Wednesday, 18 February 2015

(10.30 am)

(Proceedings delayed)

(10.40 am)

MR JUSTICE DAVID RICHARDS: Mr Trower.

Opening submissions by MR TROWER

MR TROWER: May it please your Lordship. This is a trial of the joint administrators' application for directions in which we are dealing with tranche A of the three tranches which your Lordship directed at the last hearing.

MR JUSTICE DAVID RICHARDS: Yes.

MR TROWER: My Lord, I hope you will forgive me if I don't go through the appearances. They are apparent in the skeleton arguments.

MR JUSTICE DAVID RICHARDS: Indeed.

MR TROWER: My Lord, can I raise just one small point of housekeeping, we do have a transcript so if we could have a short mid-morning and mid-afternoon break, I think the transcribers would appreciate that.

MR JUSTICE DAVID RICHARDS: Yes certainly.

MR TROWER: My Lord, the issues which are before your Lordship today are issues that go to three broad categories of question. The first category is issues on quantification of statutory interest, and those are

issues 1 to 8.

MR JUSTICE DAVID RICHARDS: Yes.

MR TROWER: The second category is whether currency conversion claims exist in certain circumstances and the quantification of those claims. That broadly issues 28 to 33.

The third question is -- which is a freestanding point, is how to proceed where a single figure compromise has been reached on a series of claims by the same creditor, containing different interest rates and currencies, and there isn't actually on the face of the compromise any provision for how you approach it as between the various parts of the single claim.

My Lord, just so your Lordship can put these in context, and I don't think we need to come back to them, save possibly in relation to an issue that we may have to think about a little bit later, the tranche B issues and the tranche C issues are as follows. The tranche B issues are concerned with post-administration contracts; in other words, agreement that were entered into by the company in administration with its creditors and the impacts that those contracts may have on the questions in relation to interest and foreign currency conversion.

Those are issues 9, 34 to 36 and 38. That's the second stage of the trial.

The third stage, tranche C, is issues 10 to 27 and those are essentially master agreement issues. They relate to cost of funding and issues relating to the construction of master agreements and foreign master agreements, foreign law master agreements.

MR JUSTICE DAVID RICHARDS: Right.

MR TROWER: The reason I mention those now is there is a question about -- as to whether some of the issues in relation to currency conversion which are before your Lordship today should actually now be put off to tranche C.

MR JUSTICE DAVID RICHARDS: Yes.

MR TROWER: And we'll come on to that.

MR JUSTICE DAVID RICHARDS: Yes, because as one got into issues in the 30s, I think, apart from 39, the written submissions, as it were, peter out a bit.

MR TROWER: I think it's fair to say that there's a lack of enthusiasm.

MR JUSTICE DAVID RICHARDS: I'm sure we'll all feel that way, but the point in a sense is that there is -- the point is made by number of parties that there isn't necessarily the information or evidence available at the moment and, but anyway we'll come to that.

MR TROWER: We'll have to come to that at some stage.

MR JUSTICE DAVID RICHARDS: Yes.

MR TROWER: It's fair to say -- and I was going to make the point a little bit later, but I'll make it now -- it's blindingly obvious from the skeletons that parties are more concerned about the interest issues than they are about the other issues.

MR JUSTICE DAVID RICHARDS: Yes.

MR TROWER: That's what the concentration is on.

MR JUSTICE DAVID RICHARDS: I think issue 39 comes in with issues 1 to 8 really the company does.

MR TROWER: It actually applies to both interest and foreign currency conversion.

MR JUSTICE DAVID RICHARDS: I see.

MR TROWER: But it's being dealt with -- and before I forget, does your Lordship have a copy of the trial timetable?

MR JUSTICE DAVID RICHARDS: Yes.

MR TROWER: We suggest we deal with it together with issues 2 and now 3 because it follows naturally on from some of the arguments on issue 2.

MR JUSTICE DAVID RICHARDS: Yes.

MR TROWER: These issues arise in the context of an eventual surplus after payment of proved debts of between a low case on the latest progress report of 4.94 billion and a high case on the latest progress report of 7.39 billion.

MR JUSTICE DAVID RICHARDS: Pounds sterling.
MR TROWER: In sterling.
Your Lordship gets latest progress report is in the bundle. I'll just give it to your Lordship for the moment. It's exhibited to Mr Lomas's eleventh witness statement at volume 4, tab 2, and the relevant figures are on page 9. They're as at the end of September.
MR JUSTICE DAVID RICHARDS: Right.
MR TROWER: So there will be another progress report fairly soon but it's not out yet.
So that's the sort of range of figures we're talking about. As your Lordship knows from the skeletons, the Senior Creditor Group represented by Mr Dicker and York represented by Mr Smith argue for result on each issue which increases the distributions of statutory interest to be made and increases the amount of any non-provable claim; that is the broad thrust of what their positions are. Whereas Wentworth, and Mr Zacaroli and Mr Allison, argue for a result on each issue which increases the prospects of recoveries available for the sub-debt and ultimately the members.
Now, there's just one little wrinkle, in that Wentworth, in particular, doesn't make arguments to that end which it considers not to be arguable.
Your Lordship will have seen, for example, on one issue,

