Tuesday, 24 February 2015

(10.30 am)

Reply submissions by MR DICKER (continued)

MR JUSTICE DAVID RICHARDS: Mr Dicker.

MR DICKER: My Lord, three small points arising out of yesterday.

Firstly, your Lordship asked whether we knew how the eventual surplus was treated in Rolls-Royce.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: The answer is unfortunately no, but your Lordship may recall that one of the cases cited in Rolls-Royce was Humber Ironworks.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: And a second case was Fine Industrial Commodities, in which your Lordship may recall Mr Justice Vaisey saying you treat the company as if it has always been solvent.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: Though we can't provide chapter and verse, my Lord I think one can say the same in relation to Fine Industrial as well, another surplus case, also cited Humber Ironworks and WW Duncan.

My Lord, that's the first point.

The second, a short point on Judgments Act interest under 2.88(9) which I may not have made sufficiently

clearly yesterday. My Lord, my submissions yesterday essentially focused on the fact that if the company was solvent, i.e. if there is a surplus, it's treated as if it always had been solvent, and we say, given that, why on earth doesn't rule in Bower v Marris apply?

There's another way of reaching the same conclusion, which is to start at the other end and by that I mean imagine a creditor who in fact obtains a judgment prior to the date of administration. It's common ground that unless the terms of the statute Judgments Act provide to the contrary, the rule in Bower v Marris will apply.

One then applies Mr Justice Chitty's reasoning in Whittingstall; in other words, because of the moratorium the courts treat creditors effectively as if they had a judgment.

Now, if that's right and the creditor who actually had a judgment is entitled to the benefit of the rule in Bower v Marris, why isn't a creditor who was prevented from obtaining a judgment by the moratorium but who is treated effectively as being the same position not equally entitled to the benefit?

If that is not right, you would end up with this inequality: a creditor who had obtained a judgment immediately before the winding up but had the benefit of the rule -- in other words, one day before you get

benefit -- but a creditor who would have obtained a judgment one day after was prevented from doing so by the moratorium does not.

MR JUSTICE DAVID RICHARDS: Does not ...?

MR DICKER: Does not obtain the benefit on my learned friend's case.

MR JUSTICE DAVID RICHARDS: I think on their case neither would obtain post-liquidation judgment rate interest, save under the rule.

MR DICKER: Yes, but, my Lord, I'm sorry, I'm going back, as it were, to the application of Bower v Marris. Ignoring at the moment the effect of construction of the 1986 rules --

MR JUSTICE DAVID RICHARDS: I see.

MR DICKER: So one looks at the position beforehand. Take the 1825 Act, for example --

MR JUSTICE DAVID RICHARDS: I'm sorry, I see. Yes, supposing in those circumstances a creditor obtained a judgment.

I mean, so, in other words, in the position as obtained at the time of Lines Brothers, if you had -- if a creditor had a pre-liquidation judgment, then Bower v Marris would apply to the calculation of interest post-liquidation.

MR DICKER: Yes.

MR JUSTICE DAVID RICHARDS: You say what about the creditor who obtains a judgment post-liquidation, is that what your instancing? No, you're instancing someone who doesn't because of the moratorium, but an interesting one is someone who does obtain a judgment.

MR DICKER: It's a very interesting intermediate position, absolutely, because then you have a creditor who is in exactly the same position. The only distinguishing feature is one of timing, whether it was before or after the date of administration. Why should that difference matter if the company eventually turns out to be solvent? Why does it then become critical what particular date the company went into administration effectively process of collective enforcement started?

MR JUSTICE DAVID RICHARDS: But in the position before -- I mean, under the Lines Brothers position, pre-1986, it was clear that if you didn't have a judgment or a contract or other right to interest pre-liquidation you wouldn't get interest post-liquidation. You had to have a right outside the liquidation.

MR DICKER: Yes, although none of the cases consider a situation your Lordship just suggested.

MR JUSTICE DAVID RICHARDS: No, but just pausing there. That is the position. So there was under the old regime a clear distinction between those with interest -- who

had got a judgment or a contract before liquidation and those who hadn't.
MR DICKER: Well, my Lord, we would draw the distinction in a slightly different way, a distinction between those who had a right outside liquidation, whether before or after --
MR JUSTICE DAVID RICHARDS: Then that's -- so then if you take the case of somebody who gets a judgment after liquidation, would they then be entitled to interest on their judgment from the date of judgment, which is necessarily later than the start of the liquidation, and would Bower v Marris then apply?
MR DICKER: We say, taking your Lordship's -- that particular situation, why on earth not? Imagine the most stark example. Proceedings commenced before the date of administration but the judgment only in fact obtained afterwards.
MR JUSTICE DAVID RICHARDS: I mean, the sort of case where -- because of course certainly in a compulsory liquidation you need the leave of the court or you needed leave of the court to commence or continue your proceedings. I mean, a typical example would be a personal injuries claimant who normally would be given permission to commence proceedings, principally with a view to getting benefit of the third party's rights

against insurers, and typically the court's order would be that leave to commence proceedings on terms that no steps are taken to enforce the judgment.
MR DICKER: Yes, but interesting the question, again, as your Lordship's just observed, there are circumstances in which one can properly obtain a judgment after liquidation.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: It may be that you're not allowed to enforce it.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: But, nevertheless, having obtained a judgment, you have obtained a right to interest at the Judgments Act rate.
Now, Bower v Marris applies when you have such a judgment beforehand, why not afterwards?
MR JUSTICE DAVID RICHARDS: Well, I suppose the answer might be then the court would have to decide in its discretion whether to permit you to enforce the judgment such as to obtain interest. That would be -- that's a debate that I'm not aware ever occurred.
MR DICKER: No, although there are analogies perhaps with the example your Lordship gave in TNM of asbestosis creditors whose claims effectively came into existence after the relevant date.
MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: Your Lordship said, and we provided some supporting additional authorities in our skeleton, that of course in that situation those creditors would be able effectively to obtain payment out of the surplus before it was eventually paid to the shareholders.
MR JUSTICE DAVID RICHARDS: Certainly.
MR DICKER: My Lord, just taking -- adopting your Lordship's approach of a sort of salami-slicing or incremental approach, if one then takes as the next example or considers the position where proceedings were actually commenced before the date of administration and judgment obtained afterwards, why on earth shouldn't that creditor be in the same position as someone who actually obtained a judgment beforehand in the event of a surplus?
We know from Nortel that because you have commenced proceedings beforehand you're effectively already within the interest regime. You have a contingent claim to interest. We know from Nortel that that contingent claim to interest, so far as it relates to the pre-insolvency period, is also provable.
Now, if one goes --
MR JUSTICE DAVID RICHARDS: Because of -- by analogy with cost of the proceedings, yes.
MR DICKER: Equally in the discretion of the court, one may

say. So we have an individual who has commenced proceedings before he has a contingent right to interest to the extent it's pre-insolvency interest, it's provable. Why on earth wouldn't he be entitled to say in the event of a surplus, "Equally I now have my judgment. I should be entitled to interest in respect of" --
MR JUSTICE DAVID RICHARDS: It's a very interesting question. I mean, of course your approach to that would be, well, this doesn't matter now. But it would have mattered before 1986, it undoubtedly would have mattered, because unless he got a judgment post-liquidation he would not be entitled -- there would be no basis on which he would be entitled to post-liquidation interest.
MR DICKER: Absolutely.
MR JUSTICE DAVID RICHARDS: But then the court might say well, because of the general rule about no interest post-liquidation, it would be unfair and wrong to allow that creditor, because they have the leave of the court to continue or commence proceedings, to advance their position as against others.
MR DICKER: My Lord, that's one possibility. The other possibility, after the section 132 of the 85 Act was introduced or 2.88(9) of the 1986 Act, is for the court

to say, "We'll effectively now approach matters in the way that they were approached in Whittingstall v Grover. Essentially you have been stopped from obtaining a judgment by the moratorium; these rules effectively are intended to put you into the position that you would have been if you had actually got a judgment, ergo following the individual cases back to the first example, you ought to be treated in the same way. Bower v Marris applies".

Now, your Lordship talked about making an application to lift the stay. One thing that was considered on this side at one point was saying to your Lordship there is a surplus or it's anticipated there will be a sir plus, can we have a judgment, not to enforce but simply to crystallise a right to interest at the Judgments Act rate which would operate in the ordinary way?

Now, my Lord, obviously that would have the been an undesirable course for all creditors to take. It would effectively have meant a series of applications for judgments, costs and expense, et cetera. What we say 2.88(9) is doing is effectively saying creditors shouldn't have to go through that process.

MR JUSTICE DAVID RICHARDS: But it's not necessarily -- it doesn't follow that they would be allowed to go through

that process.

MR DICKER: No, although -- it doesn't, although if the basis was simply every creditor coming along and saying, "We only want a judgment" --

MR JUSTICE DAVID RICHARDS: In order to claim interest --

MR DICKER: -- "in order to claim a surplus and on no other basis, and the basis on which we want that is because we have been prevented from the moratorium and at the moment, as a result, we are being treated unequally with all other creditors".

MR JUSTICE DAVID RICHARDS: It seems to me this is asking the same basic question in another guise. If you're right about Bower v Marris and 2.88 then that's not an issue which arises. If Mr Zacaroli and Mr Trower are right about 2.88, then the point doesn't arise anyway because that's a complete code, they say, for post-administration interest.

MR DICKER: What we say is the series of examples your Lordship has just --

MR JUSTICE DAVID RICHARDS: I think one has to grapple with them, I agree, but there is that sort of basic position, I think.

MR DICKER: Absolutely. What we do say is one goes through the series of examples your Lordship has just put to me. The answers to those are indicative of the answers as to

who is right and who is wrong.

MR JUSTICE DAVID RICHARDS: I follow. I follow, yes. Thank you.

MR DICKER: So that was the second point.

MR JUSTICE DAVID RICHARDS: Thank you very much.

MR DICKER: The third point is a small point in relation to what I called the inconsistency with question 30 issue. It's simply this: your Lordship knows it's common ground that a creditor whose claim is denominated in a foreign currency is entitled to any shortfall in interest that he receives pursuant to the rule. That's the position of each of the parties under question 30.

I said that's inconsistent with Wentworth and the administrators' approach to question 2 because it involves creditors getting more interest than the rules provide, but there's another inconsistency as well. On question 2 Wentworth and the administrators' case is that under the rules interest necessarily stops running on the date of final dividend. That's the outstanding point. That's when the debt has been discharged. Interestingly that's not their approach in relation to question 30.

All the parties' positions under question 30 are that where you have a foreign currency claim, interest is calculated for the period up to the date that the

surplus is applied. That must be the case because obviously it's only when the surplus is eventually applied and converted into the foreign currency that you know whether you have a shortfall at all. So my learned friend's sort of impreganable line, the rules necessarily exclude any possibility of interest notionally continuing to run after the final date of dividend is contradicted by their own case in relation to issue 30.

My Lord, my next task is to turn to the 1883 Act and to deal with the submission that the 1883 Act provided creditors in bankruptcy with interest at a flat rate of 4 per cent and nothing more. The submission was made for the first time, but not developed, in Wentworth's reply submissions -- just so your Lordship has the reference, it's paragraph 30. We don't need to, I think, turn it up. The first time we understood how the point was being run was when my learned friend Mr Zacaroli went through it during the course of his oral submissions on Friday.

We say it's wrong. The correct position is that interest was never payable simply at a flat rate of 4 per cent and nothing more and the contrary submission, firstly, produces an outcome wholly contrary to principle; secondly, it's unsupported by any materials

leading up to the 1883 Act that we have been able to identify; thirdly, it's wrong as a matter of construction and, fourthly, it's not supported by any authority again that at least we have been able to identify.

My Lord, I say at least that we have been able to identify simply because we necessarily haven't had as much time to deal with the point as perhaps might be ideal, but, my Lord, we have certainly sought to exhaust such areas of enquiry as we could.

My Lord, can I start by reminding your Lordship of the position prior to the 1883 Act.

MR JUSTICE DAVID RICHARDS: Hmm, hmm.

MR DICKER: Because one needs to understand this to understand what Wentworth are saying the effect of that Act was. The 1849 Act was to the same effect as the 1824 and 1825 Acts. Your Lordship has seen that. Surplus was applied first in payment to creditors with a contractual right to interest and, subject to that, all creditors were then entitled to receive interest at 4 per cent; in other words, if there was enough to go round, everyone got a minimum 4 per cent. Now, that did two things. It respected the principle of payment of creditors in full and it also provided that creditors would get a minimum of 4 per cent if there was

sufficient.

Now, we say that what happened in 1883 was simply to adjust that so that one starts by paying everyone interest at 4 per cent and one then provides that creditors with a claim to a higher rate of interest can receive the balance of any sum that they were due. That's our case.

Wentworth's case is dramatically different. They say that a creditor's right in effect to a minimum of 4 per cent, funds permitting, became a right to a maximum of 4 per cent, with the result that for the first time one might have a situation in which the surplus was returned to the bankrupt, although at that stage there were claims of creditors which had not been satisfied in full and led to a situation in which a bankrupt could effectively or a debtor could use bankruptcy as a way of avoiding interest rates higher than the bankruptcy rate.

My Lord, in our submission that contention is not supported by and indeed is inconsistent with the materials leading up to the introduction of the 1883 Act. This is the next topic.

My Lord, the Act immediately before the 1883 Act was the 1869 Act. It was, as your Lordship will see, an Act that was universally criticised. The reasons it was

criticised were largely based on the fact that it abolished the role of the official assignee and was described as providing bankrupts with the ability to enter into fraudulent compositions with their creditors without being subject to independent examination.

Now, so far as the Senior Creditor Group have been able to identify, there was no criticism in the materials leading up to the 1883 Act that suggested that the principle that creditors' rights should be satisfied in full before any surplus was returned to the bankrupt should no longer exist or that interest should not be calculated in accordance with the ordinary approach.

Now, the defects in the 1869 Act and the solution proposed in the 1883 Act are summarised by Mr Chalmers in the introduction to his 1883 edition of the Bankruptcy Act 1883. Mr Chalmers, I'm sure your Lordship knows, Mackenzie Chalmers was the draughtsman of the Bills of Exchange Act and Sale of Goods Act.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: So --

MR JUSTICE DAVID RICHARDS: I didn't realise he ventured into this area as well. Quite a polymath.

MR DICKER: A polymath, plainly.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: On any basis, a Parliamentary draughtsman of extraordinary distinction.

MR JUSTICE DAVID RICHARDS: Indeed.

MR DICKER: My Lord, tab 8 of our additional bundle of authorities.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: The way that the book works is that there is a lengthy introduction and then --

MR JUSTICE DAVID RICHARDS: I thought the draughtsman of the Sale of Goods Act, did you say, or did you just say bills of sale?

MR DICKER: Bills of Exchange Act and, as I understand it, unless I am wrong, the Sale of Goods Act.

MR JUSTICE DAVID RICHARDS: Who is William Chalmers? It seems to be MD Chalmers, but there we are. Anyway, let's get down to Mr Chalmers of 11 New Court, Lincoln's Inn.

MR DICKER: My Lord, if I have that wrong --

MR JUSTICE DAVID RICHARDS: Please don't worry.

MR DICKER: Those behind me will check.

My Lord, the way the book works is it's divided up effectively into a lengthy introduction which we have included in full, then there's the recitation of the Act itself.

Just picking up a few parts from the introduction,

starting, if your Lordship has it, heading, "Introduction".
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: Reference to:
"The bill now becomes the Bankruptcy Act 1883, introduced by the president of the Board of Trade, the Right Honourable Joseph Chamberlain, in February last."
I'll show your Lordship the speeches in a moment.
Then if your Lordship goes over the page, paragraph 3 contains a criticism of the previous Act taken from Mr Chamberlain's speech moving the second reading of the bill. Dealing with this as quickly as I can, 3 starts:
"The history of previous legislation ... might be traced as follows...(reading to the words)... of congratulations on the extension of the system."
Then if your Lordship goes over the page --
MR JUSTICE DAVID RICHARDS: Then we return to absolute chaos, I see, and general dissatisfaction. I am reading on a bit, yes. So we come back to a more systematic approach.
MR DICKER: Yes. You see that in paragraph 4:
"The present Act makes a fresh departure of severances made between the ...(reading to the words)... department of the state, namely the Board of Trade."

MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: So that's, as it were, the preamble.
Then at the bottom of that page, there's a heading, "Summary of changes in the law":
"The main features in which the present Act changes the law as settled by the Act of 1869 ...(reading to the words)... to accompany the bill in the House of Lords."
There then followed 20 pages of -- ten pages of that summary. My Lord, the point I wish to make is simply a negative. There is absolutely nothing at all which touches on the question of interest out of a surplus or suggests that the intention might have been the bankrupt should be able to recover part of the surplus without having first satisfied his creditors in full.
That ends two pages from the end on page 22 of the book, paragraph 6, where Mr Chalmers says:
"How the new measure will work, it will be idle at present to attempt to forecast."
Now, my Lord, that's Mr Chalmers.
The speeches introducing the bill your Lordship has at tab 7.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: My Lord, we have included a lengthy section. I was only going to show your Lordship an extract from Mr Chamberlain and then a short extract from a gentleman

called Mr Dixon-Hartland, but Mr Chamberlain starts at page 816, column 2, beginning:
"In asking the House to assent to the second reading of the bill, I find it unnecessary to dwell at any length on the defects of existing legislation relating to the subject."
If your Lordship then goes down between a third and a half, in the left-hand column there's a reference to Lord Randolph Churchill.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: Towards end of that column, if you go across to the right, there's a sentence beginning, "He would say then ..."
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: "He would say then that the Acts of 1869 had favoured the debtors...(reading to the words)... escape absolutely from all their liabilities."
My Lord, I wonder if your Lordship would mind just reading on to the bottom of that page and then the first 15 lines of the following page. (Pause)
MR JUSTICE DAVID RICHARDS: So where do you want me to read to?
MR DICKER: Just to the end where he says, "And, lastly, the arrangements for supervision control ..."
MR JUSTICE DAVID RICHARDS: I have that, yes.

MR DICKER: My Lord, then in the right-hand column, just below the first hole-punch, is a sentence:
"No objection was likely to be taken by creditors generally or by the commercial community as a whole ...(reading to the words)... it indicated a state of things which required explanation and enquiry."
My Lord, there's then a lengthy summary of the effect of the 1883 Act. I don't need, I think, to take your Lordship through that.
If you then go on to 836, there's a speech from a Mr Stanhope who was not in favour of the bill.
Going on to page 843, Mr Dixon-Hartland disagreed with Mr Stanhope. He said:
"He was very sorry he could not agree with the Right Honourable gentleman ...(reading to the words)... practically acquainted with the working of the bankruptcy laws."
My Lord, if you go down that column, below the second hole-punch, just by the mark, he says:
"But if he flattered the Right Honourable gentleman last year [that's Mr Chamberlain] he had this year returned the flattery ...(reading to the words)... had introduced and modified 12 others."
844 on the right-hand column, so the same page, the right-hand column: 10 lines down:

"The present bankruptcy law was a gigantic failure. Successive ministers had deplored its usefulness but of all Acts that had been passed relating to bankruptcy, the Act of 1869 was the worst and a public scandal."

Then ten lines from the end of that column:

"The annual report of Mr Mansfield Parkyns. The controller in bankruptcy was a recurring ...(reading to the words)... it should not be used merely as a means of white-washing a debtor."

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: Then the final passage, just on the right column on that page, 846, just above the first hole-punch, "The Controller General stated ...", if your Lordship has that?

MR JUSTICE DAVID RICHARDS: I do.

MR DICKER: "The Controller General stated the tendency of easy liquidation ...(reading to the words)... would ever think of paying 20 shillings in the pound."

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: My Lord, finally, before turning to the 1883 Act itself, my Lord, that's all the legislative materials that we can find. As I say, no reference at all to a desire to improve the position of debtors, enable them to escape obligations in respect of interest, to leave creditors otherwise than fully satisfied.

Wentworth's reply skeleton did not suggest any reasons why Parliament might have wanted to act in this way. It was only towards the end of his oral submissions that my learned friend Mr Zacaroli tentatively suggested some possible reasons for the change. The first was he said it might lie in the fact that by 1883 debtors were no longer considered offenders. He mentioned by way of colour the fact that John Dickens, Charles Dickens's father, had been imprisoned in Marshalsea debtors' prison in 1824. My Lord, undoubtedly bankruptcy had been decriminalised. My Lord, the reason why creditors are entitled to receive their bargained for rights before any surplus is returned to the bankrupt has nothing to do with the debtor being an offender. It simply depends on the fact the debtor is not, has never been allowed to compete with his creditors over the assets forming part of his estate.

