concession, is the correct logic, that one has to look 21 at rate as not being merely the numerical rate but also 22 the applicable mode of applying that rate. That equally 23 applies to Bower v Marris, as it does to compounding. 24 My Lord, I don't think we were under any 25 misapprehension as to what the administrators were</p> <p style="text-align: center;">Page 156</p>

1 saying, but there is, in my submission, a possible
2 misconception on their side as to how compound interest
3 works.
4 My Lord, unless I can assist you any further, that's
5 what we were proposing to say.
6 MR JUSTICE DAVID RICHARDS: Thank you very much indeed,
7 Mr Smith.
8 MR SMITH: Thank you.
9 MR JUSTICE DAVID RICHARDS: So, Mr Zacaroli, will you be the
10 next to address me? It's a matter for you. If you want
11 to poison my mind for five minutes, by all means.
12 MR ZACAROLI: My overview will take more than five minutes.
13 MR JUSTICE DAVID RICHARDS: To poison my mind.
14 MR ZACAROLI: I wouldn't dream of it anyway.
15 MR JUSTICE DAVID RICHARDS: Good. All right. Thank you
16 very much. I'll just assemble one or two things here.
17 10.30 tomorrow morning.
18 (4.12 pm)
19 (The court adjourned until
20 Friday, 20 February 2015 at 10.30 am)
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