issue 3, in their position paper they advanced an argument which they no longer advance in their skeleton. There's one issue where for some other reason which the administrators don't know, but it doesn't matter what the reason is, they're not arguing, in what might be thought to be that interest, which is why the administrators have advanced an argument and that relates to issue 8.
MR JUSTICE DAVID RICHARDS: Right.
MR TROWER: I am going to take your Lordship to the -- what I thought I would do is just run through the issues quite quickly to summarise what the parties' positions are. It won't take me very long. Before I do that, can I just say this, and we make this -- in paragraph 15 of our skeleton argument we refer to this. There are a number of issues which have become effectively agreed positions, although what we have done is set out the arguments for your Lordship and they can be found, and we'll go there in due course, either in the position paper or the skeleton, so your Lordship can see the way they have developed.
The administrators were concerned, obviously, to ensure that having become agreed positions in the context of parties to this application any stakeholder with an interest had an opportunity to come along and

say, "This shouldn't be the agreed position"; so steps have been taken to keep the website up-to-date every time an agreed position has been reached so that people can have an opportunity to come along and say to the administrators, "Actually this argument shouldn't be made". Actually nobody has said anything in light of that. We will still take your Lordship through the arguments just so your Lordship can see what they are, because I will be asking for directions that the administrators should proceed in accordance with the agreed positions in any event.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: Against that background, shall we go -- the easiest way of doing this may be simply to open the application notice and I'll -- because that lists out the issues.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: I'll go through the ones which are before your Lordship. Issue 1 is the first one which actually has become an agreed issue anyway, save for a small part. This is whether on the true construction of 2.88(7) the statutory interest is payable simple or compound, while the rate applicable is the Judgments Act rate. So we're talking about the Judgments Act rate context. And the question is whether when you're looking at the rule

2.88(7) the statutory interest is payable, simple or compound.
I don't know whether your Lordship might find it helpful, while we are going through the issues, to have rule --
MR JUSTICE DAVID RICHARDS: It would be helpful. I meant to bring my Red Book down.
MR TROWER: It's in the bundles as well. It's in 3 -- I'm afraid I've been using the Red Book as well. It's in 3D, at tab 64. Mr Bayfield has thought your Lordship might like a copy of the Red Book.
MR JUSTICE DAVID RICHARDS: Don't worry, I'll look at it here. I appreciate it's a bit like the Bateman cartoon, "The man who hasn't got his Red Book in present company"! But I've got it here for the moment.
MR TROWER: I immediately see we have -- I think we have the wrong one. Mr Bayfield's Red Book is the right version because it's the version that was in force when the company went to administration.
MR JUSTICE DAVID RICHARDS: Ah, yes, of course. Thank you. That's a good point. It would be no use to me having the current Red Book.
MR TROWER: We'll dig out a proper version.
MR JUSTICE DAVID RICHARDS: Yes, thank you very much.
MR TROWER: So if we look at -- if we do this exercise in

relation to the rules, we're looking at what the Judgments Act rates means for the purposes of 2.88(7).
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: Can it include compound interest or is it only simple? All, agreed that the answer on the main issue is simple, not compound, so this is one of the agreed issues.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: Now, there is a deeply technical sub-issue where -- which relates to the computing of the daily rate and whether in computing the daily rate the calculation should be made by reference to either a year of 365 days or a year of 366 days, depending on whether or not it's a leap year. On this point there's a short point which we'll come to -- we certainly don't need to deal with it now and we'll deal with it at a convenient moment, subject to your Lordship. York says the rate should always be quantified by reference to a year of 365 days. The administrators say that you look at reality and if it's a leap year for the relevant period of days, then you compute it by reference to a year of 366 days.
MR JUSTICE DAVID RICHARDS: Right.
MR TROWER: But we can come back to that because what I'm going to suggest is there will be one or two

miscellaneous points like this which are probably better picked up at the end.

My Lord, the second issue is one of the principal issues which your Lordship is being asked to decide. It's called in lots of places the Bower v Marris issue but the question is: is statutory interest calculated on the basis of allocating dividends first to the payment of statutory interest and then principal, or first in reduction of principal and then to payment of statutory interest.

This makes quite a significant difference on the figures. Your Lordship will find the figures identified in Mr Lomas's eleventh witness statement at paragraph 13. The overall difference is it's about 5.1 billion will be distributed by way of interest if it's treated as applied principal first and about 6.4 billion if it's interest first.

Now, the SCG, the Senior Creditor Group, says that once a surplus on payment proved debts arises, the dividends previously paid are notionally treated as being allocated to interest accrued as at the date of the payment of the principal. That's their case. York agrees. Wentworth say that there is no notional re-allocation and the joint administrators agreed with Wentworth on this point. So that's the way the parties

stand on that.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: There is -- we're now suggesting that your Lordship then deals with issue 39 immediately after.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: Issue 39 is this, and it's obviously towards the back of the application notice on page 13: insofar as it relates to statutory interest, is a creditor who is entitled to statutory interest or indeed any non-provable claim, but let's focus on statutory interest for present purposes, entitled to compensation for the time taken to discharge the claim and, if so, does the compensation form part of statutory interest and, if so, pursuant to the Judgments Act some claim in damages, some form of cause of action in restitution or in some other form?