The second reason given was that delay affects all creditors equally. My Lord, I have already dealt with that. Even on Wentworth's case, the legislature hasn't taken the course of treating all creditors equally. Some get interest, some do not. The bankrupt, who my learned friend said is equally affected by the delay, doesn't get anything until that interest is paid.

My Lord, there's something, however, more fundamentally surprising in the construction for which my learned friend contends. It's this: by the time the 1883 Act was passed, the usury acts had been abolished for some 27 years. They were abolished by 1718 Victoria cap. 90. Whilst unconscionable credit transactions could still be challenged in equity, there was no legally prescribed limit to interest rates and attempts to impose such limits had been described by Lord Chancellor Selborne as an inconvenient fetter upon the liberty of commercial transactions.

Can I just show your Lordship the reference to that. It's in a case called Aylesford v Morris, again in our supplemental bundle, at tab 2.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: My Lord, the only point I want to pick up from the facts comes in the second paragraph, six or seven lines down. There's a reference to the interest and discount together exceeding the rate of 60 per cent.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: Lord Selborne's judgment starts at 489. The relevant passage is on 490. It's the paragraph beginning just below the middle of the page, where he says:

"The usury laws, however, proved to be an

inconvenient fetter upon the liberty of commercial transactions ...(reading to the words)... still leaves the nature of the bargain capable of being a note of fraud in the estimation of this court."

Your Lordship will see at the start a reference to the usury laws having proved to be an inconvenient fetter upon the liberty of commercial transactions.

Parliament next intervened in this matter in the Moneylenders Act 1900. The effect of that Act was not to impose fixed limits on interest rates to provide a broad jurisdiction to re-open transactions which were found to be harsh and unconscionable. My Lord, so that's the backdrop, both before and after the introduction of the 1883 Act. Essentially Parliament saying there should no longer be Acts stipulating maximum rates of interest. There should only be provisions dealing with transactions which are harsh and unconscionable.

Again, we ask why, given this, did Parliament apparently limit creditors to a flat rate of 4 per cent in the 1883 Act? Why take such a step in bankruptcy? What is the logic, particularly against the explanation for the 1883 Act, of providing a means for a debtor to get out of paying higher interest rates, subject to the price of going into bankruptcy? It makes no sense at

all, we submit.
Wentworth has not identified any legislative report or other materials in support of their submission -- by other materials, I mean by reference to textbooks, learned articles and things of that sort. My Lord, if the effect of the Act had been and had been understood to be limited -- limiting creditors to a flat rate of 4 per cent, in our submission one would have expected this to have been the subject of lengthy discussion in textbooks and articles explaining why, in this situation only, debtors are entitled to compete with creditors and explaining why, in this situation only, any right to interest above 4 per cent has been extinguished.
My Lord, Wentworth has not identified any such materials and the Senior Creditor Group has not been able to identify any.
My Lord, turning now to the construction of the 1883 Act, and I can deal with this shortly.
Your Lordship understands Wentworth's submission, flat rate only, and our submission which is that the effect of section 45 was to ensure in the first instance interest was awarded to all creditors pari passu at a rate of 4 per cent and the statutory right of creditors to receive payment in full was preserved by section 65.

Just turning up the wording, if your Lordship has it in bundle 3A, tab 27. The two sections your Lordship knows, section 40, sub-section 5, and section 65.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: 40, the sub-section provides for interest at 4 per cent. Section 65, which is essentially the descendant of the provisions in the 1542 Act dealing with the overplus, says:
"The bankrupt shall be entitled to any surplus remaining after payment in full of his creditors, with interest, as by this Act provided ...", et cetera.
My Lord, we say there is no difficulty at all in construing that as preserving creditors' rights to any interest over and above 4 per cent. My Lord, in a sense, that's indicated by the punctuation: after payment in full of his creditors, comma, that's one concept, with interest, comma, as by this Act provided.
Now, what the draughtsman has no doubt done is insert in the language of the previous provisions, which were essentially payment in full of his creditors, usually didn't express as by this Act provided, he's inserted the words "with interest" effectively to make it plain, to remind you, to put it another way, to look at section 40, sub-section 5.
There's one further provision that's relevant which

is section 66(1) of the Bankruptcy Act 1914, which your Lordship will find at tab 36.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: Just reminding your Lordship of the wording, section 66(1):
"Where a debt has been proved, and the debt includes interest or any pecuniary consideration in lieu of interest, such interest or consideration shall, for the purposes of dividend, be calculated at a rate not exceeding 5 per cent per annum, without prejudice to the right of a creditor to receive out of the estate any higher rate of interest to which he may be entitled after all the debts proved in the estate have been pained full."
Now, section 66(1) was originally enacted, as your Lordship knows, as section 23 of the 1890 Act. It's concerned with proved debts. What it provides is for the purposes of -- essentially that you prove the full amount of your claim, the principal and pre-insolvency interest, regardless of what rate of interest you're entitled to, and then for the purposes of dividend you receive a rate not exceeding 5 per cent, but all of that is without prejudice to the right of a creditor to receive out of the estate any higher rate of interest to which he may be entitled.

What section 66(1) was intended to do was to ensure a fair distribution of the assets amongst the creditors. It was designed to ensure that creditors didn't effectively seek to scoop the pool by providing extremely high rates of interest which was thought to be prejudicial to other creditors, not really within the spirit of pari passu distribution.
It was buttressed, as your Lordship knows, by section 66(2) which contained various anti-avoidance provisions.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: I won't go through the details of those but dealt, for example, with a creditor who effectively restated the account monthly, capitalised the interest and then had interest continuing to run.
Now, section 66(1) ran into one further complication. A creditor's claim for interest has effectively been broken down into three parts. He has pre-insolvency interest at less than 5 per cent, which is provable, firstly. He has pre-insolvency interest at more than 5 per cent, which is provable but subject to a discount for the purposes of dividend, and he has post-insolvency interest. Now, the cases then have to grapple with the priority of those parts, in particular the second part.

MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: The pre-insolvency interest at more than 5 per cent which was provable but discounted for the purposes of dividends. The question is: when does that bit get paid? The answer in the cases is it gets paid immediately after proved debts but before the 4 per cent interest. The reason it gets paid in that ranking is because it was a provable debt and was merely discounted for the purposes of dividends.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: And because proved debts are payable in priority to post-insolvency interest.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: Now, that priority issue has nothing to do with what happens to the rest of the rights of the creditors to receive out of the estate any higher rate of interest to which he may be entitled, but your Lordship may already have seen effectively a similar -- a common pattern here. Section 66(1) effectively said so far as pre-insolvency interest is concerned, everyone gets 5 per cent equally. The next thing is anyone entitled to pre-insolvency interest greater than 5 per cent gets the excess. We say that's effectively mirroring what section 40, sub-section 5 and 65 did. Everyone in the first interest -- in the first instance gets interest at

4 per cent and then, under 65, anyone who's entitled to any more gets his claim satisfied in full before the surplus is returned to the bankrupt.
Now, what about the authorities? My learned friend referred you to re Baughan. One of the cases re Baughan referred to was a case called in re Howes. Just so your Lordship has it, and I don't need to go to it, it's in our supplemental bundle at tab 4. My Lord, the reason I won't go to it is I simply need it for a negative. There's nothing in that case to indicate that any creditors were entitled to interest at a rate higher than 4 per cent and therefore any issue that might have arisen in that situation simply didn't need to.
MR JUSTICE DAVID RICHARDS: The same as re Baughan.
MR DICKER: Yes, absolutely the same as in re Baughan. Well, as in re Baughan.
The moneylenders case is slightly different because the moneylenders case did involve creditors with a contractual right to interest greater than 4 per cent but --
MR JUSTICE DAVID RICHARDS: In re Baughan, did it?
MR DICKER: Yes. Do you remember there are --
MR JUSTICE DAVID RICHARDS: Yes, I do.
MR DICKER: The moneylenders case did involve --

MR JUSTICE DAVID RICHARDS: I see, ah, but, that was of course pre-bankruptcy interest, wasn't it?
MR DICKER: Absolutely.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: The problem in that case was there wasn't enough to pay the 4 per cent in full so the issue was essentially a priority issue --
MR JUSTICE DAVID RICHARDS: Absolutely, yes.
MR DICKER: One case my learned friend again referred to in re Baughan, but my learned friend I don't think showed you is a case called re A Debtor, which is in our supplemental bundle at tab 5.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: Now, just so your Lordship knows the issue in this case. It's the second paragraph of the headnote:
"Petitioners who are moneylenders presented a bankruptcy petition against the debtor ...(reading to the words)... of the Moneylenders Act 1927."
Essentially the same terms as section 66(1):
"On the petition coming before the registrar, the debtor tended to the ...(reading to the words)... therefore justified in refusing the tender and the receiving order was rightly made."
It's concerned with pre-insolvency interest. The basic thrust is pre-insolvency excess is preserved.

What's interesting is the way in which the position is explained by the Court of Appeal. If your Lordship goes on to 186, the judgment of Lord Justice Romer.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: He says, at the start, he's assuming there's nothing else in the Moneylenders Act which affects the position. Then seven lines down:
"That being so, it is to be observed that section 9 in no way affects the amount of the petitioning creditor's debt ...(reading to the words)... including the petitioner's debt with interest with 5 per cent interest in full."
So a general statement that the debt, as one would expect, in accordance with basic principle, et cetera, unaffected.
Lord Justice Green is to like effect; his judgment starts at the bottom of 187. The passage I wanted to show your Lordship was six lines down on page 188. He refers again to section 9 of the Moneylenders Act. He then says:
"That sub-section does not destroy the excess interest for the purposes of the bankruptcy law ...(reading to the words)... in addition to the payment of the principal and interest at the rate of 5 per cent."

All general explanations.
It would, of course, be absurd if what the Act did was effectively to say that the creditor was entitled to the excess over the 5 per cent so far as it was pre-insolvency interest, but not so far as it was post-insolvency interest.
There is certainly nothing in the judgment in re A Debtor in the Court of Appeal to suggest that was the consequence.
My Lord, I don't know when your Lordship would think it convenient to take a short break?
MR JUSTICE DAVID RICHARDS: I would think at about 11.45.
MR DICKER: My Lord, so that's the authorities referred to by my learned friend.
Next, re Hibernian. Your Lordship noted this point in the judgment, that Mrs Justice Carroll concluded that although section 86 referred solely to interest at the Judgments Act rate, she said effectively anyone entitled to a higher rate gets his higher rate. I don't know if your Lordship recalls?
MR JUSTICE DAVID RICHARDS: I remember the case.
MR DICKER: Can I just --
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: 1C, tab 107. The statutory provision is at the top of 267.

MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: "The estate of any bankrupt sufficient to pay £1 in the pound with interest at the rate currently payable ...(reading to the words)... to be paid or delivered to or vested in the bankrupt, his personal representative or assigns."
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: Again, one almost -- it's almost a mirror of MacKenzie v Rees, it's two termini. And Carroll at 269, the second paragraph from the end of that page --
MR JUSTICE DAVID RICHARDS: Yes, that's right.
MR DICKER: -- fills the gap in the middle by saying:
"After payment of the statutory interest the contractual creditors ...(reading to the words)... for the amount received for statutory interest."
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: Now, we have managed, or the industry of those beside me and behind me managed to find a copy of the committee report. It's in our supplemental bundle at tab 9. My Lord, the relevant section of the report starts on page 242, three pages in --
MR JUSTICE DAVID RICHARDS: Can I just ask this: do we have a date for this report?
MR DICKER: 1973.
MR JUSTICE DAVID RICHARDS: 1973. Thank you very much.

MR DICKER: That's certainly my recollection. Mr Phillips is nodding behind me.
MR JUSTICE DAVID RICHARDS: Very well. I see that's in the index actually, in the table at the front, yes. 1973. Very well. Thank you.
MR DICKER: At page 242 there's a heading, "Interest".
Over the page, 243, paragraph 43.9.3, "Development in England". I think the only thing I need to show your Lordship is four lines down, it says:
"Before the 1825 Act, however, interest was only allowed under the general equitable jurisdiction in bankruptcy."
A reference to Bromley v Goodere.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: Then if your Lordship goes on to page 245, paragraph 43.9.11 at the bottom of the page, the law in England, Brown v Wingrove. Then a reference to statutory provisions, five lines down, to section 132 of the 1825 Act and the 1849 Act, et cetera.
My Lord, picking it up halfway through that paragraph in the middle of the page, there's a sentence beginning, "Section 40, subsection 5 of the 1883 Act ..."
Does your Lordship have that?
MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: "Section 40, sub-section 5 of the 1883 Act provided that if there was a surplus ...(reading to the words)... Bower v Marris disproving re Higginbottom."
So if the 1883 Act did what my learned friend suggests and excluded the operation of Bower v Marris, it's a point that this committee behind this report obviously failed to appreciate.
MR JUSTICE DAVID RICHARDS: Well, I'm not sure. I think they thought about it and decided on balance that Bower v Marris did apply. That's why they say "it is conceived that". That's the sort of language one uses when one has -- when one isn't actually quite sure but you have reached a view on balance that is the right answer.
MR DICKER: My Lord, the point remains the committee didn't reach the conclusion --
MR JUSTICE DAVID RICHARDS: Correct.
MR DICKER: Then there's a final slightly -- to our eyes, at least -- puzzling paragraph. If your Lordship goes on to page 251, which I should, for completeness show, your Lordship. It's paragraph 43.14.15, "Interest payable out of a surplus". The drift of this is that because some debtors are dissolute and some are hard-working, it's unfair for the hard-working debtor to pay interest but the dissolute not, and therefore no one

ought to have to pay interest. Your Lordship may just like to quickly read that paragraph, if you wouldn't mind.
MR JUSTICE DAVID RICHARDS: Right. (Pause) Yes, I see.
MR DICKER: Your Lordship -- I then think I need to show you the next Hibernian case, there's a reference to the fact that the Bankruptcy Law Committee excluded from their draft bill the payment of interest to creditors in the event of a surplus and the Irish Parliament deciding that it was having no truck with that.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: Now, there are then two further cases I should mention to your Lordship in this context, although the point in relation to both of them is a rather more subtle point. The two cases are Rolls-Royce and Fine Industrial. The issue in those cases, as your Lordship knows, is whether the company law regime post-insolvency interest applied or whether the section 317 of the Companies Act required the court to apply the bankruptcy regime.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: Obviously the court ended up holding the company law regime, no the bankruptcy law regime.
MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: But if my learned friend is right, the issue before both of these courts was essentially as follows. We have two possible regimes. Under the company law regime creditors with a contractual right to interest receive such interest but no one else gets any. Under the bankruptcy law regime everyone only gets 4 per cent.
My Lord, in our submission a fair reading of the discussion in those authorities indicate that's not the basis on which the courts approached matters. What they essentially were doing was saying, "We know that creditors with a contractual right to interest or with any other right to interest are entitled to be paid whatever they're owed. The question is can we plug the gap for those creditors who and entitled to any interest so their debts don't accrue interest? Can we in respect of them apply the bankruptcy provision and remove the anomaly, namely some creditors get interest and others don't?"
My Lord, it's not as clear as it might be on the authorities, but there are some indications of that which I can just show your Lordship. Firstly, Fine Industrial, 1B, tab 76. Now, page 258, the second full paragraph, is the reason why the authority isn't perhaps as quite as helpful as it might be:
"There are 83 unsecured creditors of the company

whose debts total ... the only creditor who was, to the knowledge of the liquidator, entitled to prove for interest was the respondent who recovered judgment against the company."
In other words, we are concerned with a Judgments Act creditor entitled to interest at the Judgments Act rate.
If your Lordship then goes down to the last paragraph just before the argument starts:
"The liquidator, having been advised of the question whether or not interest should ...(reading to the words)... payable out of the assets of the company" --
MR JUSTICE DAVID RICHARDS: Where?
MR DICKER: The same page 258, just above the argument:
"The liquidator, having been advised that the question whether or not interest should ...(reading to the words)... in respect of creditors who were not entitled to prove for interest on their debts."
Mr Sykes, your Lordship will see at the bottom of that page, the last two lines, refers to Humber Ironworks.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: The judgment of Mr Justice Vaisey starts at page 260. What he does is essentially deal with the two issues in turn. He deals with the creditor who is

entitled to interest otherwise than under the -- obviously otherwise than under the scheme because there is no express provision.
At the bottom of 260, he says:
"The question which arises must be summarised thus: are the creditors of the company ...(reading to the words)... that he was and is entitled to interest as from the date of the commencement of winding up."
The subtle point is this: on our case it's perfectly -- it's analytically correct to deal with the matter in this way. He has a right, apart from a statutory scheme. That right is respected. It happened to be a claim to interest at 4 per cent but it could have been anything. You deal with that first. Then what Mr Justice Vaisey did was to go on, over the page, and say:
"The difficulty as regards the ordinary creditor whose debts do not carry interest under the rights which accrued to them by virtue of their debts."
So what he now does, in respect of those creditors, i.e. those creditors whose debts do not carry interest, he sees whether he can solve that problem by cross-referring to the bankruptcy rules.
MR JUSTICE DAVID RICHARDS: Yes, I see.
MR DICKER: The answer, although he's disappointed to reach

it, is unfortunately not.
MR JUSTICE DAVID RICHARDS: Yes. I see what you say.
MR DICKER: Now, one can't put that point too hard, but we certainly say it's another indication in support of our position, rather than for Wentworth.
My Lord, I wonder whether that's a convenient moment?
MR JUSTICE DAVID RICHARDS: Yes, certainly. Five minutes
(11.45 am)
(Short break)
(11.50 am)
MR JUSTICE DAVID RICHARDS: Mr Dicker.
MR DICKER: My Lord, the same exercise essentially in relation -- now in relation to Rolls-Royce.
MR JUSTICE DAVID RICHARDS: Right.
MR DICKER: Which your Lordship has at tab 83. Again, 1586 deals with the facts. There was only one claim to interest that was essentially considered by the court.
As your Lordship knows from the way in which the argument went, that claim didn't carry interest.
MR JUSTICE DAVID RICHARDS: Right.
MR DICKER: It's difficult to believe that there weren't other claims against Rolls-Royce which did carry interest.
MR JUSTICE DAVID RICHARDS: Quite.

MR DICKER: But they're not the subject matter of this judgment.
MR JUSTICE DAVID RICHARDS: Right.
MR DICKER: Obviously on Wentworth's case, if the choice for the court was between, firstly, does the company regime apply so that everyone with a contractual right gets the right to interest against that rate and no one else gets anything, or does the bankruptcy regime apply, in which case everyone gets the flat 4 per cent, one might have thought this issue wouldn't have been argued simply between a creditor whose claim did not carry interest and the company. One might have thought any creditors who had a contractual right to interest higher than 4 per cent would have wanted to participate to say, "This isn't how the scheme works".
A couple of paragraphs from the Vice-Chancellor's judgment. The first, just to remind your Lordship because I referred to it before, is on 1588.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: Where, at D, he refers to 317 of the Companies Act. Then he refers to the two provisions in the Bankruptcy Act, 33.8 and 69. Then says:
"The provision contained in 33.8 reproduces in substance a provision which has been in force since the Bankruptcy Act 1849 at least."

Suggesting that he at least doesn't see any major change in the post-insolvency regime, having occurred in bankruptcy in 1883. If he had done, it would have been very odd simply to say --
MR JUSTICE DAVID RICHARDS: So the provision in the 1849 Act was in large part a re-enactment of section 132 of the 1825 Act?
MR DICKER: Correct.
MR JUSTICE DAVID RICHARDS: I see.
MR DICKER: So he's going back in history, but he's going back in history before 1883 and he's not suggesting 1883 changed anything radically in the bankruptcy regime.
Then there's a discussion about a construction of 317. Over the page, 1589, he says, between A and B:
"If one could look at section 317 in isolation from its statutory history, I should see the greatest force ...(reading to the words)... being kept out of the money during the period of examination."
Which we say is entirely consistent with our approach.
Then he says, at C:
"Unfortunately, however, as it seems to me, an examination of the statutory history ...(reading to the words)... impossible to accept this contention."
Then he deals with that and there's a reference to

re Humber Ironworks. My Lord, perhaps your Lordship will forgive me if I just add this as essentially another case on the importance of the statutory history, and the ability of the statutory history to get the courts to reach a conclusion which one couldn't reach if you just look at the section in isolation.
MR JUSTICE DAVID RICHARDS: Hmm, hmm.
MR DICKER: There's an argument by Mr Muir Hunter at 1590, between G and H. He relies on a change of language, section 10 of the 1875 Act, introducing a shorter formula:
"Mr Muir Hunter contended that this change of language rendered section 207 of the Act applicable to any company."
That's rejected by the Vice-Chancellor, over the page, 1591, between B and C:
"If the intention of Parliament in the Act of 1908 had really been to alter the law as ...(reading to the words)... in place of the longer formula in the Act of 1875."
Then he concludes, at D:
"On the proper construction of the statutory provision, quite apart from authority, section 317 has no application once the liquidation throws up a surplus."

Then a reference to Fine Industrial Commodities.
Then this, between letter G:
"I reach this conclusion with some regret, as did Mr Justice Vaisey, because, as I have already said ...(reading to the words)... appears to be without logical foundation."
In other words, in this respect, it is a reference to the fact that in bankruptcy creditors who aren't otherwise entitled to get interest get interest and in a company winding up they do not.
Now, if the issue facing Vice-Chancellor Pennycuick had been as Wentworth suggests, namely what is the regime in company winding-up? Is it that only everyone gets a flat 4 per cent or is it everyone gets what they're contractually entitled to, and do they get -- do those who aren't entitled to anything get 4 per cent?
If it were as Wentworth suggests, in our respectful submission, the argument would have been and the discussion would have been completely different. One particular point, if under the 1883 Act the legislature had limited creditors to interest at 4 per cent and if that was, as my learned friend suggests, because of the policy, the fact that you no longer treat the bankrupt as an offender, one issue that would have had to have been grappled with is: do those policy reasons apply

equally in a company context? Can Parliament have intended in a company context a flat rate, a similar flat rate to be applied and effectively members potentially coming out first or not? You would have expected other creditors, as I said, to have attended saying, "We're entitled to a higher rate of interest" --
MR JUSTICE DAVID RICHARDS: Assuming there were any.
MR DICKER: My Lord, yes, I do make that assumption. We say it's a reasonable assumption.
MR JUSTICE DAVID RICHARDS: I don't know. I just don't know. Rolls-Royce became insolvent in 1972 in a pre-inflationary age. It was until then an absolute blue chip borrower. Whether it had to pay interest in excess of 4 per cent, I just don't know. I mean, one make assumptions either way really.
MR DICKER: My Lord, I accept that. What we do say is there's no reference to the other creditors --
MR JUSTICE DAVID RICHARDS: No. I follow that.
MR DICKER: -- and what their position was.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: Now, there's one further authority which, again, the diligence of chose to behind me managed to find over the weekend which, although it might fairly be said to be from a less often cited jurisdiction, is in our submission bang on point and well-reasoned. It. In our

supplemental bundle. It's a decision by the Court of Appeal in the Madras High Court in 1931 in a case called China Venkataraju. My Lord, there are two judgments, the first given by Mr Justice Reilly and the second, your Lordship will see, page 6.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: My Lord, I understand, and perhaps we need to check this again, that Mr Justice Reilly was Sir D'Arcy Reilly, the last British Chief Justice of the Mysore High Court from 1934 and 1943. His son had some colour in the way that my learned friend did. Patrick Reilly was apparently friends with Lord Wilberforce at All Souls.
My Lord, more substantively, the Indian Act contained provisions in essentially the same terms, not surprisingly, as the English Act. So if one compares the English Act, section 40, sub-section 5, as a direct comparison, section 66(1), as a direct comparison, section 69, as a direct comparison, your Lordship will see that.
So paragraph 1:
"The appellants in this case, father and son are judged insolvent on their own petition in 1919 ...(reading to the words)... easy to reconcile but I think when they are examined their effect becomes

clear."
Then he goes through the provisions of the Act. The first thing, dropping two lines, he refers to is section 34 which provides that provable debts include all debt and liabilities to which the debtor is liable when he is adjudged insolvent.
Then the last two lines of that paragraph reflect the cut-off rule:
"That interest which is included in the proved debt, the debt entered into the schedule, runs only up to the date of adjudication."
3:
"That is in accordance with the long established rule in England as shown by Bromley v Goodere ...(reading to the words) ... of course only arises when there is not enough to pay the assets proved in full."
Then paragraph 4, which is the equivalent of our statutory interest provision --
MR JUSTICE DAVID RICHARDS: I have read paragraph 4.
MR DICKER: I am grateful.
Then our equivalent of section 69 dealt with in paragraph 5.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: "If there is a surplus ...", et cetera.
MR JUSTICE DAVID RICHARDS: I have read that.

MR DICKER: 6:

"It will be seen before the insolvent can get any part of the surplus under that ...(reading to the words)... exceeds 6 per cent. It's here the last part of section 48(2) must be taken into consideration."

So that's the last part of our section 66(1):

"... without prejudice to the right of a creditor to receive out of the debtor's estate any higher rate of interest to which he may be entitled after all the debts proved have been paid in full."

Mr Justice Reilly says:

"If we take those words they preserve the creditor's right to get the higher rate of interest ...(reading to the words)... for which he may be entitled up to the date of adjudication."

8:

"I do not think we are entitled to read the words in that way."

Then he deals with that. Just dropping ten lines to the end of that paragraph, just above what is in fact a quotation he, says:

"But there are some words in section 67 which might thought perhaps to raise a little difficulty in this interpretation ...(reading to the words)... given the first instance out of the surplus at 6 per cent on all

proved debts under section 61(6)."

MR JUSTICE DAVID RICHARDS: Yes. So he's basing his argument at some length on section 48(2) and the proper construction of that. I have read on to the top of page 4. That seems to be the linchpin of the argument here.

MR DICKER: Although --

MR JUSTICE DAVID RICHARDS: 48(2) is the equivalent of one of -- of 66(1).

MR DICKER: It's the proviso to 66(1); in other words, that's the section which makes it clear, could be another way of putting it, that creditors are not simply limited to the prescribed rate; any creditor with a higher rate is also entitled. You can see that because the proviso at 48(2) says that in terms.

MR JUSTICE DAVID RICHARDS: Well, yes. I mean, the issue of construction is whether 66(1) is concerned with interest for which you can prove, that's to say pre-liquidation interest, or whether it goes wider.

MR DICKER: That's exactly the issue he's addressing and his conclusion --

MR JUSTICE DAVID RICHARDS: Is that it does go wider.

MR DICKER: Correct.

MR JUSTICE DAVID RICHARDS: But if he's wrong about that, then the reasoning falls down.

MR DICKER: My Lord, if one goes wrong at a stage --

MR JUSTICE DAVID RICHARDS: But I am just identifying that that is the linchpin really.

MR DICKER: My Lord, again, just note the end of paragraph 10. Although your Lordship is absolutely right that that is an important part of his reasoning, he says:

"We must take all the provisions of the Act together and in my opinion we have no right to adopt an interpretation of section 67 which ignores the words in section 48."

MR JUSTICE DAVID RICHARDS: Of course he's right about that, but question is what do those words mean?

MR DICKER: Yes. The point I suppose I was making was a slightly different one. Your Lordship will see in due course that one doesn't construe a statute in a vacuum. One doesn't construe a provision on its own; one construes it in the context of the Act as a whole. One construes it by reference to the underlying and principle and policy inherent in the scheme. He comes back to those points, as your Lordship will see, and they all together provide him with the answer he came to.

MR JUSTICE DAVID RICHARDS: Yes. Thank you.

MR DICKER: Interestingly, echoing a submission I think

I made to your Lordship, in paragraph 11, just five lines from the end, he says:

"It will be observed the creditor's right to get higher rate is preserved not as a right of suit but as a right to get that higher rate out of the debtor's estate."

Your Lordship will recall I made the submission that one is concerned here not with remission to the contract, in the sense of permitting creditors to sue, but with a rule governing how the estate is to be distributed.

There's then a reference to a couple of decisions --

MR JUSTICE DAVID RICHARDS: I'm not sure whether that's a very -- what's the significance of that distinction?

MR DICKER: Well, my Lord, it goes back to one of the distinctions between Wentworth and ourselves. They say effectively that when you're talking about the rule in Bower v Marris you're effectively -- the position is effectively the court is just saying, "Right, now let's just look at the contractual rights as if we're now outside of the statutory scheme all together". We say that's not quite the right analysis; remission for contractual rights can equally be expressed as satisfaction of creditor in full.

MR JUSTICE DAVID RICHARDS: I see.

MR DICKER: That's a principle of insolvency law and therefore what we're dealing with here is not simply the court saying, "Now go back to your contract. This is no longer a matter of insolvency". What the court is doing is applying the insolvency scheme but one of the principles is payment in full and you talk about payment in full, of course you're going to be referring to underlying rights.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: My Lord, then in paragraph 12 reference to a couple of cases. The first Ganga Sahai.
Your Lordship will see, four lines down:
"A bench of that court decided that after the 6 per cent on approved debts had been distributed ...(reading to the words)... sufficient weight to the words of section 48(2)."
So, deciding or expressing the view that that case was wrongly decided.
Then there's another decision of the same High Court, ten lines from the end of that paragraph, again Ganga Sahai v Mukarram Ali Khan.
"Where it is implied in the judgment that a debtor who wishes to get his adjudication annulled ...(reading to the words)... mentioned in section 48(2) if they are entitled to it."

13:
"Mr Viyanna has drawn our attention to several linkage cases which show that this matter ...(reading to the words)... which corresponded to our date of adjudication here up to the date of payment."
So Bower v Marris seems to have spread, as far as one can see, about as far as the British empire.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: My Lord, then over the page can I pick it up about ten lines down, where he says:
"But when we come to the Bankruptcy Act of 1883 ..."
It may be easiest again, if your Lordship is happy to do this, just to read this and then paragraph 14.
MR JUSTICE DAVID RICHARDS: I'll do that. (Pause)
Yes.
MR DICKER: My Lord, then, as I mentioned to your Lordship, he turns to what he refers as to practical convenience but we would say is perhaps more fairly described as policy and principle. He says:
"I may add the interpretation of the Act which I have adopted appears to ...(reading to the words)... which gave room for such manoeuvres."
MR JUSTICE DAVID RICHARDS: I should have thought creditors could oppose the petition, it might be thought. Anyway, yes.

MR DICKER: Mr Justice Reilly seems to have thought there should be no reason for giving creditors that onerous task.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: Then the second judgment starts, just at paragraph 18. I'll deal with this more shortly, although, again, it's all worth reading. I was going to pick it up, however, at paragraph 27. Four lines from the end, he says:
"Section 61(6) [this is the equivalent of our section 45; in other words, the 4 per cent provision] does not in my view conclusively operate to cut down the contract ...(reading to the words)... should be placed on them as would make the said provisions not inconsistent with each other."
Then in the next paragraph, seven lines down, he refers to an argument that creditors are only entitled to 6 per cent under the provisions of the Civil Procedure Code and says, seven lines down:
"Although at first sight that argument looks plausible yet having regard ...(reading to the words)... the argument should not be accepted when there is a surplus."
He too refers to principle, going to some ten lines from the end, a sentence in the middle, beginning:

"It is a principle underlying administration ..."
Does my Lord have that?
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: "It is a principle underlying administration in insolvency that no debt which is not proved ...(reading to the words)... should be dealt with in the insolvency proceedings."
Paragraph 29, he says:
"When we come to section 67 [which is the equivalent of our section 69] we find the insolvent should be entitled to any surplus remaining ...(reading to the words)... only when he has been paid also interest as provided by the Act."
In other words, not limited to.
Paragraph 30, he comes back to principal. He says, in 30:
"The insolvent could not take advantage of insolvency to cut down the rate of ...(reading to the words)... object and policy of the Insolvency Act do not seem to me to bring about such a result."
At the end of that paragraph:
"Besides the sections already noticed, our attention has not been drawn to any specific provision in the Act which expressly deprives the creditor of such a right or even of any provision in the Act which by necessary

inference lead to such a result."
He then makes the point that the wording has been borrowed from the 1883 Act as amended by section 23 of the 1890 Act.
He cites, in 31, Bromley v Goodere. 34, ex parte Morris. 35, ex parte Mills. 38, Bower v Marris.
My Lord, then paragraph 41, again, my Lord, I wonder if it might be easiest if your Lordship would read 41.
MR JUSTICE DAVID RICHARDS: Yes. (Pause)
I have read 41.
MR DICKER: Then 42:
"In Robson on Bankruptcy it is stated, no doubt quite correctly, that section 23 of the Act" --
MR JUSTICE DAVID RICHARDS: Just pausing. Section 23 of the 1890 Act in England is the section that brings in what became section 66?
MR DICKER: Correct.
MR JUSTICE DAVID RICHARDS: Before then, is this right, there was no limit on the amount of pre-adjudication interest that could be proved?
MR DICKER: Correct. And they then say in --
MR JUSTICE DAVID RICHARDS: I do have difficulty with his construction here and, in particular, I have difficulty in identifying the purpose of the section. It seems to

me the purpose was to limit the amount of interest that could be proved, not to make clear that post-adjudication interest could be claimed out of surplus. I am finding this really -- I understand what they're saying. I'm just having difficulty in accepting it.
MR DICKER: Well, the first part of section 66 undoubtedly limits --
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: That is essentially to ensure, very loosely speaking, pari passu distribution.
MR JUSTICE DAVID RICHARDS: Well, I understand the point you are making, because otherwise people might have contracted for an unreasonably high interest in order to boost their proof in a bankruptcy, yes.
MR DICKER: Then you have the proviso to section 66.
MR JUSTICE DAVID RICHARDS: Yes, quite.
MR DICKER: Their construction, which we submit is the right construction, is that proviso makes it clear that this is only a matter as between creditors, only operates by way of discount for the purposes of dividend. It isn't entitled to benefit the debtor. That's what the proviso is generally intended to make clear; in other words, the creditor continued to receive the full amount of their debt as against the debtor in the event of a surplus.

We say there's no surprise in any of that because that's precisely what Lord Justice Romer and Lord Justice Green in the re A Debtor case I showed your Lordship said.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: So one has a creditor whose very high rate of interest is discounted for the purposes of dividend. The proviso to section 66(1) says essentially it's not otherwise affected. And that's not otherwise affected not merely in relation to the pre-insolvency part but also the post-insolvency.
MR JUSTICE DAVID RICHARDS: That is the point. I mean, that is the point. This court here is taking the view that the proviso applies as much to post-adjudication interest as to pre.
MR DICKER: In our submission --
MR JUSTICE DAVID RICHARDS: They're wrong about that, if they're wrong about that, then the basis of their decision goes. That's not to say the decision is wrong, but it means that their reasoning is wrong.
MR DICKER: Yes. Then our submission they're right about that -- and --
MR JUSTICE DAVID RICHARDS: You say that section -- the proviso in section 66(1) dealt not only with interest in excess of 5 per cent pre-adjudication but also

contractual interest in excess of whatever the statutory rate was post-adjudication?
MR DICKER: Yes. Perhaps put in a slightly different way, the only thing it did was to discount pre-insolvency interest and the proviso made it clear that everything else is unaffected.
MR JUSTICE DAVID RICHARDS: I see.
MR DICKER: That's what the Court of Appeal hold in re A Debtor.
MR JUSTICE DAVID RICHARDS: It doesn't really hold anything about post-adjudication interest.
MR DICKER: Your Lordship is quite right. That is what the passages I showed your Lordship in the judgment of the Court of Appeal show.
MR JUSTICE DAVID RICHARDS: Obviously I shall read the whole of this judgment or judgments, but, I mean, this seems to be the central kernel of it, doesn't it?
MR DICKER: The only additional point I was going to make is this: the reference to Robson on Bankruptcy stating, no doubt quite correctly, that section 23 of the Act of 1890 was of greater benefit to creditors. My learned friend said, I think, that that extract from Robson was incorrect. My Lord, we say not so. My Lord, again, speculating --
MR JUSTICE DAVID RICHARDS: It depends which creditors

you're talking about. It did give a greater benefit to the creditors whose debt didn't carry interest at an excessive rate.
MR DICKER: My Lord, can I tentatively suggest this. What Robson appears to have indicated was that immediately following the 1883 Act there might have been some potential doubt as to the basis on which interest was payable, but that doubt was regarded as having been resolved following the introduction of section 23. Effectively everyone then said, okay, we now have an additional provision we can throw into the mix and construe as part of the whole. When you look at section 23 and the proviso to it, it's clear that, whatever we may have thought for a couple of weeks after the enactment of the 1883 Act, whatever doubts we may have had, it's now clear you get not merely the 4 per cent but any excess.
MR JUSTICE DAVID RICHARDS: Is Robson one of the textbooks I was shown?
MR DICKER: I don't think, unless your Lordship wants it, it's bundle 2, tab 12, page --
MR JUSTICE DAVID RICHARDS: Is that one you took me to before, Mr Wace and --
MR DICKER: No. Can I just show your Lordship? It's the footnote, bundle 2, tab 12.

MR JUSTICE DAVID RICHARDS: Yes, we did have a look at this. The footnote, yes. Ah, yes. Yes, I have this marked. I know -- so he's referring to this footnote, is he, when he says this?
MR DICKER: Yes. What Robson, we submit, appears to be saying is, "Okay, 40, sub-section 5, that's the 4 per cent; this provision is altered by the Bankruptcy Act 1890, section 23, for the benefit of creditors whose debts carry higher interest at 4 per cent". In other words, although it's slightly Delphic, the implication appears to be that there may have been some doubt following an introduction of the 1883 Act but the doubt didn't last long. Following the introduction of section 23, the view that was reached was in accordance with, again, the Court of Appeal in re A Debtor and the Indian case I've just shown your Lordship.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: My Lord, the only other paragraph -- again, I am conscious your Lordship will look at this --
MR JUSTICE DAVID RICHARDS: No, if there's something in particular I should see.
MR DICKER: It is just 49.
MR JUSTICE DAVID RICHARDS: Is preserved by section 48(2).
MR DICKER: Yes. Then the last sentence:

"In any event, unless the creditor's rights to such contract rate or interest is ...(reading to the words)... the official receiver is more than" --
MR JUSTICE DAVID RICHARDS: Yes, I see.
MR DICKER: My Lord, I think it is fair --
MR JUSTICE DAVID RICHARDS: That's, in a sense, the more general way of putting it, isn't it?
MR DICKER: Yes. My Lord, in our respectful submission if Parliament had really intended to give creditors a flat right of 4 per cent only, it was an astonishingly obscure way of achieving that.
MR JUSTICE DAVID RICHARDS: Yes, it's a mystery in a sense both ways because the 1825 Act set out the two rights, the contractual right and the flat rate right, and then the 1883 sets out just one of them. You might, given the history, have expected some clear preservation. I mean, it goes both ways.
MR DICKER: We say the way the draughtsman was thinking about it was he was thinking the fair approach is for everyone to get 4 per cent. That's what I need to deal with first. I need to do it by way of an express provision because otherwise creditors won't have a right to 4 per cent -- certain creditors won't otherwise have a right to 4 per cent, and then everything else, he says, "Oh well that's easy, I can deal with this in the

old way which is when you come to distribute the surplus, of course you have to satisfy creditors in full and that will pick up any excess".
We say, if one is thinking in terms of the way the statutory history developed, it's an entirely logical approach for the draughtsman to have taken. Full satisfaction in section 69 echoes words -- I have made this submission to your Lordship before --
MR JUSTICE DAVID RICHARDS: I do have this point, I think, yes.
MR DICKER: My Lord, my learned friend suggested the Cork Committee proceeded on the basis that post-insolvency interest in bankruptcy was limited to a flat 4 per cent. My Lord, we say you shouldn't read the Cork Report as if it was a statute. We accept it's not entirely clear quite what the members of the Cork Committee thought, at least from the text.
We say, when your Lordship re-reads the relevant paragraphs, the Cork Report is equally consistent with saying that the problem in company winding up is that although some creditors get interest because they're otherwise entitled to it, other creditors don't get any interest at all. What we want to do is plug that latter hole by including a provision for interest at the Judgments Act rate and to do so for everyone and that

then becomes the sort of base level.
My Lord, we make the same point in relation to the Cork Committee, as we made in relation to Rolls-Royce and Fine Industrial. If what they had been confronted with was a choice between a flat rate of 4 per cent on the one hand in bankruptcy and the company liquidation regime and if they had effectively been deciding between those two regimes, the discussion would have been very different. Would you have imposed on creditors of a company a flat rate? Is that consistent with members last? Large important issues of law company not referred to anywhere in the Cork Report.
My Lord, I have spent a little time on the 1883 Act. We do say it's, although interesting, ultimately on one view irrelevant and certainly not determinative, for two reasons. First of all, even if interest had only been payable at a flat rate of 4 per cent, it would not follow that the rule in Bower v Marris had thereby been excluded. Certainly within the 4 per cent you would have had creditors who can say, "We're only getting our 4 per cent because we have a contractual right to it. We still have an underlying contractual right preserved, see Wight v Eckhardt".
My Lord, the second point is even if interest had only been payable at a flat rate of 4 per cent in

bankruptcy, that ceased in 1986 so whatever policy there may or may not have been justifying that approach, it wasn't accepted by the draughtsman of the 1986 Act.
My Lord, a very short point. My learned friend referred to letters sent by administrators -- by the administrators when dividend payments were made. My Lord may remember this and your Lordship's observations.
MR JUSTICE DAVID RICHARDS: I remember.
MR DICKER: The aim, as we understand it, appears to be to try and preserve a further potential dispute for later; the dispute being as to whether or not creditors may have in fact appropriated to principal. My Lord, we say there is nothing in this and your Lordship should say so. Firstly, the administrators were not entitled to do anything but make payments in accordance with the Act.
MR JUSTICE DAVID RICHARDS: I'm not sure that this is an issue that is raised on this application.
MR DICKER: Well --
MR JUSTICE DAVID RICHARDS: I haven't even seen the letters, I don't think.
MR DICKER: Can I --
MR JUSTICE DAVID RICHARDS: I'm not very anxious to start opening this up now. This is a reply -- I think I made clear to Mr Trower -- he may have made clear to me --