Now, the SCG say that the answer to this is "yes" and that the claim will be larger if they're wrong on Bower v Marris because the consequence will be they will have a bigger claim that falls in under issue 39. The basis for saying that is that their existing rights are not vindicated by the statutory scheme and that there is a principle of payment of compensation in respect of late distributions. That effectively what they say.

York agrees essentially on the basis there's a claim for damages for late payment of money.

Wentworth disagrees and the joint administrators disagree.

So that's basically how the parties stack up on issue 39.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: Issue 3, which has come into this -- actually in its substantive part an agreed issue -- is coming into being considered as part of issues 2 and 39 in circumstances I'll explain to your Lordship in just a moment, but issue 3 is whether the rate applicable to the debt, apart from the administration, and that's the rate that one is referring to under paragraph 9 of rule 2.88 --
MR JUSTICE DAVID RICHARDS: Yes --
MR TROWER: -- refers only to a numerical percentage rate or to a mode of calculating the rate at which interest accrues, including compounding.

Now, the parties' position is that the Senior Creditor Group has always contended that that rate encompasses all factors relevant at the rate at which interest accrues and therefore includes compounding. York agrees but makes no submissions in its own right on this point -- anyway at the stage of the initial

skeletons. Wentworth now accepts that that is the position. They didn't at the time of their position paper but they now accept that you compound -- that rate includes the concept of compounding.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: We agree with the conclusion but we have included in our skeleton a description as to why it is that we have reached that conclusion and identified the counter-arguments for your Lordship.
MR JUSTICE DAVID RICHARDS: Yes. Thank you.
MR TROWER: Now, in paragraph 31 there's a sub-issue that arises in relation to issue 3 which arises in this way, and it's identified in paragraph 1 of the joint administrators' position paper. If the Senior Creditor Group is wrong on Bower v Marris, so we're in the realm of principal before interest and there's no notional re-allocation, and if the rate applicable to the debt apart from administration can include a compound rate -- so everyone is right on issue 3 -- the sub-issue is whether statutory interest continues to compound following payment in full of the principal; if it doesn't continue to compound following payment in full of principal, whether the creditor has a non-provable claim for interest that would have continued to compound following payment in full of the principal.

MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: But that may not be the answer.
Now, the Senior Creditor Group's position on that issue is that if it is wrong on Bower v Marris, statutory interest does continue to compound following payment in full. York doesn't make any substantive submissions on the point and Wentworth disagrees.
Now, we don't take a position on this point in the light of the fact that it appears to be being fully argued. I'll come back to just one point I want to make in relation to issue 3 that arises out of York's reply skeleton, but the impact of the sub-issue, this particular sub-issue, is quite significant. It's dealt with by Mr Lomas in paragraph 17 of his witness statement. The overall effect of interest continuing to compound is about 450 million.
Now, in their reply skeleton York assert that what they characterise as Wentworth's and the joint administrators' concession on issue 3 is inconsistent with their position on Bower v Marris. So they have made that point in their reply skeleton. So in effect they're saying there's an inconsistency between the position that's taken on Bower v Marris and the position which is taken on issue 3, namely that interest -- the interest rate can include compounding. That's the

reason why issue 3 is going to be looked at in the context of issue 2.
MR JUSTICE DAVID RICHARDS: Yes, I see.
MR TROWER: Even though in substance it's agreed.
I just want to say this: for the avoidance of any doubt we don't accept -- it won't surprise your Lordship to hear -- that the fact that compounding is appropriate when calculating the rate for the purposes of rule 2.88(9) has any effect on the rule in Bower v Marris. They are two quite different questions. Compounding is available as a matter of construction of rule 2.88(9) because it is a factor which goes to the computation of the rate that is permitted by rule 2.88 and properly falls within the words. The rule in Bower v Marris is not such a factor because it is inconsistent with the true construction of rule 2.88.
I just wanted to make that point because there does seem to be a bit of a misapprehension as to what is actually the administrators said about why it was that they were accepting what the answer was in relation to issue 3.
Issue 4. This is: is the rate applicable to the debt apart from the administration apt to include a foreign rate of judgment interest? Again, we're still looking at 2.88(9), the rate applicable to the debt,

apart from the administration, is that apposite to include a foreign rate of judgment interest? Now, the Senior Creditor Group contends that it is apt to include a foreign judgment rate and they contend that it is apt to include it whether or not a foreign judgment has been obtained before the administration.
York agrees with that.
Now, Wentworth takes the opposite position in circumstances in which the creditor was entitled to sue in a foreign jurisdiction but did not have a judgment at the time of the administration. So the ground of dispute between the parties is whether the rate applicable to the debt apart from the administration is capable of covering what would be a foreign judgment rate of interest in circumstances in which a creditor had an entitlement to sue for a foreign judgment but did not in fact do so and couldn't do so because of the administration.
MR JUSTICE DAVID RICHARDS: What about a contractual rate?
MR TROWER: A contractual right to sue --
MR JUSTICE DAVID RICHARDS: A contractual rate of interest.
MR TROWER: The contractual rate of interest will -- well, what, if there's a contractual entitlement to sue for a foreign judgment?
MR JUSTICE DAVID RICHARDS: No. Sorry, perhaps I am reading