I was not proposing to deal with the point. I think that's how it was left.
MR DICKER: My Lord, obviously we on this side are concerned if essentially issues are going to be parked.
MR JUSTICE DAVID RICHARDS: Well, I mean, as I say, it's not an issue on this application so I'm not at the moment proposing to deal with it.
MR DICKER: My Lord, I hear what your Lordship says.
Finally, and very briefly, given your Lordship's indication earlier in relation to question 39, we have set out three ways, we say, it works in our written argument. I have nothing further, I think, I need to say in relation to that.
The only submissions in reply I want to make are these. Both sides accept that it would be odd if the legislature had intended to provide for part of interest -- part of creditors' rights to interest to be covered in rule 2.88(7) and (9), but subordinated the right to interest in accordance with Bower v Marris to the status of a non-provable debt. Both sides agree that's an odd approach for the legislature to have taken.
My Lord, I made the point in a sense, what does the legislature have against the rule in Bower v Marris? That applies both if one is arguing it has been excluded

altogether but it also applies if one is arguing it's been subordinated to the status of a non-provable debt.
As your Lordship knows, the parties' response to this is of course different. We say 2.88(7) and (9) provide the answer. Bower v Marris is still in there. Wentworth says the solution is it was excluded altogether and doesn't even come in as a non-provable claim. As your Lordship knows, we say Wentworth's position must be wrong because this results in a surplus being returned to shareholders and creditors have not been satisfied in full.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: It also produces inequality. I wasn't sure whether this was one of the factors my learned friend also made. But, whether or not he did ... unless we're right -- also right on statutory interest, what one would then have is contractual creditors getting compensation based on existing underlying rights, the creditors entitled to interest at the Judgments Act rate, not essentially getting equivalent compensation pursuant to Bower v Marris; in other words, the equality which the legislature sought to achieve at the level of rule 9 would have broken down at the level below. If you exclude Bower v Marris, some get it, some don't, and we say everyone accepts there ought to be a pari passu

treatment and that wouldn't achieve this.
My Lord, unless I can help you Lordship further, those are our submissions in reply.
MR JUSTICE DAVID RICHARDS: Just a small point. You relied in opening on that footnote in Gore-Browne. There were submissions made in relation to it. Do you still rely on the footnote in Gore-Browne?
MR DICKER: My Lord, can I say two things. Firstly, I think I misunderstood, and I apologise for that, the apparent agreement between your Lordship and I as to what the context of the footnote was. We only rely on it for this purpose, which is the author appears to have thought that re Joint Stock Discount Company is still a relevant case and a relevant case insofar as it refers to interest first, not principal first.
Now, quite how far that goes is of course obscure so far as that footnote is concerned.
MR JUSTICE DAVID RICHARDS: Thank you.
Can I just look at one thing. (Pause)
Well, Mr Zacaroli, in the course of his submissions -- it's on page 33 of Day 3 -- sets out a calculation which he says illustrates your submissions. My only question is: do you accept the arithmetic? Do you accept that that is how your submissions work?

MR DICKER: And I'm afraid that I am the wrong person to ask.
MR JUSTICE DAVID RICHARDS: All I -- I needn't have an answer now, but if you would like to have a look at it with those beside and behind you, if you could let me know.
MR DICKER: I will.
MR JUSTICE DAVID RICHARDS: All right, Mr Dicker. Thank you very much.
Mr Smith?

Reply submissions by MR SMITH

MR SMITH: My Lord, we have a few points we would like to address by way of reply. If it's convenient to your Lordship I'll remain here rather than swapping with Mr Dicker but perhaps we'll swap at the short adjournment.
My Lord, the first point arises in relation to exchange between your Lordship and my learned friend Mr Trower regarding the question of the essential principles of insolvency law where clear language would be required to exclude their application. My Lord, in our submission Bower v Marris is such an essential principle. The reason why that is is it embodies and applies a principle of common justice that the creditor should be entitled to treat payments made by the debtor

as being applied in discharge of interest before principal. That basic principle your Lordship will see in the authorities has been described as a principle of common justice.
Firstly, if I can take your Lordship to a case called Venkatadri --
MR JUSTICE DAVID RICHARDS: We have that, I mean that point, in a number of the authorities that have been cited already, haven't we?
MR SMITH: We have, my Lord. I'm not sure that your Lordship has seen this particular authority.
MR JUSTICE DAVID RICHARDS: I just have in mind that it's a point that's been made. Where is this?
MR SMITH: Perhaps I can just show your Lordship this example. It's in authorities bundle 1B, tab 62. The reason for showing your Lordship this it that this seems to be the passage that is then picked up in the later authorities as being the articulation of the principle.
Your Lordship sees it's a Privy Council case again. The relevant passage is on page 153. It's about halfway down the page. Then there's a -- the rule is set out, but your Lordship then sees reference by I think it is Lord Buckmaster to the Court of Appeal, the decision of Lord Justice Rigby in Parr's Banking, where he said:
"The defendant's counsel relied on the old rule that

does no doubt apply to many cases ...(reading to the words)... rule where it is applicable is only common justice."
MR JUSTICE DAVID RICHARDS: Yes.
MR SMITH: So, my Lord, your Lordship will see that decision in Venkataraju is the decision that's then picked up in the later cases, including the case that Mr Zacaroli showed your Lordship in tab 66.
So, my Lord, in our submission the foundation of the rule is common justice.
The other point, my Lord, is that it's a rule of presumption of law in our submission. Mr Zacaroli in his submissions, I think, tended to put it in terms of it being based on the presumed exercise of a right of appropriation by the creditor. That is a gloss, we would respectfully suggest. It's true that the application of the rule can certainly be excluded by evidence of contrary intention, but, in, submission, it's fundamentally a rule or presumption of law based on notions of common justice.
MR JUSTICE DAVID RICHARDS: I think it is expressly founded also on what in normal circumstances any sensible creditor would do.
MR SMITH: Well, that may link to the --
MR JUSTICE DAVID RICHARDS: I mean, I think that's said by

the judges in some of cases.
MR SMITH: That may link to the common justice.
MR JUSTICE DAVID RICHARDS: It may do. I think it probably does, yes.
MR SMITH: It's certainly how it seems to be articulated and the basis of it. My Lord, in our submission, it's really nothing more than the principle of common justice.
My Lord, the other point it is obviously very important to have in mind is outside of insolvency a creditor cannot be compelled to accept payment of principal in priority to interest. Your Lordship already has that point.
MR JUSTICE DAVID RICHARDS: Yes.
MR SMITH: Mr Dicker, I think, took your Lordship to the Nemichand decision in particular.
Now, my Lord, it's really in that context that one then comes to rule 2.88. If one is looking first at creditors with contractual rights to interest, in our submission there's really three relevant points of context. The first is, as I say, the basic principle of common justice. So the creditor should be entitled to treat payments from the debtor as being applied first and discharge of interest before principal. My Lord, that is, we would say, one of the fundamental facets of

the rights of a creditor. That the first point.
The second point is obviously that in the insolvency context in addition, there are other specific policy reasons and principles at play. One of those principles, we would suggest, is that the creditor should be made as whole as far as possible to the extent that there are funds available to do so before any fund are returned to shareholders. Indeed, we would suggest it's really impossible to identify any sensible policy objective or principle which requires that creditors are not made whole before funds are remitted to shareholders. So that's the second piece of context.
The third piece of context is the existing line of authority reflected in particular in Bower v Marris and Humber Ironworks which shows that the insolvency scheme is not incompatible with applying the principle of common justice that the creditor can treat payments received from the debtor as being applied first to interest before principle.
So, my Lord, those are the three relevant pieces of context, we say, when one comes to look at rule 2.88 in the light of.
We do suggest that in that context it would really be extraordinary if there had been an intention to deprive creditors of their ability to treat --

MR JUSTICE DAVID RICHARDS: Mr Smith, I am sorry to interrupt, but I do have these points, I think. Which submission are you replying to?
MR SMITH: I was dealing -- this arises out of the exchange really between your Lordship and Mr Trower.
MR JUSTICE DAVID RICHARDS: I appreciate that. I understand the points you are making, I think Mr Dicker and you have made extensively.
MR SMITH: Your Lordship has the point. This in our submission really is a fundamental principle and one would need clear language --
MR JUSTICE DAVID RICHARDS: I understand that and I follow the point.
MR SMITH: -- to exclude it and certainly one doesn't find that clear language in rule 2.88.
Now, moving on then to Mr Zacaroli's submissions. Obviously the second topic on which Mr Zacaroli addressed your Lordship in relation to issue 2 was why he said the rule in Bower v Marris was irrelevant to the construction of rule 2.88 and, in particular, that was his point that you needed a pre-existing claim.
MR JUSTICE DAVID RICHARDS: Yes.
MR SMITH: His third topic, which I think was related to the second topic, is the idea that Bower v Marris could only apply in respect of interest-bearing debts.

Now, we respectfully submit neither of those points are correct and the relevance of the rule in Bower v Marris isn't limited in that way.
MR JUSTICE DAVID RICHARDS: Right.
MR SMITH: Now, so far as Bower v Marris itself is concerned, if I can just take your Lordship back to that very briefly. I know your Lordship has obviously looked at this now more than once. Tab 17, bundle 1A. It's really page 355 of the report I wanted to take your Lordship to.
MR JUSTICE DAVID RICHARDS: Yes.
MR SMITH: And just make really two points in relation to that. The first is at the top of page 355, what Lord Cottenham appears to be doing there is describing the rule or presumption of law which I have already described that ordinarily a creditor is entitled to treat payments received as being attributed first to interest before principal. So he seems to be there just setting out the general rule as it is. So that's the first point. That's relevant because we'll see that subsequently picked up by the Court of Appeal in Humber Ironworks.
The second point obviously is the passage at the bottom of page 355 which in our submission really sets out the ratio of the decision. So obviously the court

here is looking at the position of sums due to the creditor from the solvent co-obligor, not the insolvent co-obligor, and essentially what the court held is that the doctrine of appropriation can't have any place in consideration of that question as the mode of appropriation is, in his words, regulated by Acts of Parliament.

Now, obviously Bower v Marris is primarily concerned with the position vis-a-vis the solvent co-obligor. Now, that, in our submission, makes the Humber Ironworks decision in many ways perhaps the more relevant of the two because your Lordship will see that in tab 27, but obviously it is in re Humber Ironworks where the court expressly is grappling with the question opt the insolvent co-obligor.

My Lord, the relevant passage in our submission is that of Lord Justice Selwyn in the second half of page 645. Mr Zacaroli took your Lordship to this passage, but in our submission Lord Justice Selwyn is really making two discrete points here. The first proposition, which your Lordship sees just below the second hole-punch, is that payments made in process of law, without any contract or agreement between the parties, do not amount to appropriation. That's the first proposition.

MR JUSTICE DAVID RICHARDS: Yes.

MR SMITH: He's not obviously relying on Bower v Marris for that.

MR JUSTICE DAVID RICHARDS: No, but it's consistent with it.

MR SMITH: It's consistent with Bower v Marris. He's not obviously relying on it, but in our submission that is simply a straightforward proposition of law which means what it says.

The second proposition --

MR JUSTICE DAVID RICHARDS: I mean, he probably -- well, sorry, he does refer to Bower v Marris there.

MR SMITH: He then goes on to refer to Bower v Marris in the context of the second proposition.

MR JUSTICE DAVID RICHARDS: Yes.

MR SMITH: Which is that the account must be taken in the event of there being a surplus in the ordinary way. That's the second proposition. Then he says:

"That is in the manner pointed out in Bower v Marris by treating the dividends as ordinary payments on account."

So the reference to the manner pointed out in Bower v Marris appears to be a reference back to the description of the general rule or presumption which Lord Cottenham has set out in -- at the top of page 355. So that appears to be why he's referring back to

Bower v Marris because it's there that Lord Cottenham had described the ordinary way of treating payments made to the creditor.

Now, on one view really all he's relying on Bower v Marris for here is simply the description of that rule or presumption.

Now, the other point just to make about this --

MR JUSTICE DAVID RICHARDS: I'm sorry, at the moment I don't see what you get out of Humber Ironworks which assists you in dealing with the point made by Mr Zacaroli because, I mean, you'll see, as obviously I'm sure you have, at the foot of that page the way of applying Bower v Marris is applying in the first place to the payment of the interest due at the date of such dividend.

MR SMITH: Yes.

MR JUSTICE DAVID RICHARDS: So, I mean, Mr Zacaroli of course relies on that.

MR SMITH: He does, yes. I was going to come to that, but the short point in relation to that is of course he's looking at the position here once the surplus has arisen so he's obviously looking at this on the footing that there's a surplus. Your Lordship gets that --

MR JUSTICE DAVID RICHARDS: I appreciate that. Sorry, isn't the point you're addressing that you're taking issue

with Mr Zacaroli's submission that this appropriation is only relevant if there is interest, as well as principal, due at the date of the relevant payment?

MR SMITH: Yes.

MR JUSTICE DAVID RICHARDS: So how does this case help you?

MR SMITH: Well, it helps me -- the first point, my Lord, is the two propositions which Lord Justice Selwyn sets out. I mean, by their terms, there's nothing in those propositions which is necessarily based on the idea that there needs to be an accrued right at the time of the payment. The first proposition is simply that a payment made in process of law doesn't amount to an appropriation.

MR JUSTICE DAVID RICHARDS: Correct. So that leaves -- that's neutral. That's going to a different point, yes.

MR SMITH: Then there's nothing essential to that proposition that requires to have an accrued right of interest.

MR JUSTICE DAVID RICHARDS: No.

MR SMITH: The second proposition, which follows from the first, is that therefore the account must be taken as between the company and creditors in the ordinary way.

MR JUSTICE DAVID RICHARDS: Yes.

MR SMITH: Now, my Lord, in our submission there's also nothing in the second proposition which depends on there

being an accrued right to payment.
MR JUSTICE DAVID RICHARDS: Well, that's what -- the only trouble is that's precisely what Lord Justice Selwyn says.
MR SMITH: My Lord, he then goes on to describe how it's done, but obviously he's looking here at the manner in which you do it. He's not saying that in order to apply the -- in order to carry out the payments in the manner described in Bower v Marris there has to be interest due at the time of payment. He's saying --
MR JUSTICE DAVID RICHARDS: Well, let's put it the other way. There's nothing in what he says there which supports a submission that it doesn't matter --
MR SMITH: No.
MR JUSTICE DAVID RICHARDS: -- that nothing is due. So I don't think you're going to get very far on the back of this.
MR SMITH: Well, it's neutral. My point simply on this is the two propositions here.
MR JUSTICE DAVID RICHARDS: You say it's neutral?
MR SMITH: It's neutral.
MR JUSTICE DAVID RICHARDS: I see. All right. I have your submission that it's neutral.
MR SMITH: It's not a necessary part of the reasoning as to those two propositions that there's an accrued right of

interest as at the time of payment.
MR JUSTICE DAVID RICHARDS: Right.
MR SMITH: I mean, of course it's right that at the time -- certainly Mr Zacaroli said that at the time of Humber Ironworks the right to post-liquidation interest was only available to creditors who had interest-bearing debts. That's his submission, but what we suggest is the reasoning of Lord Justice Selwyn in relation to those two propositions doesn't turn on that in any way.
MR JUSTICE DAVID RICHARDS: He doesn't discuss it. Insofar as he discusses it, he talks about interest due at the date of the dividend payment.
MR SMITH: He does.
MR JUSTICE DAVID RICHARDS: So that's against you, but he certainly doesn't address the issue, supposing it's not an interest-bearing debt, does Bower v Marris apply?
MR SMITH: He doesn't.
MR JUSTICE DAVID RICHARDS: I think you need to focus on the authorities which you say show that Bower v Marris does apply where there is no interest-bearing debt.
MR SMITH: Yes. My Lord, all I need to get, I think, out of Humber Ironworks is that the two propositions which he makes, which in my submission are the two relevant propositions, don't bear or don't require the existence of an accrued right to interest.

MR JUSTICE DAVID RICHARDS: Well, I mean, at the moment I haven't seen -- you state that, but I haven't seen anything in Humber Ironworks which supports it. You state it and you'll have to establish it by reference to some other authority or principle. I don't at the moment see that as Humber Ironworks assisting you in establishing that. That's just assertion, in other words.
MR SMITH: My Lord, I'll perhaps come back and try and make that good at 2 o'clock.
MR JUSTICE DAVID RICHARDS: All right. 2 o'clock.
(1.02 pm)
(Luncheon Adjournment)
(2.00 pm)
MR JUSTICE DAVID RICHARDS: Yes, Mr Smith.
MR SMITH: Thank you. My Lord, I just finished, I think, dealing with Humber Ironworks before the short adjournment.
My Lord, just in summary, three points which we say are relevant on that. Firstly, neither of the two propositions Lord Justice Selwyn depends on there being an accrued right to interest at the time of payment of the dividend.
Secondly, in fact under the insolvency scheme, under the 1862 Act, no right to interest arises before the

surplus and your Lordship has our points on that.
Thirdly, insofar and Mr Zacaroli relies on the comment of Lord Justice Selwyn in relation to interest due at the date of such dividend, all he was describing there was the manner in which you take the account or if you -- obviously that is done once there is a surplus. Once there is a surplus the rights of post-liquidation interest does arise, it can be treated as having fallen due at the time provided for in the relevant instrument.
MR JUSTICE DAVID RICHARDS: No, no, sorry, it did fall due. It had fallen due by then. It wasn't treated as falling due.
MR SMITH: Sorry, my Lord --
MR JUSTICE DAVID RICHARDS: Because it was an interest-bearing debt so interest had fallen due on that date. It wasn't treated as falling due.
MR SMITH: Yes. What he's doing -- what he's describing in my submission at the end of page 645 is the manner in which you undertake the account. Certainly by the time you come to take the account, there is a surplus so one is looking at it on that footing. The right to post-liquidation interest has arisen --
MR JUSTICE DAVID RICHARDS: You then -- the creditor can then exercise or be presumed to have exercised his rights of appropriation.

MR SMITH: Yes, but he's looking at it at that point once there is a surplus.
MR JUSTICE DAVID RICHARDS: Yes. He's treating the dividend -- the treating bit is the dividend not the interest.
MR SMITH: The key point I think is where he refers to interest due, he's obviously looking at that in the situation where there is a surplus, where --
MR JUSTICE DAVID RICHARDS: Well, no. Is that right? In one sense you're right; this only becomes relevant, at that point. But the interest had fallen due.
MR SMITH: As a matter of contract.
MR JUSTICE DAVID RICHARDS: Exactly.
MR SMITH: Indeed.
MR JUSTICE DAVID RICHARDS: That's the point.
MR SMITH: Yes, but -- absolutely, but in my submission what one needs to take a little care with that because obviously he's looking at it on the footing that there is a surplus.
MR JUSTICE DAVID RICHARDS: What is said against you is that if there is a surplus and no interest had fallen due, well, there's nothing -- there's no scope for appropriation, and that's the point I think you have to address.
MR SMITH: My Lord, that goes back to the two propositions

of -- which Lord Justice Selwyn set out in his judgment.
MR JUSTICE DAVID RICHARDS: I don't -- I'm not inviting you to repeat your submissions.
MR SMITH: My Lord, it doesn't depend on there being a right to appropriate because one simply applies the ordinary principle that they're payments on account.
Now, my Lord, just on the question of whether interest could only be recovered in a liquidation if the creditor had an interest-bearing debt. There was one other authority I just wanted very briefly to show your Lordship which we referred to in our skeleton and we referred your Lordship into my submissions on Day 2, which is a decision called re East of England. It's in the authorities bundle 1A, tab 26.
MR JUSTICE DAVID RICHARDS: I don't think I've been taken to this.
MR SMITH: You haven't. I referred to it, but I didn't -- I gave your Lordship the reference to the passages. I didn't take your Lordship to it.
MR JUSTICE DAVID RICHARDS: Oh, I see.
MR SMITH: My Lord, if we can pick it up first of all on page 15. Your Lordship sees in the description of the case, the second paragraph:
"On 18 August, following a resolution passed at a general meeting that the company should be wound up

voluntarily under the 1862 Act, the liquidators were then appointed. On 3 November 1864 the winding up was ordered to be continued under the supervision of the court."
Then, my Lord, over on page 16, in the first full paragraph, you see the claim to interest which was advanced in this case. My Lord, it was put on two bases by the holders of certain notes. They claimed, first of all, interest at 5 per cent under the law of merchants or 4 per cent under the 26th rule of the order of 1862 which provides that in the case of debts due to a company which do not bear interest, that the rate of 4 per cent shall be allowed from the date of the winding up.
That was obviously part of the order which was held to be ultra vires and that submission, one sees in between the two hole-punches.
MR JUSTICE DAVID RICHARDS: Yes.
MR SMITH: "Mr Wickens, and Mr Cozens-Hardy, for the liquidators: This case must be considered without reference to the 26th rule", and they refer back to the earlier Hatfield case and Herefordshire Banking Company case.
MR JUSTICE DAVID RICHARDS: Yes.
MR SMITH: Then, my Lord, just looking how that was then

dealt with by Lord Cairns on page 17. He dealt, first of all, with the ultra vires point and he basically agreed with the earlier judges. It was ultra vires.
MR JUSTICE DAVID RICHARDS: Yes.
MR SMITH: But there was then the second basis of the claim for interest which is that the notes were payable on demand. Your Lordship sees he deals with that in page 18, just above the first hole-punch:
"I pass now to the other question, namely that which relates to the notes payable on demand."
He then says:
"I am on the opinion that there is nothing in the notion that the voluntarily ...(reading to the words)... the holder of a note from making a demand for payment."
Just following down against the second hole-punch, he deals then with the argument which was being advanced that there was not a demand which had been made according to the law of merchants. He says:
"I am not aware that any particular form of demand is required by the law of merchants."
Then just at the bottom of that page:
"Therefore, I think that the demand was sufficient and that interest must be allowed at the same rate as would have been recoverable in an action at law, namely 5 per cent from the date when each claim was sent in."

So, my Lord, it appears in this case that what the noteholder was entitled to recover was the interest he would have been entitled to recover if he had brought an action at law.

Now, my Lord, that reflects the fact that interest at law was treated as damages at this time, rather than interest, and the reference for that I can show your Lordship in an earlier case called ex parte Koch which we'll perhaps come to in a moment.

That's how Lord Cairns dealt with it. You see also, over the page, Lord Justice Sir William --

MR JUSTICE DAVID RICHARDS: Why should -- because I see the claim was put on the basis as being under the law of merchants.

MR SMITH: Yes.

MR JUSTICE DAVID RICHARDS: So is that -- is the Lord Chancellor there awarding interest on that basis?

MR SMITH: Yes, as I understand it.

MR JUSTICE DAVID RICHARDS: Yes.

MR SMITH: What he's saying is they're entitled to the interest as would have been recoverable if they had brought an action at law.

MR JUSTICE DAVID RICHARDS: But that's because of the law of merchants presumably?

MR SMITH: As I understand it, yes. What in my submission

he seems to be saying there is that what they're entitled to is the interest they would have been awarded by the court if they had brought an action. My Lord, one also sees that from Sir William Page Wood, over the page, in between the two hole-punches. He says:

"With respect to the claim for interest on the promissory notes, it would run from the time of the demand."

Then just skipping ahead, he said:

"If the holder had brought an action that would have been sufficient and the effect of the Companies Act is that the demands which would have been made by action must be made by claim under the winding up."

He then says:

"It was therefore made in the proper way and at the proper place. I am of the opinion that interest according to the law" --

MR JUSTICE DAVID RICHARDS: So he puts it explicitly on that basis.

MR SMITH: Yes.

My Lord, the position is that interest at law was, as I say, awarded as a matter of damages. One sees that from the earlier decision in ex parte Koch, which is in tab 13.

MR JUSTICE DAVID RICHARDS: 13?

MR SMITH: Tab 13.

MR JUSTICE DAVID RICHARDS: Oh, yes.

MR SMITH: I think your Lordship has already --

MR JUSTICE DAVID RICHARDS: I'm not sure I have actually seen this. I'm not sure. Anyway ...

MR SMITH: Just looking at the first full paragraph, your Lordship sees the description of the petition presented by the creditors. Then one sees it was basically:

"... based on bills of exchange and promissory notes respectively ...(reading to the words)... each payable to the bearers on demand."

So it included notes which both reserved a right of interest and other notes which were effectively simply payable on demand.

MR JUSTICE DAVID RICHARDS: Yes.

MR SMITH: Now, my Lord, just going down against the second hole-punch. There's then a passage in the argument of Sir Samuel Romilly for the bankrupt and he makes the point, just against the second hole-punch:

"That though at law interest is frequently given for the detention of a debt, it is always in the shape of damages which cannot be proved as a debt."

So he's saying interest at law is a matter of damages and the particular issue in that case was that

meant it couldn't be proved as a debt at the time.

Then that's also then picked up in the speech of the Lord Chancellor, Lord Eldon, just over the page, page 135, six lines down, he says:

"Damages are not interest and in the cases of law it has been considered as ascertained damages, not as interest due by the contract."

MR JUSTICE DAVID RICHARDS: Just hold on. (Pause)

So he allowed interest only on those debts which carried interest as a matter of contract.

MR SMITH: That's correct.

MR JUSTICE DAVID RICHARDS: Which he states at the bottom of page 134 he understood to be -- had always understood to be the rule in bankruptcy.

MR SMITH: Correct.

MR JUSTICE DAVID RICHARDS: That's what he did. Anything else you say is damages?

MR SMITH: But what I'm relying on it for is that he characterised the interest at law as damages which would be awarded by a court.

Now, when one therefore gets to Lord Cairns in re East of England, back in tab 26, at the bottom of page 18, what he appears to be saying is the creditor who holds the instrument payable on demand is entitled to recover interest on the footing that those would have

been the damages which would have been awarded to him if he had brought an action at law. That's what he appears to be saying, because he's saying the creditor is entitled to the interest as would have been recoverable in an action at law.
MR JUSTICE DAVID RICHARDS: I mean, I'm not sure, I don't read that as identifying the rate.
MR SMITH: Yes --
MR JUSTICE DAVID RICHARDS: Rather than the jurisprudential basis for the award. There's no discussion here about damages, interest as damages.
MR SMITH: No.
MR JUSTICE DAVID RICHARDS: What is said is that interest is payable under the law of merchants.
MR SMITH: Indeed.
MR JUSTICE DAVID RICHARDS: On a promissory note, payable on demand.
MR SMITH: Indeed, indeed, but, my Lord, in my submission what one gleans from the earlier case is that interest at law is treated --
MR JUSTICE DAVID RICHARDS: I don't know whether they're talking in the earlier case about interest under the law of merchants.
MR SMITH: Well, he seems to be talking about interest at law generally. In the earlier case what he's certainly

dealing with --
MR JUSTICE DAVID RICHARDS: But there is a difference, isn't there, between the law in general and the law of merchants?
MR SMITH: What one knows is he's dealing with --
MR JUSTICE DAVID RICHARDS: I mean, the earlier one, there's a debt due from a bank.
MR SMITH: It was an on-demand instrument, yes.
MR JUSTICE DAVID RICHARDS: Issued by a bank.
MR SMITH: Yes.
MR JUSTICE DAVID RICHARDS: That may --
MR SMITH: He's certainly dealing with on-demand instruments in the earlier case.
MR JUSTICE DAVID RICHARDS: Certainly he is, which is what he's dealing with here. I agree. Promissory notes.
MR SMITH: He's also dealing with payable on demand again.
So, my Lord --
MR JUSTICE DAVID RICHARDS: Yes, East of England, they were both banks, weren't they?
MR SMITH: Yes, and they're both notes payable on demand.
MR JUSTICE DAVID RICHARDS: The mystery is -- yes, I see.
MR SMITH: So, my Lord, in my submission what he appears to be saying here is the creditor who holds the on-demand instrument is entitled to recover interest on that instrument as he would have recovered in an action at

law, and that interest as an action of law would have been damages. That appears to be what he's saying here and that appears to be the basis on which interest is allowed.
MR JUSTICE DAVID RICHARDS: I'm not sure I do get that out of this because there's no talk -- you put the two cases together and say because interest at law is damages, therefore this must be a damages claim, but the odd thing about that is that in East of England Banking Company there's no talk at all about damages. It says that interest is due under the law of merchants.
So one view of this case is that there was, quite apart from any judgment, a subsisting legal right to the payment of interest from the date of presentation of the bill.
MR SMITH: Yes. That's certainly one way of analysing East of England itself simply on the face of the speeches, but in my submission one does need to see it in light of the earlier case which describes the jurisprudential basis for recovering interest in relation to an on-demand instrument. The key bit about this in my submission is that he is talking about the interest as would have been recoverable in an action at law. That --
MR JUSTICE DAVID RICHARDS: That seems to be identifying the

rate, interest must be allowed at the same rate as would have been recoverable -- as would have been recoverable in an action at law. So, yes, he's entitled to interest. The question is: at what rate? The Lord Chancellor says it should be the same rate as is recoverable in an action at law, namely 5 per cent. That's one way of reading it.
MR SMITH: Yes. In my submission what he's identifying there is the basis on which interest should be allowed.
MR JUSTICE DAVID RICHARDS: All right.
MR SMITH: And interest should be allowed as would have been recoverable in an action at law.
So, my Lord, in my submission it's not necessarily as straightforward as saying that only a creditor with an interest-bearing debt was entitled to interest in a liquidation as at the time of Humber Ironworks.
One of the things your Lordship will note is that the East of England is one of the cases which is discussed in the argument in Humber Ironworks. Lord Justice Selwyn was obviously in both cases and there's no suggestion, when it comes to Humber Ironworks, that there's a different treatment of on demand debts versus contractual debts or debts bearing a right to contractual interest so far as the analysis of Lord Justice Selwyn is concerned in the

Humber Ironworks case.
MR JUSTICE DAVID RICHARDS: Does he refer to East of England?
MR SMITH: If you go back to Humber Ironworks, tab 27, page 644, firstly, you have the arguments of Mr Southgate. At the top of the page, where he says:
"In the cases of re United States Fire Insurance Company, re Herefordshire Banking Company, re East of England Banking Company, no question of insolvency arose ..."
So he refers there to East of England.
Then, again, in reply, just below the second hole-punch, there's a point about section 170 of the 1862 Act. Mr Southgate says:
"That merely relates to the mode of procedure. This is clear from re East of England Banking Company ..."
So it seems pretty clear that they would have had the East of England in mind.
MR JUSTICE DAVID RICHARDS: Yes.
MR SMITH: My Lord, I say on that basis there doesn't appear to have been any distinction between debts which bear a contractual right to interest and debts which bear -- on-demand debts which bear a right to interest as, I would submit, a matter of damages.
MR JUSTICE DAVID RICHARDS: I see that.

MR SMITH: My Lord, that, I think, brings me to Whittingstall v Grover which your Lordship will find in tab 43 of the authorities bundle.
MR JUSTICE DAVID RICHARDS: Yes.
MR SMITH: My Lord, Mr Zacaroli's point on this was that by the time any dividends were paid, they were paid in respect of principal and interest which had been accruing from the date of the decree of the administration of the testator's estate. So his basic proposition, as I understand it, was interest began running from the date of the decree for administration so that by the time dividend payments were made, there was already an accrued right running at that point.
MR JUSTICE DAVID RICHARDS: Yes.
MR SMITH: The basis of that submission was that he said a decree for administration of an estate operated in equity as a judgment in favour of all the creditors of the deceased and gave them a right to interest.
MR JUSTICE DAVID RICHARDS: Yes.
MR SMITH: My Lord, that's true insofar as it goes, but what we would suggest is the problem with that submission is that it fails to recognise that by the time of Whittingstall that basic position had been significantly modified by the court rules which were in place at the time and the right to interest had become a right

conferred by the terms of the rules. It follows from that that what's obviously critical is the terms of the rules themselves.
Your Lordship sees that most clearly on page 217 in the judgment of Mr Justice Chitty. Just between the two hole-punches, he begins by referring to the creditors and says:
"All these creditors have now received or will now receive 20 shillings in the pound ...(reading to the words)... in the subsisting rules of court, order 55, rules 62 and 63."
So what was operative at the time of Whittingstall v Grover was the rules of the Supreme Court, rules of court, rules 62 and 63. In my submission it's those rules which govern the right to interest.
Your Lordship will see those rules in bundle 3D, tab 57.
MR JUSTICE DAVID RICHARDS: Yes.
MR SMITH: I think I actually took your Lordship to this first time round.
MR JUSTICE DAVID RICHARDS: You did.
MR SMITH: It may be worth quickly looking at it again. First of all, rule 62 is obviously dealing with the position where a debt does carry interest.

MR JUSTICE DAVID RICHARDS: Yes.
MR SMITH: It provides.
"Interest shall be computed on such debts as to such of them as carry interest after ...(reading to the words)... 4 per cent per annum from the date of judgment or order."
What is critical is rule 63, which then goes on to deal with the debt of creditors which don't carry interest. That provides if a creditor comes in and establishes his debt before the judge in chambers, under a judgement order of the court or of the judge in chambers, shall be entitled to interest upon his debt at the rate of 4 per cent per annum from the date of the judgment or order.
Then this, which is the critical bit:
"... out of any assets which may remain after satisfying and costs of the cause or matter, the debts established, and the interest of such debts as by law carry interest."
Which seems to be a reference back to the debts in rule 62.
MR JUSTICE DAVID RICHARDS: Yes.
MR SMITH: So, my Lord, in the case of a creditor whose debt does not carry interest, he only gets a right to interest if there is a surplus remaining after the costs

of the cause and matter, the debt's established and the interest on the debts which do carry interest. So it's a case where there's a right to interest but only if there is a surplus.
MR JUSTICE DAVID RICHARDS: Yes.
MR SMITH: Now, my Lord, it follows from that, in our submission, that in the case of creditors with debt which did not bear interest, as a matter of law, they had no right to such interest until a surplus actually arose in the sense defined in rule 63 and therefore they didn't have a right to interest at the time the dividends were paid. It also follows from that that when Mr Justice Chitty was dealing with creditors with debts which did not bear interest as a matter of law, he was dealing with creditors who had no accrued right to interest at the time the dividends were paid and, as I say, they only acquired an accrued right to interest when the surplus arose.
Now, my Lord, we would therefore submit that this case is incompatible with Mr Zacaroli's submission that Bower v Marris depends on the creditor having an accrued right to interest due at the time the payment is made. That's not how the rules worked in that case.
The passage -- and we would submit that's simply a matter of looking at the rules and seeing how they

operate.
The passage which Mr Zacaroli relied on was on, I think, page 217 in the right-hand column. I think he referred to the final part of that passage where it says:
"All the dividends have been paid in process of law and the account ought be taken in the manner pointed out in Bower v Marris and the Warrant Finance Company case. It is by treating the dividends as ordinary payments on account and applying each dividend in the first place to the payment of interest calculated to the day of such dividend and the surplus, if any, to the reduction of the principal."
Mr Zacaroli said that that makes it clear that it's interest that's due at the date of the dividend. In my submission that doesn't follow at all. All Mr Justice Chitty is saying there is that when you do come to apply the rule, dividends were applied in the first place to interest calculated to the day of such dividend. He's talking about the mode of application of the rule. He's certainly not saying it's a condition to the application of the rule that interest must have been due when the dividends were paid.
So, my Lord, in my submission, that passage doesn't take Mr Zacaroli any further, but, on the contrary, it

shows Mr Justice Chitty applying Bower v Marris to debts which only accrued due in respect of interest where there was a surplus. So we do suggest Whittingstall v Grover is inconsistent with Mr Zacaroli's case.
The only other authority I was going to deal with was Gourlay v Watson, the Scots case, which your Lordship will see in bundle 1B, tab 51.
MR JUSTICE DAVID RICHARDS: Yes.
MR SMITH: Now, my Lord, we say the relevant point about this case is that the right to interest in relation to the period after the date of the trust deed was a right to legal interest conferred by section 52 of the Scottish Bankruptcy Act and that right to interest by its terms arose only in the event of a surplus.
Now, my Lord, just to get facts clear. The trust deed itself was dated 11 August 1886. As your Lordship knows, that was a trust -- essentially a trust to the benefit of creditors.
MR JUSTICE DAVID RICHARDS: Yes.
MR SMITH: The relevant claim we're concerned with was made by a firm called James Watson & Co. Your Lordship will see that described in between the two hole-punches on page 762.
MR JUSTICE DAVID RICHARDS: Yes.

MR SMITH: Your Lordship sees, in between the two hole-punches, it says:
"Among the creditors was the firm of James Watson & Co Iron Merchants, Glasgow, whose claim with interest to date amounted as at 11 August 1886 to £12,000-odd."
So it appears that there were trade debts.
It's certainly true that interest was accrued on those debts up to the date of the trust deed and was effectively capitalised in the normal way to produce the sum of £12,000. That was the sum which was admitted under the trust deed and I suppose by analogy to a bankruptcy that was effectively the claim which was proved for.
MR JUSTICE DAVID RICHARDS: Yes.
MR SMITH: Now, the critical point for our purposes is what was the basis of interest on the proved sum which accrued post the trust deed. In our submission that was a right to statutory interest at a rate of 5 per cent conferred by section 2 of the 1856 Act. One sees the reference to that in a number of places. If your Lordship will just bear with me.
First of all, on page 762, below the second hole-punch, there's a description of the fifth dividend which refers in part 2 to 6p per pound to account of

interest at 5 per cent per annum accrued. So that's the first reference to 5 per cent interest.

There's then, over on page 763, in the second half of that page, the calculation which perhaps makes the point rather more clearly, that interest accruing since the date of the trust deed was the 5 per cent interest. Your Lordship sees how the calculation works.

MR JUSTICE DAVID RICHARDS: Yes.

MR SMITH: Then 764, below the first hole-punch, there's a description in the opinion of the Lord Ordinary, the judge below, he says:

"After an administration extending over 12 years the whole principal has been met with interest at 5 per cent from 11 August 1886, being the date of the trust deed."

Again, he referring to the post trust deed interest at a rate of 5 per cent.

Then, my Lord, perhaps the most useful reference is then on page 765, which is in the argument of James Watson & Co, so this is the basis on which they were putting their claim. Your Lordship sees, at the bottom of the main paragraph in 765, so just above the large footnote, they put it on the basis -- on this basis:

"Even in a sequestration, if there should ultimately be a surplus after paying the principal debts, the

creditors were entitled to the whole interest accrued thereon after the date of the sequestration. The creditors are accordingly entitled, there being a surplus, to principal and legal interest unless they have done something to disentitle them."

So one sees the basis on which the claim was put there was by reference to legal interest.

My Lord, if you pick up -- go back to page 765 at the bottom and pick up the reference to footnote 3, which footnotes the Bankruptcy (Scotland) Act 1856, section 52. Your Lordship sees that sets out, right at the bottom of the page, that:

"If there be any residue of the estate after discharging the debts ranked, he should be entitled to claim out of such residue the full amount of the interest on his debt in terms of law."

MR JUSTICE DAVID RICHARDS: Yes.

MR SMITH: So, in our submission, what the claim for interest post the trust deed was was essentially a claim for legal interest on the basis of the application of section 52.

Now, the reference to legal interest is explained further in the Weir case which is in 1E of the authorities, tab 158A.

Again, I took your Lordship to one passage

relatively briefly in opening.

MR JUSTICE DAVID RICHARDS: You did.

MR SMITH: I may need to refer to a couple of other passages. Your Lordship sees from paragraph 2 Lord Hodge says:

"This is an unusual case. The winding up has taken 28 years."

Then over the page, paragraph 4, he deals with the question of the payment of interest on creditors' claims. He basically makes the point that section 48 of the Bankruptcy (Scotland) Act 1913 continues to apply:

"Accordingly, the entitlement of the creditors to interest on their claims is derived from section 48. That section, so far as relevant, provides ..."