this too widely, but -- so the issue in issue 4 is stated to be whether the rate applicable to the debt, apart from the administration, is apt to include a foreign judgment rate of interest or other statutory interest rate?
MR TROWER: Yes.
MR JUSTICE DAVID RICHARDS: My question is: what about -- so you have a debt in US dollars with a contractual interest rate.
MR TROWER: Yes.
MR JUSTICE DAVID RICHARDS: Is that encompassed in this question?
MR TROWER: No, it's not.
MR JUSTICE DAVID RICHARDS: Is it encompassed anywhere?
MR TROWER: It's relevant to this question --
MR JUSTICE DAVID RICHARDS: Yes, it is.
MR TROWER: -- in the sense that where you have a debt in a foreign currency in that way it may well be that there's an entitlement to sue for recovery of it in a foreign jurisdiction.
MR JUSTICE DAVID RICHARDS: Well, sorry, I am just -- looking at 9, the point I think I'm on is this: the interest rate, which is payable as statutory interest, is the greater of the judgment rate under English law or "the rate applicable to the debt apart from the

administration".
MR TROWER: Yes.
MR JUSTICE DAVID RICHARDS: So those words everyone agrees those latter words, includes a contractual rate of interest if it's greater than the judgment rate.
MR TROWER: Indeed yes.
MR JUSTICE DAVID RICHARDS: But they're quite general words so it could include, it is said, a foreign judgment rate.
MR TROWER: Yes.
MR JUSTICE DAVID RICHARDS: The question I'm asking is -- and I appreciate issue 4 is looking at foreign judgments but what about contractual rates of interest?
MR TROWER: There isn't an issue before your Lordship on that.
MR JUSTICE DAVID RICHARDS: Everyone agrees --
MR TROWER: Everyone agrees that if there's a contractual entitlement to a rate which is greater than 8 per cent.
MR JUSTICE DAVID RICHARDS: All right. This is the one area, and it is the only area, I think, where I think I might want some more assistance.
MR TROWER: Yes.
MR JUSTICE DAVID RICHARDS: The reason for it is this: if you have an interest rate of, let's say, 15 per cent, be it a foreign judgment rate or a contractual rate, on

a foreign currency, is it right -- does the rule envisage that that interest rate should be applied to a sterling debt? Because obviously the proved debt is a sterling debt.
MR TROWER: Yes.
MR JUSTICE DAVID RICHARDS: Now, that's what I -- I mean, there is an apples and pears problem about applying a rate of interest applicable to a debt in a foreign currency to a debt in a different currency because interest rates necessarily are linked to the currency in question.
MR TROWER: Yes.
MR JUSTICE DAVID RICHARDS: So if I can take a slightly, no doubt, extreme example but not one which is impossible to imagine. Assume you have the Ruritanian piso and the Ruritanian piso is regarded in the markets as being an incredibly dodgy currency, likely to devalue as against major currencies. That would then reflect itself, one would imagine, in a high interest rate. And the point of the high interest rate is to compensate against the risk seen as real of a devaluation of that currency.
So let us suppose the Ruritanian piso one-year LIBOR is 25 per cent; not impossible. You then convert your Ruritanian piso debt into sterling as at the date of administration, giving you a debt of £1 million. It

then takes five years for the administration to reach the point of making, let's say, a single distribution. Assume the Ruritanian piso LIBOR rate remains the same; does that creditor get 25 interest -- interest at 25 per cent on the sterling debt? You're nodding, Mr Trower.
MR TROWER: I'm not nodding in the sense --
MR JUSTICE DAVID RICHARDS: I have put out the problem. I don't want to -- it's just an issue that I think needs to be thought about.
MR TROWER: Yes. I'm nodding in the sense of understanding the point.
MR JUSTICE DAVID RICHARDS: You understand the point. I'm not expecting any response from anyone at the moment, but I am -- it's a matter on which I shall require some assistance in the course of this hearing.
MR TROWER: Yes.
MR JUSTICE DAVID RICHARDS: Let me put it that way; when you get to it is another matter, and I appreciate it is not something you have addressed.
MR TROWER: I am grateful for that indication.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: So just to summarise in relation to the actual issue in relation to 4, the territory where there's dispute between the parties is whether -- is the

circumstance in which a foreign judgment could have been sought but was not obtained.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: The only point I just want to add to this is in our position paper, at page 14, we did identify that in the event that the answer is that put forward by the Senior Creditor Group and York, the joint administrators would like guidance on the question of the factors which satisfy the test. This is in: is the mere ability to sue enough and when should it be assumed that the foreign judgment was obtained?
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: Because they (inaudible).
There is just for your Lordship's note some evidence that gives a bit of colour to this point -- to this issue which is contained in Mr Lomas's eleventh witness statement, at paragraphs 22 to 25.
MR JUSTICE DAVID RICHARDS: Right.
MR TROWER: It just explains what the major jurisdictions we're talking about are and what is the judgment interest position in those jurisdictions.
The next issue is issue 5. The issue here is whether the comparison exercise, which is done for the purposes of -- done under rule 2.88(9), requires a comparison of the total amount of interest payable or