Your Lordship sees that's essentially in the same terms as section 52 which we were looking at in Gourlay v Watson itself.

Then basically there's a discussion of what rate is to be applied under section 48.

Over in paragraph 7, he says:

"The creditors' entitlement to interest does not rest on a common law ground of mora or wrongful holding, which Lord Reid discussed in Wilson v Dunbar Bank. It has been created by statute."

Then he goes on in paragraph 8 to say:

"Had the question arisen in 1914, it is likely that the court would have held that 'the full amount of interest' which was due 'in terms of law' was, in the absence of a contractual rate, interest at 5 per cent a year ...(reading to the words)... see, for example, Dunn & Co Foundry Company Limited, [and then] Wilson's Trustees v Watson", which is Gourlay v Watson.

Then he goes on to say:

"Thus the contemporary texts on the law of bankruptcy ...(reading to the words)... on the surplus of the bankrupt's estate."

So, my Lord, in our submission the right to interest which the court was concerned with in Gourlay v Watson was the right to statutory interest at 5 per cent which arose under section 52 and which arose in circumstances where there was a residue of the estate.

So, my Lord, on that basis the case is essentially on the same footing as Whittingstall v Grover; in other words, there's a statutory right to interest which arises where there's a surplus. And that's the basis on which the interest claim was put by James Watson & Co and that's the basis on which it's dealt with by the judges.

So, my Lord, on that footing we would submit that Gourlay v Watson is also an example of Bower v Marris

being applied to statutory, non-contractual interest.
MR JUSTICE DAVID RICHARDS: Yes.
MR SMITH: And really the points which Mr Zacaroli made about the case don't bear on the fact that ultimately that was the legal foundation for the interest which was claimed there.
MR JUSTICE DAVID RICHARDS: Yes.
MR SMITH: My Lord, because section 52 is essentially in -- has much the same scheme to the rules which exist in Whittingstall v Grover, and, indeed, rule 2.88 itself, that is another example of Bower v Marris being applied where the creditor didn't have an accrued right to post trust deed interest at the time of the dividend payments being made.
MR JUSTICE DAVID RICHARDS: Yes.
MR SMITH: My Lord, those are all the points we have by way of reply.
MR JUSTICE DAVID RICHARDS: Mr Smith, thank you very much indeed.
Mr Zacaroli, a number of authorities have been cited in reply.
MR ZACAROLI: My Lord, yes.
Reply submissions by MR ZACAROLI
MR ZACAROLI: My Lord, if I may start with the authorities from this morning from Mr Dicker in relation to the 1883

Bankruptcy Act.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: Construction point. First of all, my Lord was shown some pre-legislation materials and also the commentary of Mr Chalmers.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: The new Act, as it was then.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: My Lord has our points, I know, that the 1883 Act is clear in dating what interest the post-bankruptcy period is payable and it undoubtedly did change the position from the previous Acts. The only issue is the extent to which it changed that position.
Really the best that these documents show is that an absence of anything. There is nothing in Mr Chalmers's commentary, as my learned friend accepted, and I think the reason he cited it, there's nothing in it which deals with this change, nor is there anything in the Parliamentary debates which touches on the question of interest, but, given that the Act undoubtedly changed the position, it's irrelevant. The materials are simply neutral. They don't take the debate further one way or the other.
The only other point to make on the Parliamentary debates, because I think my learned friend was making

a broader point about them, and those are to be found at tab 7 of my learned friend's authorities bundle -- supplemental authorities bundle.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: The point to make is that the thrust of the complaint about 1869 Act was on a completely different topic. The complaint was that bankrupts were getting away with it now because there was no examination of their conduct and their estate could be in the hands of unscrupulous creditors who would only act in their interests and not the interests of everybody else.
That's shown most clearly from page 816, the right-hand column, at the beginning of Mr Chamberlain's speech.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: My Lord has seen this. It's marked. I know my Lord has already seen it, but halfway down the page, the reference is to the 1869 Act had favoured the debtor at the expense of creditors:
"It made it easy for debts by paying no dividend or a small dividend to escape absolutely from all their liabilities."
Then it goes on to discuss the lack of examination of the circumstances which brought the debtor to that position.
That was the thrust of the complaint and that's the

thrust of all the different passages that my Lord was shown in that debate which leaves my Lord having to construe the words of the statute. We say, for the reasons I've already developed, it's very clear what the statute then provided.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: Turning then to the cases that my Lord has been referred on this point. Again, my Lord has our points that there's no English authority which suggests that interest at greater than 4 per cent was payable under the 1914 Act or the 1883 Act and that the Cork Committee in that paragraph I showed my Lord clearly thought it was limited to 4 per cent before the bankrupt then had the surplus.
My learned friend showed you one Indian authority. It's tab 3 of his supplemental bundle, Venkataraju. My point on this is a short one. My Lord already has it, I know, which is that the reasoning of Mr Justice Reilly that interest extended under section 61(6), I think it was, of that Act, it wasn't limited to contractual interest for the post-bankruptcy period. That argument rested entirely on the wording of section 48(2) which mirrors 61(6) of the Bankruptcy Act 1914.
MR JUSTICE DAVID RICHARDS: Yes. 66(1).
MR ZACAROLI: I am sorry, 66(1). You can see that, for

example, at the bottom of page 2, going up to the top of page 3.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: Paragraph 7 and paragraphs 9 to 10. My Lord pointed this out, that the conclusion is based upon reading the sections together. So it's critical to his reasoning that that's the case.
True also of the other judge, particularly paragraph 43, for example, in his conclusion. He refers to section 61 standing by itself capable of the construction which is essentially the one we say it has, but when you read it together with 48(2) it doesn't.
Just one other passage to remind myself of. Paragraph 13 of Mr Justice Reilly again, page 5, he also thought that the argument that effectively we are contending was right or appeared to be right at least, top half of the page, page 5, until you get to 48(2).
MR JUSTICE DAVID RICHARDS: Which was introduced in 1890.
MR ZACAROLI: It was, yes.
MR JUSTICE DAVID RICHARDS: Sorry, insofar as England was concerned.
MR ZACAROLI: In England, but I presume in India it could happen at the same time; we don't know.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: My Lord, not wishing to burden the court

with --
MR JUSTICE DAVID RICHARDS: But not resisting the temptation!
MR ZACAROLI: But not resisting the temptation. It so happens there are two other Indian cases which show that this case is simply unreliable.
MR JUSTICE DAVID RICHARDS: Right.
MR ZACAROLI: These are two cases of authority for the proposition. One of them is authority for the proposition that their proposition that section 61(6) interest does not include a higher contractual rate so the creditors are not entitled to a higher contractual rate beyond the 6 per cent they get under the India statute before the bankrupt gets the surplus.
That was a case that was cited in the case my learned friend showed my Lord and disagreed with. Nevertheless it's worth my Lord seeing the passage which was disagreed with to see that the reasoning is not absurd at all.
The other case is authority for the direct proposition that section 48(2) has nothing to do with post-bankruptcy interest.
MR JUSTICE DAVID RICHARDS: Right.
MR ZACAROLI: These cases are to be found -- I believe they have been put into the back of our supplemental

authorities bundle, at tab 6 and tab 7.
MR JUSTICE DAVID RICHARDS: I have -- they haven't been put in mine but I have --
MR ZACAROLI: One is in the Allahabad High Court, Ganga Sahai.
MR JUSTICE DAVID RICHARDS: No, hold on, I have it here probably. Let me just put these in. (Pause)
MR ZACAROLI: The first case is from 1925 and is the one that was referred to in the Venkataraju case.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: It's a judgment of Mr Justice Sulaiman. In paragraph 1 it's an appeal from an order which he says was the subject of much controversy:
"The respondent was adjudicated an insolvent on 16 February 1917 and a large number of creditors were entered ...(reading to the words)... which the court might consider reasonable."
Skipping three lines:
"The learned judge, without passing any formal order as to whether he approved the proposal or not, at once appointed a commissioner to go into the question of the accounts of the creditors."
The main part of this judgment deals with the fact that the judge was wrong to have allowed the debtor to question the debts of the creditors. That's at

paragraph 2:
"I am bound to say that the procedure adopted by the learned judge was not in strict accordance ...(reading to the words)... very well be called a proposal."
Now, that part of the -- that aspect of the case is dealt with quite shortly in paragraph 7 of this judgment. It begins about ten lines into the paragraph. The judge says:
"We, however, find that it is not open to an insolvency court to allow interest at a rate ...(reading to the words)... any higher rate of interest ..."
Perhaps my Lord will read to the end of that paragraph.
MR JUSTICE DAVID RICHARDS: Yes, I will. (Pause)
Yes, I have read that.
MR ZACAROLI: So a clear proposition at the bottom of that paragraph that once you have 6 per cent, that's it.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: At paragraph 9 he concludes:
"On both these grounds, therefore, it is impossible to interfere with the order of the district judge fixing 6 per cent as the rate of interest and which interest should be payable after the adjudication."
Mr Justice Boys begins at paragraph 10. He deals with it very shortly at paragraph 31:

"As to the questions of interest and the merits of the particular appeal, I have had the advantage of seeing the judgment of Mr Justice Sulaiman, and I entirely concur with the order proposed."

We needn't turn it up but for my Lord's note it's paragraph 12 of the other decision where Mr Justice Reilly says he disagrees with this decision, the Ganga decision. The reason he says he disagrees is:

"The learned judges do not appear to have given sufficient weight to section 48(2)."

So that's ground of disagreeing with it. Which brings us then to the second or the third of the Indian cases. This also in the Allahabad High Court, this time in 1954. This was an application for an annulment on the grounds that all the debts must be deemed to have been paid in full.

Now, I accept that so far as the interest payable post-bankruptcy point is concerned, the argument in this case was to the opposite effect. What was being argued was that all the debtor had to do was pay interest at a -- to those creditors who had a contractual right in order to pay his debts in full and didn't have to pay everyone at the 6 per cent. That argument failed.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: So I'm not relying on it for that part of the

case, but you'll see how the Chief Justice deals with the issue at paragraph 5, first of all:

"Coming to the merits of the application, section 35 of the Insolvency Act provides that where in the opinion of the court a debtor ought not ...(reading to the words)... was based on the second part of the section that the debts of the insolvents have been paid in full."

Paragraph 6:

"The amount deposited was sufficient to pay off the amount mentioned in the schedule. If the applicants are liable to pay up interest after the date of adjudication, then it is admitted it cannot be said the amounts deposited are sufficient to pay off all the debts in full."

The argument, as I've just explained, is there.

7:

"The key point therefore for consideration is section 61(6)."

He goes on to consider section 48 at paragraph 8. He refers to section 48(1), first of all, which isn't directly relevant. Then:

"As regards the debts which carry interest, section 48(2) provides a maximum limit ...(reading to the words)... the only section dealing with this matter

is section 61(6) which is as follows ..."

On the clear language, therefore.

So that's the bit -- passage I needed to rely upon. It simply makes it very clear that, at least in 1954 in India, section 48(2) has nothing to do with interest after adjudication.

MR JUSTICE DAVID RICHARDS: Yes. Paragraph 11, he deals with, is this right, the case -- no.

MR ZACAROLI: He does, indeed. It's the second one referred, to Ganga Sahai, the third line.

MR JUSTICE DAVID RICHARDS: He doesn't deal with --

MR ZACAROLI: No, he doesn't. It's not cited, it looks like.

MR JUSTICE DAVID RICHARDS: No. Thank you.

MR ZACAROLI: The position in India is at the very least by no means straightforwardly in support of the conclusion that the judges reached in the Venkataraju, the case beginning with V, that my learned friend cited. It's clearly not straightforwardly that position. As my Lord pointed out, that argument in the judge's judgment in that case is problematic in any event when one looks at the section.

Looking at the position in England, leaving aside for a moment the awkward point that between 1883 and 1890 you didn't have section 66(1) to assist you in

interpreting the rest of the section so this point could never have been run then, but, leaving that aside, assuming there was some change in 1890, again, I've shown my Lord the case of re Baughan and I don't propose to go back to that which on this point was very clear, that section 66(1) is about the excess of interest for the purses of proof alone. It is about the provable debt.

MR JUSTICE DAVID RICHARDS: Yes, that's right.

MR ZACAROLI: My learned friend referred you also to the case of re A Debtor which is tab 5 of his supplemental bundle. This case concerned solely, again, the question of interest due prior to the date of adjudication. That was common ground. My learned friend sought to suggest that some of the language, particularly in the decision of Lord -- the judgment of Lord Justice Romer and Lord Justice Green, could be said to be broader than that because it was in broad terms.

My Lord, that language has to be read in the context that they were only dealing with interest due up to the date of adjudication and simply were not considering anything else. So one can't, from that, take their language out of context.

My Lord, there's one other point just to remind my Lord of. I think I made this point briefly. I'm not

sure -- let me make it again. Section 66(1) of the 1914 Act cannot be the solution or the gateway to post-bankruptcy interest, contractual interest, for this further reason, that section 66(1) relates to excess interest over five per cent, whereas section 66(9), which deals with statutory interest is interest payable at 4 per cent.
MR JUSTICE DAVID RICHARDS: Right.
MR ZACAROLI: So, take a creditor with a contractual rate to 5 per cent, section 66(1) is simply irrelevant. It's only engaged by creditors at the greater rate which strongly suggests that 66(1) was not meant to be the provision which allows interest post-adjudication at the contractual rate.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: My Lord, the last authority that my learned friend took you to was the Irish Bankruptcy Law Commission report. That's tab 9 of his supplemental bundle.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: My Lord, the relevant passage is on page 246 of the Commission's report. I simply want to draw my Lord's attention to one point. If my Lord can take up also bundle 2 at tab 16. The reason for doing this is to reinforce a point my Lord made about the language

used by the Commission, namely that it is conceived that interest is to be computed as running interest.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: Which suggests they haven't actually come to a view about it. They are just saying what may be the position.
My Lord, the point gets even stronger when you see that that is an exact copy out of the paragraph in Mr Wace's textbook, without any amendment at all.
MR JUSTICE DAVID RICHARDS: Oh, really? Oh, I see, yes.
MR ZACAROLI: So it does appear that the Commission didn't really give that much thought to this.
MR JUSTICE DAVID RICHARDS: Hold on. (Pause)
MR ZACAROLI: My Lord notes of course that the Commission recommended the abolition of all interest in any event.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: My learned friend Mr Smith took my Lord to the East of England Banking Company.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: My Lord, our short submission on this is that one gets nothing from that case, in particular because we don't know what the law of merchant was --
MR JUSTICE DAVID RICHARDS: No.
MR ZACAROLI: -- at the time. What we do know is that Lord Justice Giffard, in the Humber Ironworks case, just

a couple of years later, said in very clear terms that creditors without interest-bearing debts get no interest. The question really is what is an interest-bearing debt. It seems that the law of merchants gave interest to creditors even if their contract did not, but that's irrelevant. That means it's an interest-bearing debt. There's no issue about that.
MR JUSTICE DAVID RICHARDS: Yes. The relevant thing is whether for the purposes of your submission it was accruing due during the relevant period.
MR ZACAROLI: Yes, precisely.
My Lord, there's only one other point in relation to Mr Smith's submissions and it's this, that he took you to Whittingstall v Grover, a case I did deal with length and I'm not going to go back over it. Just to make this point, when he told my Lord which bit I had relied upon, he did not refer my Lord to the important bit I relied upon. It might just be worth reminding my Lord of that passage.
MR JUSTICE DAVID RICHARDS: Okay.
MR ZACAROLI: It's in 1A, tab 43. It's page 217 of the report. He said I took my Lord to the last paragraph on the right-hand side. It's true I did take my Lord to that, but actually the part I was relying upon for my

submissions was the passage beginning level to the hole-punch on the left-hand side, over to the top of the right-hand side. The point I was making was that the rules of court depended for their validity on the Judgments Act of 1837, which is 1 and 2 Victoria, chapter 110.
MR JUSTICE DAVID RICHARDS: Yes. So you started to read ... so that the passage you're referring to now, sorry, is ...?
MR ZACAROLI: I started with the orders of 1841 which my learned friend did take you to. But I carried on: the rules of 1841 were founded on the statute of Victoria, chapter 110.
MR JUSTICE DAVID RICHARDS: Yes, indeed.
MR ZACAROLI: And from there to the top of the next page where it repeats the orders of 1841.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: The point being, those orders, the order of court, had validity because the decree was a judgment and operated as a judgment in favour of all creditors and therefore gave rise to interest from the date of the judgment, which rendered them intra vires as compared to the companies rules in the very same year, which were ultra vires because a winding-up order is not a judgment in favour of creditors. That was the point made in the

Re Herefordshire Banking Company case by Lord Romilly which, again, I did take my Lord to that passage.
MR JUSTICE DAVID RICHARDS: Right.
MR ZACAROLI: That's why interest was accruing.
My Lord, that leaves one issue which is an issue which crosses over into other issues as well, and therefore my Lord may say, "Let's deal with it when it come to it", but it does have an impact on issue 2, and the issue is this: the case my learned friend Mr Dicker was advancing this morning about treating the creditors who don't have interest-bearing debts as if they have a judgment. Now -- and the fact that there's a -- as he would put it, an arbitrary distinction being drawn between a creditor who has got a judgment just before administration and one who doesn't and gets one afterwards or may have got one.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: This comes into issue 4 because in issue 4 the question is: do the words "the rate, apart from administration", "the rate applicable to the debt, apart from administration", do those words include a foreign judgment to which a creditor might have been entitled post the administration?
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: As I say, I can deal with the point then but

I'm sort of warning my Lord that it will have ramifications, my submission on that, for issue 2. If my Lord wants me to make those submissions now, I can.
MR JUSTICE DAVID RICHARDS: Let's do it with issue 4.
MR ZACAROLI: I'm grateful. In which case, my Lord, those are my rejoinder submissions.
MR JUSTICE DAVID RICHARDS: Just give me one moment.
(Pause)
Thank you very much.
MR TROWER: My Lord, as Mr Zacaroli indicated, issue 4 is the next one on the list. There are just two or three small housekeeping points that we might tidy up before the mid-afternoon break, if your Lordship would like to deal with it that way, or we can come back afterwards?
MR JUSTICE DAVID RICHARDS: Mr Dicker, do you want to say anything about the two new India cases?
MR DICKER: I can't resist your Lordship's invitation.
MR JUSTICE DAVID RICHARDS: I'm not inviting you, but you're entitled.
Further reply submissions by MR DICKER
MR DICKER: Just to ensure that your Lordship is clear how we put our argument. One undoubtedly starts with the 1883 Act but we say one can construe that as covering both interest at 4 per cent, that's under section 40, sub-section 5, and also payment in full with interest in

accordance with the terms of this Act. That picks up the residue.
MR JUSTICE DAVID RICHARDS: I follow.
MR DICKER: We accept that one can certainly argue about whether or not that is correct as a matter of construction. What we do say is that by the time the 1890 Act was passed, the matter had become clear.
The only other point I would make to your Lordship in relation to the second case that my learned friend took you to, your Lordship's noted it didn't actually cite the earlier one that we rely on. Just so your Lordship knows, if you haven't already had it, that the argument there was essentially there's a statutory right to 6 per cent but the only people who get it are those who have a contractual right to interest. That was the extent to which the argument went in that case. I have nothing else.
Your Lordship did, if you will forgive me, ask me a question about the figures used by Wentworth. My Lord, I've just been handed a piece of paper. I haven't yet digested it.
MR JUSTICE DAVID RICHARDS: Have a look at that. Very well. If you think it's convenient, I give the shorthand writers their break now, we'll do that now.
MR TROWER: Yes.

MR JUSTICE DAVID RICHARDS: So I'll rise for five minutes.
(3.11 pm)
(Short break)
(3.16 pm)
Reply submissions by MR TROWER
MR TROWER: My Lord, just very briefly so that we can get them out of the way. Your Lordship asked me during the course of my submissions what the position was in relation to the appeal: all ten declarations are being appealed.
MR JUSTICE DAVID RICHARDS: Right.
MR TROWER: My Lord, the second point is we had a discussion about a 19th century case in which the press and the ordinary unsecured ranked pari passu in respect of interest. Your Lordship had a recollection.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: We have looked quite hard. The closest we can get to it is that the order that was made in Bromley v Goodere actually made provision for the interest payments to the various categories of creditor as described being paid pari passu, but there was no reference to prefs there.
MR JUSTICE DAVID RICHARDS: I must have dreamt it.
MR TROWER: My Lord, we'll keep an eye out and just --
MR JUSTICE DAVID RICHARDS: Don't do any more than that.