only numerical rates. SCG say that it's the total amount. York agree. Wentworth agree that where this issues arises as a result of compounding it should be the total amount. Our understanding is this issue is essentially therefore agreed between the parties.
There is some evidence which is set out in Mr Lomas's eleventh witness statement, at paragraphs 27 and 28, the practical problems that arise if the answer is not as everybody has agreed.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: There's then a sub-issue in relation to issue 5 which is dealt with in paragraph 40 of the position paper. It's this: when comparing the Judgments Act rate with the rate applicable, apart from the administration, is the proved debt to be considered as a single debt or do you just aggregate it into its component parts? Which is a question which is relevant where part of the debt bears contractual interest and part doesn't.
The parties actually have all reached the same position on this sub-issue as well, which is that disaggregation is the correct approach.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: Again, in Mr Lomas's eleventh witness statement, paragraph 29 and following, he explains some of the practical consequences that flow if there is

disaggregation in accordance with the agreement and what the difference is for creditors if there were to be aggregation, but he doesn't -- unlike the main issue 5, he doesn't say that there are problems; he just sets out what the consequences are.
The next series of issues which I thought might be more helpful to take together is issues 6 to 8.
MR JUSTICE DAVID RICHARDS: Right.
MR TROWER: These are all concerned with the concept of when interest is payable from.
MR JUSTICE DAVID RICHARDS: Oh, yes.
MR TROWER: Issue 6 is dealing only with interest applicable to the debt, apart from the administration.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: For the purposes of making the rule 2.88(9) comparison, i.e. comparing which is the greater, and the question there is: is the rate taken from the administration date, from the due date for the debt or from some other date?
Question 7 is: is statutory interest payable on the contingent debt payable from the date of the administration, the date the debt ceased to be contingent, or some other date, having regard to whether the debt was contingent at the time of the final dividend or at the time of payment of statutory

interest?
Question 8 raises exactly the same question in relation to future debts.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: Now, the Senior Creditor Group's position in this group of issues is that in all cases interest is payable from the date of administration, whether the debt is present, future or contingent. That's their broad thrust and York agree.
Wentworth says that in relation to contingent debts, interest is payable from the date on which the debt actually arises. That's what they say, but they have a different position in relation to future debts.
The joint administrators say that the start date is the date at which the debt falls due in relation to both contingent debts and future debts, so we agree with Wentworth on contingent debts but we stand alone on future debts. We also say that where the applicable interest is payable at the rate applicable to the debt, apart from the administration, so in the easy case the contract base, as opposed to the Judgments Act rate, it must be also be the case that the interest has become payable.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: Now, the Senior Creditor Group also raise the

issue in their reply skeleton of differences in the approach to when a liability is contingent for the purposes of the outstanding test. So what they illustrate in their reply skeleton is a range of different circumstances in which a liability might or might not be regarded as being contingent. I think rather than getting into any great discussion of that now, because it's not the time, I just want to make clear what the administrators' position is. The administrators' position is that a debt is outstanding for the purposes of rule 2.88 from the moment at which the creditor had a complete cause of action for its recovery. That's what we say the question is, although there is the extra point about where the applicable interest is payable at the rate applicable to the debt, apart from the administration. It must also be the case that the interest has become payable.

The practical impact on issue 7 is dealt with in Mr Lomas's witness statement at paragraphs 34 to 40. So he explains what the position is. The total impact in respect of contingent claims is that an extra half a billion, 0.5 billion, will be payable if contingent claim interest dates back to the date of administration and all claims are paid in full by September 2016.

So that is what I was going to say about issues 6

to 8.

We then move on -- as I said at the beginning my Lord, your Lordship is likely to be troubled with those issues, more than any of the others.

MR JUSTICE DAVID RICHARDS: Yes.

MR TROWER: We then move on to the essential currency conversion claim ones and just to go through them fairly quickly as to what the position is.

MR JUSTICE DAVID RICHARDS: Yes.

MR TROWER: Issue 28 is the first one: should the calculation of a currency conversion claim take into account the statutory interest paid? That's the question. The Senior Creditor Group says "no". Wentworth says "yes". York has a slightly more elaborate position in relation to this issue. All I'm going to do is invite your Lordship just to look at paragraph -- to note paragraph 208 of York's skeleton argument which describes it as having a primary case and a secondary case. Its primary case is essentially that interest is brought into account for the purposes of calculating a currency conversion claim based on the assumption that they're correct on issue 4, i.e. that a foreign judgment rate is available, even if the judgment isn't obtained.

If they're wrong on issue 4, they treat interest and

currency conversion claims as separate and they support Senior Creditor Group on issue 28. On this issue the administrators are in the same position as the Senior Creditor Group so we're on the Senior Creditor Group's side of the argument on this one.

Again, there is evidence -- Mr Lomas, paragraphs 51 to 55 -- which deals with the practical impact of this particular issue and there's a range between 0.4 billion and 0.9 billion.

The next issue is issue 29. This is: does a creditor have a currency conversion claim where he receives statutory interest at the Judgments Act rate on a sterling admitted claim which is less than the amount that he would have got if the Judgments Act rate had been applied to the underlying foreign currency claim?

Now, the SCG says that the currency conversion claim exists in its own circumstances but only if the creditor is entitled to interest in a foreign currency at the Judgments Act rate, absent the administration. It's a very sort of limited context.

York agrees. Broadly speaking, the joint administrators agree as well.

Wentworth say that absent the coincidence of an entitlement to the Judgments Act rate there is no currency conversion claim. So they're on the other side

of the argument on that one.

Issue 30: does a creditor have a currency conversion claim where he receives statutory interest at the rate applicable, apart from the administration, on a sterling admitted claim which is less than the amount he would have got if that rate had been applied to the underlying currency conversion claim?

So this is now all are agreed on this, that the answer to this question is "yes".

Issues 31 and 32 are issues which go to the question of whether currency conversion claims can arise under particular contracts. The joint administrators have always taken a completely neutral position on these issues, but there is a debate at the moment which is not yet resolved between the Senior Creditor Group and Wentworth as to whether either issues 31 or issue 32 can be resolved on this application and, if so, when. The Senior Creditor Group say that issue 31 can't be considered without further evidence and shouldn't be dealt with at all. But if it is to be dealt with, it should be dealt with now, that's their latest position.

Wentworth say that issue 31 doesn't require further evidence, can be resolved as a question of construction, but that the agreements are governed my New York law and therefore should be dealt with as part of tranche C.

That's where we're now moving to on Wentworth's position.
MR JUSTICE DAVID RICHARDS: I see.
MR TROWER: Both parties, as I understand it, both parties, are agreed that issue 32 can't be resolved on this application.
MR JUSTICE DAVID RICHARDS: Right.
MR TROWER: Now, it may be that the parties' position in relation to issue 31 and 32 have become slightly more refined by the time we get to them, which won't be until the beginning of next week, at the earliest.
MR JUSTICE DAVID RICHARDS: Right.
MR TROWER: But that's where we are on those at the moment.
Issue 33 -- we only have two more to go, issue 33 and issue 37 -- this a question of whether a currency conversion claim can be established where there has been a transfer of the provable debt. We summarise the parties' position in our skeleton at page 80. As we understand it, either this issue should -- the position is that either the issue should go altogether as it's too fact-specific and insufficient evidence has been produced, or it should go into tranche B, so we're still -- it may be that the matter will crystallise a little bit further by after the weekend, but we'll have to come back to that, I think, at the appropriate

moment.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: Issue 37 is a completely freestanding issue. It is the issue which arises where different claims with different currencies or different rates of interest have been compromised without indicating how much of the compromised sum is attributable to each claim.
Now, this situation arises where an agreed claim is lower than the total claim asserted by the creditor. The Senior Creditor Group says their position, which is a helpful place to start, is that if it's possible to identify a consensus on the point, then that must prevail. And that's obviously right; if you can identify an agreement, that ought to prevail. If it's not possible to identify a consensus, what should prevail is the basis on which the joint administrators did in fact admit the claim. That's what should be the -- where it's not possible to reach that conclusion, there should be a pro rata approach.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: We broadly speaking agree with the joint administrators on this.
MR JUSTICE DAVID RICHARDS: With the senior creditors.
MR TROWER: Sorry, we are the joint administrators: we agree with ourselves all the time, of course!

We agree with the Senior Creditor Group on this.
It's not quite clear to me exactly where Wentworth have got to on this. I think -- I had initially thought that they were taking a different approach and they say that the claim must be divided into the underlying claims. But we're not quite sure where they are on this and it may be that we can get a little bit more clarity before we get to this, which will be presumably at the end of the hearing, as it's the last issue.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: York takes no issue on this.
Now, there is evidence in Mr Lomas's eleventh witness statement, again paragraph 66 to paragraph 75, which gives your Lordship an explanation as to the circumstances in which this all came to pass.
So, my Lord, that was a fairly quick gallop through the issues to show what the parties' position is in relation to each of them.
MR JUSTICE DAVID RICHARDS: Thank you very much.
MR TROWER: Against that background we have set out the skeleton -- a skeleton of the timetable.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: We haven't tried to be too prescriptive about exactly how much each party's -- the time each party is going to take, but we have agreed the total time and we

have -- which ought really to be allocated to each issue and the order in which the submissions are going to be made which is what we have in the timetable at the moment.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: That's intended to reflect where the parties are amongst other things on the various issues.
It may well be that some of the issues which, even at the time this timetable was produced, looked as if they were going to require a little bit of time are not going to require very much time at all. That may enable there to be a little bit of slippage in relation to the two principal blocks, which are 2, 3 and 39, and 6 to 8. Not that I'm encouraging, nor I'm sure your Lordship will be encouraging, more to be said than is necessary.
MR JUSTICE DAVID RICHARDS: No.
MR TROWER: Right.
Mr Bayfield has just handed up to me a note and I'll tell your Lordship before I forget. The correct version of rule 2.88, which is the one that is applicable, is in volume 3D at tab 63.
MR JUSTICE DAVID RICHARDS: Thank you.
MR TROWER: It's the third rule that's included there.
MR JUSTICE DAVID RICHARDS: Yes. Thank you very much.
MR TROWER: That's the one, as your Lordship has seen,