MR TROWER: We'll certainly do that.
My Lord, the next point is that just to remind your Lordship, and I know your Lordship knows this, issue 3 itself, we have trespassed on during the course of this debate, it remains an issue to which the parties would like your Lordship to provide an answer. The reasoning in relation to issue 3 is dealt with in our skeleton argument. It's quite short. And what it does is it explains why it is that we say that rate include compounding, and in giving that explanation it picks up on the points that have been made in Wentworth's position paper as to why it did not include compounding. So your Lordship has some sort of semi-adversarial arguments advanced there. So I just simply invite your Lordship to look at that. It's in our skeleton, paragraphs 111 to 132.
At the end of that section of the skeleton --
MR JUSTICE DAVID RICHARDS: Can I just ask this, before you go on, issue 1, of course, there's no debate about?
MR TROWER: Yes. I'm very happy -- there's one sub-issue on issue 1 for the termination.
MR JUSTICE DAVID RICHARDS: Is there?
MR TROWER: Yes, it's all about leap years, my Lord.
MR JUSTICE DAVID RICHARDS: You mentioned that. My question was only, because I forget whether -- is there any

contrary argument in any of the skeletons on issue 1?
MR TROWER: We have identified what we think -- have we? Can I check that. It may be --
MR JUSTICE DAVID RICHARDS: You do want a declaration on that as well?
MR TROWER: We want as a minimum a direction that we proceed in accordance with the determination, whether it's a declaration or order or not is a different point.
I'm afraid I think all your Lordship has at the moment is nobody could really think up a tenable argument.
MR JUSTICE DAVID RICHARDS: I can understand that, but --
MR TROWER: So we have dressed up a little bit of an adversarial case in relation to the sub-issue but we can't really find one.
MR JUSTICE DAVID RICHARDS: If I'm going to make the direction, I ought obviously to say something about it.
MR TROWER: Yes.
MR JUSTICE DAVID RICHARDS: And, indeed although not necessarily putting it in exactly those words, indicating that nobody really did feel able to advance a case on it. Which is in contrast in a sense to issue 3, where Mr Zacaroli did advance a case but then chose to withdraw it; so that's in a rather different category.

MR TROWER: Some of the parties, and I cannot remember which, to be perfectly honest with you, don't trespass on issue 1 at all in their skeleton. We do actually explain a bit of reasoning from which your Lordship can -- will be able to test the argument a bit, but it's not really -- I can't put it any higher than that.
MR JUSTICE DAVID RICHARDS: Thank you.
MR TROWER: The only -- yes, I'm reminded by Mr Bayfield that in relation to issue 1, like the other issues which have been agreed, there is a statement on the website as to what the position is.
MR JUSTICE DAVID RICHARDS: Right.
MR TROWER: People have had an opportunity. We can -- just so your Lordship has it, we ought to have done it, we will take a print of what's on the website so your Lordship can see what's been said.
MR JUSTICE DAVID RICHARDS: Thank you very much.
MR TROWER: My Lord, just before I leave issue 3, at the very end of our -- perhaps if your Lordship would just turn up our skeleton for this. Paragraphs 131 and 132. There's references to two sub-issues that arose in relation to issue 3.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: The first of those sub-issues we have already touched on. This is the one where if the rate includes

compounding; in other words, if your Lordship is content with everyone's position on 3, and if the administrators and Wentworth are correct on Bower v Marris, does compound interest continue to compound following payment in full of the principal; it's that point which your Lordship has already heard addressed in the context of the argument on 2.
So far as the second sub-issue is concerned, which is referred to in paragraph 132, this is the aggregation against disaggregation point.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: Again, your Lordship had -- we put the references in there as to where the argument is and, again, we would like answer on that.
MR JUSTICE DAVID RICHARDS: Very well.
MR TROWER: My Lord, I'm grateful.
I think Mr Bayfield tells me that there is a print already in the bundle of what been put on the website.
MR JUSTICE DAVID RICHARDS: Right.
MR TROWER: It's volume 5, tab 5, tab 6 and tab 7 which are -- there was a website print on 4 November, then 4 February and then 6 February, updating it.
MR JUSTICE DAVID RICHARDS: Thank you.
MR TROWER: The only other point I just wanted to draw to your Lordship's attention, not for any particular reason

but so your Lordship is aware of it, we are rather behind on the timetable.
MR JUSTICE DAVID RICHARDS: I am aware of that, yes.
MR TROWER: I think it is fair to say -- and there will be shouts from my right if I put this not in quite the way -- it should be, that some of the issues towards the end of the application we may have been overgenerous on the time that was allocated to them, but nonetheless I think we are getting quite tight on the time.
MR JUSTICE DAVID RICHARDS: Yes, thank you very much.
Then we move then seamlessly to issue number 4, do we?
MR DICKER: My Lord, no sooner do I sit down than I find I stand again.
Submissions by MR DICKER
MR DICKER: My Lord, just before I start question 4, my learned friend mentioned question 3 and suggested your Lordship read his skeleton and Wentworth's skeleton just before, as it were, ruling on question 3. Can I just ask your Lordship to add to the reading list paragraphs 169 to 180 of our skeleton. What they do is deal with the use of the word "rate" elsewhere in the legislation.
MR JUSTICE DAVID RICHARDS: Right.
MR DICKER: There are other provisions, for example, that

provide that, for example, a distinction between a member's and a creditor's voluntary winding up depends on whether the directors have made a statutory declaration under section 89 and to do that they have to form the opinion the company is able to pay its debts in full, together with interest at the official rate.
That's obviously relevant in the context of section 3. It may be that I should have shown to it your Lordship again in the context of section 2, but if your Lordship reads it, that's all I think your Lordship needs to do.
MR JUSTICE DAVID RICHARDS: Thank you very much.
MR DICKER: Turning then to issue 4. Issue 4 is concerned with when a creditor may be entitled to interest at a foreign judgment rate or other statutory rate. The issue concerns the phrase "the rate applicable to the debt, apart from the administration" in rule 2.88(9).
My Lord, the starting point so far as the parties' positions are concerned is they all agree that the phrase is capable of including a foreign judgment rate of interest or other statutory rate. My Lord, in our submission that is correct. The only question is what is the rate that is applicable to the debt, apart from the administration? That is a question of fact and it's irrelevant whether the source of that rate is a contract, the general law or statute including

a foreign statute.
Now, my Lord, your Lordship asked, right at the start of this application, the parties to consider an example involving Ruritania. My Lord, subject to your Lordship, what I was going to suggest is I deal with first with question 4 on the basis on which the parties have been proceeding and then, perhaps, say a few words in relation to Ruritania. Just so your Lordship knows where I am going to end up so far as Ruritania is concerned, it may be sensible to address that particular issue at the same time as we address question 28, but I'll say a few words about it in the meantime.
MR JUSTICE DAVID RICHARDS: Very well.
MR DICKER: Now, the difference between parties is that Wentworth, whilst it agrees the phrase is capable of including a foreign judgment rate of interest or other statutory rate, contend that it will only do so if the creditor already had the benefit of the foreign judgment as at the date of administration. So what is said to be key is that the rate must be a rate which existed, which applied to the debt as at the date of administration. Effectively there's a cut-off date of the date of administration.
So if you have obtained a foreign judgment before the date of administration, you are entitled to rely on

the foreign judgment interest rate. If you haven't, regardless of why you haven't, or what you have in fact done, you're not.
That's Wentworth's position, as we understand it.
Now, the Senior Creditor Group and York's submission is that's incorrect. They say there's no warrant for such a cut-off date. As my learned friend Mr Zacaroli mentioned, much of the argument proceeds in a similar sort of salami-slicing discussion which your Lordship had with me earlier today, but we do say, for example, that a creditor who obtained judgment after the date of administration can rely on such a rate as giving rise to a right to interest out of the surplus when that comes to be distributed.
We also, as your Lordship, I'm sure, knows, go further than that. We say more broadly that a creditor should, so far as possible, not be prejudiced by being forced to participate in a process of collective enforcement, rather than individual enforcement. And that where there is a surplus he should be entitled to interest at the rate he had a right to obtain through individual enforcement action, even if he did not in fact obtain a judgment. That's effectively the Whittingstall v Grover-type argument.
Now, my Lord, it's not entirely clear -- no doubt

Mr Trower will explain in due course -- what the administrators' position is. Just so your Lordship knows, in their position paper they said that although the parties had fully argued the matter, it was appropriate for them to take a position and the position they took was one aligned with the Senior Creditor Group and York.

In their skeleton argument they say the parties have fully argued the matter so they're not going to make any arguments of their own. Whether that indicates some sort of shift, I'm not sure, but that's the position so far as they are concerned. We rely on the arguments they advance in the position paper, those not having been withdrawn. We can't rely on anything in the skeleton because there's nothing further.

So what I need to start with then is Wentworth's suggestion that there's potentially a cut-off date at the date of administration. Now, they advance two reasons for the existence of such a date. The first reason was contained in its position paper. And can I show your Lordship that so I summarise it correctly? It's bundle 1, tab 5. It's paragraph 28. If your Lordship just reads paragraph 28. (Pause)

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: So the first argument I want to address is the

argument that the cut-off date follows from the fact that commencement of the administration is the notional date of proof and distribution. We say that's wrong for the following reasons.

My Lord, firstly, it's not supported by the terms of rule 2.88(9). Those terms simply refer to the rate applicable to the debt, apart from the administration. They don't refer, for example, to the rate applicable to the debt on the relevant date, nor do they refer to the rate applicable to the debt on the date of the administration. That's the first point.

The second point is Wentworth's reliance on notional distribution of asset on a date of administration is, we submit, misplaced. That notion is a fiction employed in the context of the process of collective enforcement. It's employed to explain why it's necessary to value debts as at the date of the commencement of the insolvency proceedings and, given that its rationale is in explaining a pari passu distribution, it's not a concept which continues to have force when one is dealing with a surplus.

My Lord, that, as it were, is a technical point.

The third point is slightly different. The existence of a cut-off date in our submission is inconsistent with the manner in which creditors have

always been able to assert claims which only arose after the commencement date in the event of a surplus.

My Lord, your Lordship identified a category of such claims, as I submitted this morning, in TNM. I'm sure your Lordship remembers the passage, but just the reference, 1D, tab 142, and the paragraph is paragraph 107.

MR JUSTICE DAVID RICHARDS: Sorry, just remind me, which claims were those?

MR DICKER: The asbestosis claims which weren't in existence effective light the time of winding up because the cause of action hadn't yet accrued.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: It accrued subsequently and your Lordship basically said it cannot be the case that the surplus is distributed to shareholders without making provision for that.

MR JUSTICE DAVID RICHARDS: Yes, right.

MR DICKER: My Lord, there is also, again, I don't think I need to take your Lordship to it, one authority in the bundles where a creditor obtained a charging order in respect of a post-commencement date liability. That's a case called Ward ex parte Hammond. It's bundle 1B, tab 72. I don't need to show your Lordship the judgment because there's nothing in the reasoning. Just that's

what happened.

My Lord, the only cut-off date we say that has ever existed is the purely practical one of distribution of the surplus to shareholders. If one gets to the stage when the surplus has already been distributed, it's no longer part of the statutory scheme and it's too late. That is purely a practical point.

My Lord, the fourth point, why there's no cut-off date, is effectively the application of the salami-slicing argument which I dealt with this morning. My Lord, again, just running through this. One could start, for example, with a creditor who has commenced proceedings in a foreign court prior to the date of administration. So proceedings have been commenced before the date of administration. Assume a judgment is obtained subsequently, we say that must be a judgment which the creditor can rely on for the purposes of the rate applicable to the debt, apart from the administration, when the time comes to distribute the surplus.

It's a variant. If I'm right in relation to my third point, that the asbestosis creditors are entitled to payment out, even though their claims only came into existence after the date of administration, we say it must follow --

MR JUSTICE DAVID RICHARDS: Well, can I just ask you something about that?
MR DICKER: Yes.
MR JUSTICE DAVID RICHARDS: The notional date of distribution is said to be the commencement of the administration, but -- I'll just accept that for the moment, but the distribution we're talking about there is the distribution of the assets amongst the proved debts. So once you have had that distribution, really that idea of a notional date -- I mean, I don't think that has any bearing on post-administration claims, be they the personal injury-type claims in TNM or, indeed, the foreign currency conversion claims here, but really the "distribution", quote unquote, has been and gone by the time you get to unprovable claims -- non-provable claims.
MR DICKER: My Lord, precisely.
MR JUSTICE DAVID RICHARDS: But that non-concept that it's irrelevant to statutory interest, because statutory interest is interest payable on proved claims. So there is a link there, but once you get beyond that, so the non-provable claims, it doesn't seem to me that distribution has any part to play, at least that's a thought I have had at the moment.
MR DICKER: The first point, undoubtedly yes. We say the

analytical force of the notional distribution also has no impact when one comes to distributing the surplus, because the rationale for that fiction is you treat creditors pari passu as part of the process of collective enforcement in respect of their proved debts. Why do you have a cut-off? One way of illustrating that is by saying we have a notional distribution on day one.
MR JUSTICE DAVID RICHARDS: Does Lord Hoffmann speak of a notional distribution? I might find it quite helpful to see where this is said actually. I appreciate it's perhaps for Mr Zacaroli to persuade me of this and by all means leave it to him, but --
MR DICKER: My Lord, can I leave it to him in the first instance.
MR JUSTICE DAVID RICHARDS: Yes. I must say that the notion of valuation as at the date of administration, what to my mind drives at is the need to have a single date or valuation for the purposes of pari passu distribution, rather than at the moment the idea of a notional distribution I have a little difficulty with.
MR DICKER: My Lord, we agree with your Lordship.
MR JUSTICE DAVID RICHARDS: Okay.
MR DICKER: In A sense, it's tied to my third point. This notion distribution on day one in a sense can't take one anywhere if you accept my third proposition, namely that

a creditor, like the asbestosis creditors in TNM, only came into existence after the date and nevertheless get paid in full.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: There must be something else going on there. What is going on must be inconsistent with a notional distribution on day one because they weren't -- I hypothesise they weren't even alive on day one.
MR JUSTICE DAVID RICHARDS: That was my point about whether in fact it's inconsistent or on analysis is inconsistent, yes.
MR DICKER: My Lord, the only submission I need to make is that you can't get a cut-off date which my learned friend is contending for by relying on this notion distribution.
MR JUSTICE DAVID RICHARDS: I see.
MR DICKER: So I gave your Lordship the example of a creditor who commenced proceedings before the date of administration --
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: -- and obtained judgment afterwards.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: Now, why, if the asbestosis creditors in TNM are entitled to be paid out of the surplus, although only coming into existence after the date of administration,

why is this creditor not entitled to say, "I should be entitled to interest in accordance with my rights. One of my rights, it's true, only arose post the date of administration. Nevertheless, it existed by the time the surplus came to be distributed"? My learned friend, on my learned friend's case that is not a claim to interest which is catered for by rule 2.88(9). My Lord, one can take the various examples your Lordship discussed with me this morning. Proceedings having been commenced before the date of administration is obviously the easiest. What about a judgment obtained the day after, why should there be any fundamental distinction there?
It's at that stage that the -- we say the draughtsman has effectively taken in rule 2.88(9), in relation to foreign judgments, the same approach as he has effectively taken in rule 2.88(9) when talking about Judgments Act rate interest.
Can I phrase that in a slightly different way?
The reason for giving people Judgments Act rate interest is because the moratorium prevents them from obtaining a judgment of their own. You don't want creditors -- there's no point having creditors incurring this cost and expense of getting judgment, so you short-circuit it by providing a right to interest at the

Judgments Act rate.

We say embodied in the phrase "the rate applicable to the debt, apart from the administration" is an identical -- within that compendious phrase is an identical concept in relation to foreign judgments. The same rationale applies. In other words, if one accepts that creditor who has obtained a foreign judgment after the date of administration would be able to say in the event of a surplus, "I'm entitled to interest", at that point the legislature thinks to itself, "Well, we know where this is going. If we leave it like this, every creditor will simply apply for -- issue proceedings, obtain judgment to protect themselves in the event of a surplus". That pointless. So the phrase "rate applicable to the debt, apart from the administration" is broad enough to cover not merely someone who has actually obtained judgment but, similarly, someone who is entitled to do so but prevented in effect by the scheme.

MR JUSTICE DAVID RICHARDS: You move on, therefore, from the actual judgment entered post-administration to the creditor who could have commenced proceedings and entered judgment?

MR DICKER: Yes, because otherwise the scheme will operate inefficiently, unnecessarily expensively and ultimately

unfairly.

MR JUSTICE DAVID RICHARDS: Well, it would. Which is why I raised with you the question as to whether the court would actually permit proceedings to be commenced or continued if an outcome would be interest at the judgment rate. I'm not sure this is -- I don't know whether the notion of enforcement would include that, as I mentioned this morning, that's the conventional term, condition on which leave to commence proceedings is given, but if the court were alive to it, it would be an issue, I think, as to whether it might not impose a condition that the creditor would not seek to claim judgment rate interest in the administration, precisely for the reasons you're giving.

MR DICKER: Now, again, to take it in stages. One can certainly see a court regarding it as unsatisfactory if one creditor effectively obtains judgment and others, for whatever reason, either are incapable or don't, because one is then receiving interest and the other is not and that's unequal treatment. So one can certainly see that concern where there is an issue of potentially equality between creditors. But, my Lord, if all one is concerned about is the creditors effectively as a whole -- assume there are only ten creditors and they come to the administrator and they say, "Your forecasts

indicate that there is going to be a surplus. Nothing is certain". Now, you also tell us that at the moment we don't have judgment and you tell us that Mr Zacaroli has advised you that if you don't have judgment by the date of administration, you're not going to get interest. You don't otherwise have a right to interest. So the creditors say to the administrators, "This seems rather unfair. This is -- we're prevented from taking proceedings. We would have obtained judgment otherwise. You should permit us effectively to obtain judgment We're not going to enforce it. We're simply going to rely on the judgment in the event that a surplus arises" --

MR JUSTICE DAVID RICHARDS: And here you're necessarily talking about a foreign judgment, aren't you?

MR DICKER: Yes, because we --

MR JUSTICE DAVID RICHARDS: Because you have it anyway, you don't need to bring proceedings.

MR DICKER: Absolutely. The only question is whether or not that hypothetical scenario I gave your Lordship is really in a sense a complete waste of time. If in that situation the court would say, "Well, this is a competition between you and the debtor; the creditors come first; you really shouldn't be sort of prejudiced by the delay, prejudiced by the effect of moratorium".

If the court would in that situation give permission --

MR JUSTICE DAVID RICHARDS: Can I just pause you there. The prohibition on commencing or continuing legal proceedings and whatever, does that apply to foreign legal proceedings?

MR DICKER: No, and I was going to deal with this. As a matter of law, it's not regarded as having direct effect on foreign proceedings.

MR JUSTICE DAVID RICHARDS: No, I would have assumed so, yes.

MR DICKER: But the court does have -- so in a sense a creditor can in one sense commence foreign proceedings. The difficulty is that if he's subject to the jurisdiction of the English court, the English court has jurisdiction to restrain him from doing so.

MR JUSTICE DAVID RICHARDS: Yes, yes. I suppose you might get a situation, might you, where a creditor commences proceedings abroad, gets a judgment, and then lodges this proof and claims interest so at the time he got the judgment could he say he hadn't been subject to the jurisdiction of the court?