version enforced 1 April 2005 to 5 April 2010.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: So, my Lord, that was all I was proposing -- pretty much all I was proposing to say by way of opening, unless there's anything I can help your Lordship with?
MR JUSTICE DAVID RICHARDS: No, thank you very much, Mr Trower. That's fine.
So Mr Dicker.
Opening submissions by MR DICKER
MR DICKER: My Lord, the first group of questions as your Lordship knows, are 2, 3 and 39 and I was going to start with a few points by way of introduction, essentially to introduce the big themes.
As your Lordship knows, question 2 asks how one calculates the amount of interest payable to creditors out of the surplus under rule 2.88. Again, as your Lordship knows, in our submission the answer can be shortly stated; we say that the calculation is performed by notionally treating prior dividends as having been allocated first to the payment of accrued interest at the dates of payment of the relevant dividends and then the reduction of principal; in other words, in accordance with what has been referred to as the rule in Bower v Marris. My Lord, we say this the way in which

the relevant provisions of the statutory scheme have been construed and held to operate since, certainly in relation to bankruptcy, 1824, and companies winding up, since 1869.
The reasons why the courts have adopted this approach, we say, are obvious. It ensures that principal on which interest continues to run is treated as having been paid last and this way ensures that the creditors aren't prejudiced by delay in the payment of either dividends or eventually of the surplus and are entitled to received the amount of interest they would have been able to receive had the debtor not become subject to insolvency proceedings.
Now, one might at this stage ask how this approach fits within the basic nature of the statutory scheme, in particular given that the statute proceeds on the basis that proved debts have already been paid in full, how can you calculate interest on the basis that they have not? My Lord, again, your Lordship will have seen this argument isn't a new one. Statutory regime has always required proved debts to be paid in full before any question of distributing the surplus can arise. This simply reflects the basic ranking that proved debts have priority over non-provable debts and distributions to shareholders. That fact has never been regarded as

excluding the rule. Indeed, arguments to the contrary were repeatedly raised and repeatedly rejected prior to 1986. It was raised and rejected when the issue was first considered in bankruptcy in Bower v Marris itself, and was raised and rejected in 1869 and 1870 in the course of four well-known cases relating to the Humber Ironworks Company and the Joint Stock Discount Company
As your Lordship will see, exactly the same argument eliciting exactly the same response has also been raised and dealt with in every other Commonwealth jurisdiction we have been able to identify.
Those authorities consistently hold that when one comes to calculate the amount of interest to be paid out of the surplus, you treat the prior dividends as having notionally been applied first in respect of interest and then principal. In other words, what has been done is a calculation. You're not rewriting history. You're not saying that prior dividends were in fact paid in respect of interest and nor are you now seeking to apply the surplus towards principal. Obviously we'll develop those point in due course, but the point of substance is that the rule in Bower v Marris provides a calculation methodology which proceeds on a notional allocation of prior dividends to interest.
We say that approach is equally applicable to the

calculation required by rule 2.88.
The rule reflects what has been described in the cases as the "ordinary approach" or the "common justice approach". The references to the ordinary approach reflect the fact that outside of insolvency, absent a specific contractual or other requirement, a creditor can obviously ensure that any payments are applied first to interest and then to principal. The reference to it as reflecting common justice reflects the fact that, in an insolvency, the courts consider it would be wrong to allow the debtor to reduce its liability to interest by discharging principal first; in other words, to profit from the fact of insolvency.
The way in which this is dealt with in the authority is by drawing a distinction between a company which is insolvent and the position in the event of a surplus.
Your Lordship is obviously very familiar with the process of collective enforcement in relation to an insolvent company. If a debtor wants to receive anything, he effectively has to participate in that process and the moratorium prevents him from doing anything else. The basic process is of course that the assets of the debtor are realised and distributed pari passu in respect of proved debts; in other words, principal and interest to the date of commencement and

nothing beyond. It therefore necessarily follows, and has always followed, that the amount of the proved debt has to be paid in full before any question of distributing the surplus arises.

Now, there is no dispute obviously about any of that. The critical issue is what happens in the event the company turns out to be solvent? It's not a common occurrence. No doubt it happened in this case, partly as a result of the hard work done by the administrators and their professional advisors. There aren't that many authorities dealing with the situation, but those there are consistently hold that the process of collective enforcement was intended to ensure that the asset were distributed pari passu in respect of proved debts. It was not intended to prejudice creditors or to benefit the debtor in the event of a surplus. In other words, it's a matter as between creditors to ensure equal treatment of creditors in respect of an insolvent debtor.

The authorities hold that in the event of a surplus prior dividends in respect of proved debts treated as having been paid, as they were by operation of law, not as having involved a final appropriation; in other words, they're treated as having been general payments on account.