MR DICKER: Then there are two possible grounds of jurisdiction. The first is he's simply present within the jurisdiction and can be restrained in that sense. The second is, following Rubin v Eurofinance, if he

proves in the liquidation, then he's submitted to the insolvency.
MR JUSTICE DAVID RICHARDS: Yes, quite. At that point the English court, faced with this argument, might say, "We're not going to permit you to claim your foreign judgment interest"?
MR DICKER: It may do but not necessarily.
MR JUSTICE DAVID RICHARDS: No. It all depends on the construction of this really.
MR DICKER: In part, but there's also a discretionary element as well. The cases, like Swedair, the court won't necessarily grant an injunction if the effect is to prevent that creditor from obtaining the advantage in circumstances where others the court can't injunct will nevertheless go ahead and obtain the advantage anyway.
MR JUSTICE DAVID RICHARDS: I see. Right.
MR DICKER: So one starts with the fact that the English court, although the moratorium doesn't as a matter of English law purport to prevent creditors from commencing proceedings in foreign courts, it's certainly not part of the statutory scheme they're intended to do so, if I may put it that way.
MR JUSTICE DAVID RICHARDS: Correct.
MR DICKER: The court may have scope for restricting some, but not all, creditors from doing so. It may or may not

exercise its jurisdiction to do so. So one is immediately raising the possibility of unequal outcomes. Some creditors may not, some creditors may be in a position to and get their judgment. If they can have their judgment and if they're then entitled to rely on their judgment in the event of a surplus, we have unequal treatment.
MR JUSTICE DAVID RICHARDS: Yes, but are they entitled to rely on their judgment in the event of a surplus?
MR DICKER: Well, my Lord, that comes back to the two points I made earlier. First of all, under the terms of the rules if it's a rate applicable to the debt, apart from the administration, then we say under the rules "yes". You would have to find some other basis on which you could deprive them. It may be some development of the hotchpotch rule or something of that sort, but that's all in the context of -- the reason why the court would do that, in our respectful submission, is only if it would lead to unfairness between creditors.
MR JUSTICE DAVID RICHARDS: Quite so.
MR DICKER: So in every creditor could do this, there wouldn't be a problem. Permission should be granted, but it's pointless to go through the exercise of applying, getting permission --
MR JUSTICE DAVID RICHARDS: You wouldn't need permission,

would you, because they're foreign proceeding?
MR DICKER: No, you may --
MR JUSTICE DAVID RICHARDS: You might be subject to injunction -- to injunction proceedings but --
MR DICKER: Your Lordship is quite right, I think, strictly speaking. You may not need permission as such. What you may need to do is spend the time and effort ensuring that someone isn't going to injunct you from doing that, so liaising with the administrators, coming to some sort of agreement that you'll get judgment but you won't enforce it, you'll only rely on it in the event of a surplus as against shareholders, something of that sort.
MR JUSTICE DAVID RICHARDS: Exactly, yes.
MR DICKER: The short point is if that is, as it were, a potential scenario, in our submission the sensible approach for the legislature to have taken and the approach which we say they have in fact taken was effectively to take the same approach as they have done in relation to domestic judgments and say, "You don't need to get a judgment abroad. We'll short-circuit the whole process".
MR JUSTICE DAVID RICHARDS: So I suppose the question is how do you get that out of the words of the rule?
MR DICKER: Correct, and the rate applicable to the debt,

apart from the administration, we say asks essentially the hypothetical question: what would be the rate applicable, apart from the administration?
If you have a creditor --
MR JUSTICE DAVID RICHARDS: If we got a judgment?
MR DICKER: Yes, if we got a judgment. If you had a creditor, say, who had perhaps -- I think York put it rather well in their argument. They say essentially what's the difference between a creditor who has a contractual claim which he's prevented from -- contractual right to interest and he's prevented from obtaining a judgment -- sorry, has a contractual claim prevented from obtaining judgment, what's the difference between that and a party who rather than insert a contractual right effectively bargained for New York governing law, New York jurisdiction. York's point, which we submit is a good one, that he has effectively bargained instead for the right to compel payment by process of law in New York and to be paid in New York -- paid the New York Judgments Act rate and that should be sufficient.
Now, that's the first argument. I'll come back to how this all fits together in due course.
The second argument that Wentworth raises is a different argument. Your Lordship will find it in

their skeleton argument at paragraph 126, if your Lordship has that. My Lord, it's an argument based on the doctrine of merger. Your Lordship will see how it runs. 126:

"First, as a matter of construction, 2.88(9) permits statutory interest to be paid at a rate higher than the Judgments Act rate if there was a rate applicable to the debt, apart from the administration."

So one starts with the concept of the debt and in paragraph 2, they say:

"The debt there referred is to a reference back to the debt in respect of which a proof was submitted because the rate referred to in rule 2.88(9) is applied by rule 2.88(7) to those debts being the debt proved."

MR JUSTICE DAVID RICHARDS: Well, yes. There's an interesting point here that what -- well, it slightly depends what Mr Zacaroli means there, but he says that the debt there referred to is a reference back to the debt in respect of which a proof was submitted, which suggests the underlying contractual or other debt, but then goes on to refer to the rate being applied to those debts being the debts proved.

Now, there's an interesting question, I think, lurking there as to whether those are the same debts, where the debts have been converted from a foreign

currency.

MR DICKER: I don't know what the answer to that is, but, as I understand it, the force of the argument to the extent it has force comes at a later stage.

MR JUSTICE DAVID RICHARDS: All right.

MR DICKER: What's then said in 3 is:

"On the assumption that no judgment had been obtained ...(reading to the words)... of the law of obligations."

Then this is the critical point. In 4, it is said:

"Any judgment subsequently obtained would be different from such debt. The rights of the creditor after judgment flow from the judgment."

So, in other words, as we understand it: 2.88(9) provides for interest on debts. Those are essentially your underlying debts. If you get a judgment afterwards, the argument appears to be that's something different because your underling claim has merged into the judgment and what you now have, so the argument runs, is not something on which interest is payable. What you now have is a judgment. And 2.88(9) doesn't give you interest on the judgment, it gives you interest on the underlying claim and that's different.

MR JUSTICE DAVID RICHARDS: Yes. I see. So just going back to the example of the personal, injuries claim, not the

TNM one but the one where a cause of action is complete before the date of administration. The person injured gets permission from the court or leave of the court to commence proceedings, to obtain a judgment on terms where the judgment won't be enforced. He obtains judgment for, let's say, £100,000. Leave aside the Third Parties (Rights Against Insurers) Act, he then is admitted to proof for £100,000. That's clearly going to follow, but I suppose Mr Zacaroli would say he's not proving his judgment debt. The judgment quantifies the debt -- the provable debt which existed at the date of the administration.

MR DICKER: I think that's right, although there is this oddity, that the underlying debt has effectively, if one follows the merger cases, now disappeared and all you have is the judgment.

MR JUSTICE DAVID RICHARDS: Which didn't exist at the date of administration.

MR DICKER: If one insists on this sort of intellectual purity, if that's the right word, one could find oneself in our submission in a position where you're not entitled to interest. Because, although you would have been entitled to interest on your underlying claim, that no longer exists. What you have instead is a judgment and the rules don't provide for interest on judgments;

that would clearly be a complete nonsense.

Now, the reason it's a complete nonsense is because there's no difficulty effectively construing the word "debt" in 2.88(9) as including not only the debt in its original form but also the debt as subsequently merged in the judgment. No difficulty if one takes that approach in saying the bundle of rights in respect of which you are entitled to interest, now reflected in the judgment, includes the fact that you have an order for interest at the Judgments Act rate.

Put another way, the doctrine of merger exists to prevent a claimant who has obtained a judgment from obtaining a second judgment against the same party on the same cause of action. That doctrine has absolutely nothing to do with the payment of interest out of a surplus under rule 2.88(9).

York also provide further reasons why the doctrine of merger can't be relevant here. I'll leave my learned friend Mr Smith to deal with these, but just so your Lordship knows what the issues will be. York makes the point that the doctrine relies on the fact that in England a debt merges in the judgment, and your rights are then to be found in the judgment. They say, "Well, that may not be the position where one has" --

(Lights dim)

MR JUSTICE DAVID RICHARDS: If you press the thing, you'll get a bit more light on. That's it. Good.
MR DICKER: They say that may not be the case where you're dealing with judgments under a foreign law; in other words, the English doctrine of merger may not apply to foreign judgments. They also say that there's an issue as to whether it applies in relation to arbitrations.
So if you are going to rely on the doctrine of merger, plainly it has to be an applicable doctrine. York's submission, again your Lordship will hear from Mr Smith no doubt in due course, is there may be problems in that respect when you're dealing with foreign judgments.
MR JUSTICE DAVID RICHARDS: So, just to be clear about this, Mr Dicker, so far as you are concerned, there are two issues here, are there? First of all, whether the rate applicable to the debt, apart from the administration, means a foreign judgment rate in the event that a judgment is in fact entered?
MR DICKER: Yes.
MR JUSTICE DAVID RICHARDS: Point 1.
I don't know whether that's a practical issue in this case or not.
Secondly, you say that those words encompass also cases where the foreign law creditor could obtain or

a creditor could obtain a foreign judgment?
MR DICKER: Yes, and obviously our primary argument is the second.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: I don't know whether or not the first argument is so far a practical issue.
MR JUSTICE DAVID RICHARDS: I see.
MR DICKER: But it could conceivably become an issue.
MR JUSTICE DAVID RICHARDS: Yes clearly. If the answer to the first question is "no" then the answer to the second question is "no", but not the other way round.
MR DICKER: Yes. The issue would then arise if the answer to the second question is "no" but the answer to the first question is "yes" at which point every creditor --
MR JUSTICE DAVID RICHARDS: Will rush for judgment. That's your point, and I appreciate that, yes.
MR DICKER: And that may not be a satisfactory state of affairs because there may be issues -- I mean, ignoring all the obvious cost and expense, there may be issues about that they only get interest from the date of judgment, the extent to which they can get pre-judgment interest in the same way as you can under section 35, et cetera, it would potentially be a rather messy, expensive and probably unequal process.
So those are Wentworth's two arguments, at least in

their position papers and skeleton argument.
What then is the correct approach? Your Lordship has, I think, already our submissions in relation to this. We say the phrase "the rate applicable to the debt, apart from the administration" is certainly capable of covering a creditor who has in fact obtained a judgment regardless of when; and, secondly, it's also capable of being construed effectively by analogy with the Judgments Act rate provision in 2.88(9), applying similar logic in Whittingstall v Grover to encompass a creditor who hasn't in fact yet obtained a judgment.
We say that's supported by the fact it's consistent with the basic policy underlying the rules dealing with statutory interest. It's your Lordship's judgment in Waterfall 1, paragraph 163:
"The purpose of the rules is to entitle a creditor to compensation for delay by way of payment of interest which the insolvency regime has prevented it from establishing either by proving or commencing its own proceedings."
As I say, at York's submission we say rather well put in paragraph 110 and paragraph 111 of their skeleton is that:
"The party who has bargained for New York governing law and New York jurisdiction has bargained for the

right to compel payment by process of law in New York and to be paid the New York judgments rate."
In other words, what proceedings has he been prevented from commencing? Answer, in his case, New York proceedings.
Secondly, we say such an approach would be fair. A creditor who has bargained for a contractual rate of interest would not be better off than one who bargained for the right to compel payment by process of law and to obtain interest at a foreign judgment rate. They are two different sources of rights. You can either put it out in your contract or you can say, "I won't make it the subject of a contractual entitlement, I'll simply rely on statute in whatever the jurisdiction is; it could be in identical terms. If the debtor doesn't pay, I won't have a contractual right to rely on. I don't need one. I just commence proceedings and get judgment". There's no reason, as it were, why a contractual right ought to have pre-eminence over essentially a statutory right.
Third, it would avoid distinctions which are impossible to justify. My Lord, this is the salami-slicing point. Where actually are you going to draw the line if you're not going to draw it at one end or other. That, no doubt, is the reason why Wentworth

takes the position there's a cut-off date at the date of administration and nothing beyond.
MR JUSTICE DAVID RICHARDS: Less.
MR DICKER: Why we take the position actually it doesn't matter whether you have a judgment at all because the various intermediate positions are obviously not satisfactory for various reasons. The difference between us is we say those intermediate positions undoubtedly give rise to a right under 2.88(9); in other words, you have already slipped beyond Wentworth's cut-off date and you are now down the slope and there is no logical stopping point before you get to the Whittingstall v Grover conclusion.
Wentworth says this can't be right because the application is too uncertain. It asks:
"How do you determine in which jurisdiction a creditor would have sought to obtain a judgment?"
We say in most cases this will simply not be an issue. The creditor may have already commenced proceedings, either before or after the date of administration. The agreement may contain an exclusive jurisdiction clause. The creditor may only be able to take proceeding in certain jurisdictions, whether because of domicile or for some other reason.
Now, it's true that in other cases it may depend on

a closer assessment of the facts, but we say that's not a reason for saying it can never be done and the draughtsman could not have intended it ever to be done.
Put another way, the mere fact that there may be more difficult cases at the margins is not a reason for adopting an extreme conclusion proposed by Wentworth.
Wentworth asks whether it's necessary to show that the creditor would have pursued a claim all the way through to judgment; in other words, does the hypothetical exercise include cross-examining the creditor to find out whether or not it would have actually gone all the way to judgment? We say "no". Plainly that's not required. It's not required in relation to the Judgments Act rate provision. Effectively it's assumed within that entitlement.
They also ask whether it's's necessary to establish when a judgment would have been obtained and, again, we say "no" for similar reasons. That's not what the second half of 2.88(9) does and no more should it be a requirement for the first part.
My Lord, can I now deal with or rather make some comments in relation to Ruritania.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: My Lord, before, as it were, saying this is an issue probably best discussed in the context of 28.

My Lord, the observations are these. First of all, I'm sure your Lordship is aware that the issue your Lordship identified was one which was capable of arising in Lines Brothers number 2. There was a Swiss franc debt owed to the bank. There was a mandatory conversion of that debt into sterling, interest paid on that sterling sum. So the same mismatch between the underlying currency and the entitlement to interest arose.
MR JUSTICE DAVID RICHARDS: Right. So in Lines Brothers the contractual interest rate was applied to the sterling sum, and was it?
MR DICKER: Correct. That's precisely what Appendix A did.
MR JUSTICE DAVID RICHARDS: Yes, I see.
MR DICKER: No one suggested that that was inappropriate. It doesn't necessarily follow there may not be an issue in relation to it. That was the approach that was taken in Lines Brothers number 2.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: My Lord, the next observation is this: your Lordship is, as I understand it, correct that one factor that may affect the agreed rate of interest is the anticipated strength or otherwise of the relevant currency.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: Given that domestic interest rates are each

linked directly or less directly through the foreign currency markets, but, my Lord, obviously there are other factors which in many cases will be much more important when one comes to setting the interest rate on a debt, for example is the debtor creditworthy or not? The rate may be 5 per cent, 10 per cent or 15 per cent, not because of anything to do with anticipated currency movements but simply reflecting the financial strength of the debtor.
It may be that an economist would be able to estimate the extent to which the agreed rate implicitly reflected expected currency movement at the time it was entered into, but one suspect that would be a rather complicated exercise.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: My Lord, the other point is --
MR JUSTICE DAVID RICHARDS: I mean, this was -- I think someone has made the point that after Miliangos there was a period when judgments entered in England in a foreign currency carried interest at the Judgments Act rate. Then the law was changed. I forget when but someone will know that.
MR DICKER: My Lord, I'm told from a voice from my right, November 1996.
MR JUSTICE DAVID RICHARDS: November 1996, to give the court

a discretion as to the interest rate to be awarded. I mean, habitually the courts will apply a relevant interest rate to that currency.
MR DICKER: Yes.
MR JUSTICE DAVID RICHARDS: So, in a sense, the problem in relation to judgments was recognised by the legislative change. So I am only referring to that because clearly there is a problem about it.
MR DICKER: My Lord --
MR JUSTICE DAVID RICHARDS: I mean Novoship, which I think someone cited, the argument was run you should award a very high rate because it is a very high rate in England and therefore it's appropriate to award a high rate to a foreign currency, and the Court of Appeal firmly rejected that approach.
MR DICKER: My Lord, we do say that in practice in many cases, just as in Lines Brothers number 2, this is not going to be a practical issue. Yes, if one has creditors from Ruritania; no, if one has creditors from perhaps slightly more mature financial jurisdictions where extremes of interest rates are less common and currency fluctuations are also less as a result.
As far as I'm aware, and no doubt the administrators will indicate if this is wrong, the LBIE administration doesn't raise, as it were, the Ruritania problem; in

a sense there aren't in fact any creditors in Ruritania. So one approach may ultimately be for your Lordship, as it were, to exercise discretion over valour and say to the extent the problem rises, it may need to be addressed at some later date in the context of a case which actually directly raises it.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: My Lord, the other issue is whether or not there is some obvious way of accommodating the issue. My Lord, I think it's at that stage that sort of discussion may be easier to have in the context of question 28, which is why we were going to suggest your Lordship comes back to this issue, having perhaps had a clearer idea of the parties' positions on 28.
MR JUSTICE DAVID RICHARDS: Okay, yes.
MR DICKER: My Lord, those are my submissions.
My Lord, I hope your Lordship will allow me five minutes or something tomorrow morning if it turns out I've omitted something, but, subject to that, those are my submissions on question 4.
MR JUSTICE DAVID RICHARDS: Mr Smith, how long do you anticipate being on this point?
MR SMITH: Probably no more than ten minutes.
MR JUSTICE DAVID RICHARDS: Do you want to do it now?
MR SMITH: Yes. It will probably make sense. I am just

going to deal with the merger point which Mr Dicker referred to.

Submissions by MR SMITH

MR SMITH: My Lord, perhaps the easiest place to pick this up is actually in our skeleton argument which is in bundle 6, tab 3.
MR JUSTICE DAVID RICHARDS: Yes.
MR SMITH: My Lord, tab 6, page 36. The relevant point we deal with in footnote 14. It's really the question of how, if at all, the doctrine of merger applies, firstly, in the case of an arbitration award and, secondly, in the case of a foreign judgment. Dealing with the arbitration award first, your Lordship will see we refer there to two textbooks, Mustill & Boyd, firstly, and then Phipson. It's fair to say that in the arbitration context the question of whether merger applies seems to be somewhat of a live issue on which there are different views. My Lord, if you can perhaps take --
MR JUSTICE DAVID RICHARDS: I mean, do I need to know any more than that?
MR SMITH: Possibly not.
MR JUSTICE DAVID RICHARDS: I doubt whether I shall be resolving --
MR SMITH: No. I think it's probably for your Lordship to know there's a live issue really. Mustill & Boyd take

one view and Phipson take a different view, but Phipson say, actually, even then the doctrine of merger might not apply in all cases and it really depends on the terms of the arbitration clause.
MR JUSTICE DAVID RICHARDS: So Mustill & Boyd take the view -- take which view?
MR SMITH: Mustill & Boyd take the view that the doctrine of merger does not apply. Phipson is more inclined to take the opposite view, but even Phipson says it won't apply in every case and it really depends on the terms of the arbitration clause.
MR JUSTICE DAVID RICHARDS: I see.
MR SMITH: So, my Lord, that's arbitration awards where there's some uncertainty.
In the case of foreign judgments, the position is perhaps most clearly set out in the extract from Dicey we have included in the bundle. It is bundle 2, authorities bundle 2, tab 3. My Lord, it's paragraph 14-040 of Dicey. Just picking it up at the first hole-punch, it says:
"A foreign judgment in favour of the claimant was at one time no bar to a subsequent action in England based on the original cause of action."
It then refers to section 34 of the civil jurisdiction and the Judgments Act 1982, which provides

that no proceedings may be brought by a person on a cause on action in respect of which a foreign judgment has been given in his favour and proceeded between the same parties or their privies unless the judgment is not enforceable or entitled to recognition in England.

Then it says:

"This displaces in part the rule of the common law that a foreign judgment does not extinguish the original cause of action in respect of which the judgment was given. The rule which was described by Lord Wilberforce as a rule which, if surviving at all, is an illogical survival."

Then 34 does not enact the statutory rule of merger by which the original cause of action would cease to exist.

Your Lordship sees from the footnote the authority for that is the House of Lords decision in the Republic of India v India Steamship. So there's no merger as such but rather how it appears to work is it imposes a statutory bar on the bringing of proceedings.

So in relation to foreign judgments, it doesn't appear as a matter of English law there's any merger at all. So, my Lord, in our submission, the fact there is that, at the very least, uncertainty in relation to arbitration awards and foreign judgments does rather

undercut Wentworth's point.

My Lord, that was all I was going to deal with on this point.

MR JUSTICE DAVID RICHARDS: Right, very well. So, Mr Zacaroli, you will be going next. Would it make sense to sit at 10 o'clock tomorrow? What does anyone think? In the light of what Mr Trower was saying --

MR ZACAROLI: The other issues are likely to go much faster than issues 2 and 39.

MR JUSTICE DAVID RICHARDS: Right.

MR ZACAROLI: So whether we need to be concerned at this stage or not, I'm not sure. I won't be long on issue 4.

MR JUSTICE DAVID RICHARDS: Well, I would like to rise on Friday at about 3.20, but I can always sit earlier on Friday if that's needed, or we can review the position tomorrow with a view to sitting earlier on Thursday.

If it is your combined view that it's at this stage not necessary to sit at 10.00 tomorrow and to stick to 10.30, I'm content with that.

MR ZACAROLI: I'm not giving a combined view at all.

MR JUSTICE DAVID RICHARDS: No. What do we think? Is it difficult for anyone? I think there may be some sense in sitting at 10.00 tomorrow, if that means -- unless I have a strong representation against it?

Right. 10 o'clock tomorrow. Thank you very much.

(4.23 pm)

(The court adjourned until 10.00 am on Wednesday, 25 February 2015)

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