The cases say, given that those payments in a surplus have been treated as having been general payments on account, interest is calculated in the ordinary way. In other words, the payments are treated as having been applied in respect of notional interest first and then principal.

Now, the rule in Bower v Marris might be said to be judge-made law, in the sense that it involves the courts authoritatively determining the effect of the relevant provisions of the statutory scheme. But, as your Lordship knows, there is nothing unusual in that. The same equally can be said, for example, about the rule against double proof, various aspect of insolvency set-off, the hindsight principle, the fact it's retroactive, et cetera.

My Lord, that's the Senior Creditor Group's position in a nutshell.

What about Wentworth's and the administrators' positions? My Lord, as your Lordship will see, their positions changed in a number of respects between their position papers, their skeleton arguments and now Wentworth's reply skeleton argument. One key point concerns the position prior to 1986. Wentworth and the administrators both accept the rule in Bower v Marris applied prior to 1986. They say it's no longer good

law, it's old law, inapplicable to the new regime.

Now, their position in their position papers was that everything changed in 1986. In our reply position paper we responded by saying that's rather odd because if you look at the statutory provisions in relation to bankruptcy prior to 1986, they are very similar to those in the 1986 Act, running all the way back to 1824.

My Lord, that seems to have prompted a change in approach on the part of the administrators. The administrators' contention is that you have to distinguish between bankruptcy and a company winding up. Bankruptcy, the rule in Bower v Marris was apparently abolished, repealed -- whatever expression one wants to use -- by the 1883 Act, so it ceased to operate in bankruptcy from 1883 onwards. In relation to companies winding up, they say the rule continued to operate until 1986. It was abolished by the 1986 Act in the context of companies winding up.

So one has this distinction between bankruptcy and companies winding up.

Wentworth in their reply skeleton argument appear to take the same position. Paragraph 63, they say the logic is that it was abolished in 1883 in bankruptcy, 1986 in companies winding up. What they say is that at each the relevant date there was a fundamental change in

the nature of the statutory provisions governing the treatment of the surplus. My Lord, we'll obviously need to have a look at the statutes and the history in due course, but it's important to understand, we say, the nature of the fundamental change that is said to have taken place. Both Wentworth and the administrators accept before this alleged change the effect of the statutory scheme was that all creditors' non-provable claims had to be satisfied in full, including in respect of interest, before any distributions could be made to shareholders. They accept that one aspect of that was the rule in Bower v Marris; in other words, payments being notionally attributed to interest before principal.

One can see that if your Lordship just turns up Wentworth's skeleton argument, paragraph 50. My Lord, just 49 and 50. 49:

"... the so-called 'principal' or 'rule' is no more than an application of the general rule applicable between solvent parties that enables the creditor, entitled to receive both principal and interest, to appropriate payments made to it in discharge of interest before principal.

"Second, the application of that principle to the calculation of interest payable from an insolvency

surplus depends upon the fact that the relevant legislation preserved the underlying right of a creditor with an interest-bearing debt to be paid in full, suspending payment of interest as at the date of commencement of the insolvency proceedings as a rule of convenience only, such that on the emergence of a surplus there was a remission to the creditors' contractual (or other pre-existing) right to receive interest as if there had been no insolvency."

So that, they say, is effectively the position in bankruptcy prior to 1883 and in relation to companies winding up prior to 1986. Before those two dates, creditors were entitled to payment of their claims in full and that's reflected in the statement that creditors are remitted to their contractual rights; in other words, are entitled to have those rights satisfied in full.

Now, what is said is that everything changed such that from 1883 and 1986 respectively onwards, the provisions dealing with interest contained a complete and exhaustive code. To use Wentworth's words, those provisions occupied the field.

Your Lordship will see the consequence of that if your Lordship goes on in Wentworth's skeleton argument to paragraph 123. Picking it up three lines down:

"It is Wentworth's position, as explained in the sections of the skeleton argument that deal with issues 2 and 39, that rule 2.88 provides a statutory entitlement to post-administration interest which substantively alters creditors' rights in respect of interest accruing after the date of administration and there is thus no scope for remitting creditors to contractual rights in the event that the statutory regime gives them less in respect of interest accruing post-administration than they would have recovered had there been no insolvency."

So from the relevant date, whatever it was, we have a new, complete and exhaustive code that operated effectively to limit creditors to whatever the rules provided by way of interest and to discharge such other claims as they might otherwise have had.

One consequence of that, it is said, is that from the relevant date interest now has to be calculated in the opposite way from that in which it was previously calculated; in other words, it's now necessary to calculate interest on the basis that prior payments are applied in respect of principal and you have to calculate interest on that basis.

MR JUSTICE DAVID RICHARDS: The submission made here, although it supports their position on issue 2, is not,

I take it, essential to it? I mean, it will be for Mr Zacaroli to explain, but one can see that it's not essential to say there's no remission to contractual rights for the purposes of non-provable claims in order to sustain the argument that Bower v Marris does not apply to rule 2.88?

MR DICKER: Your Lordship is absolutely right theoretically. It is of course possible to have two different types of argument, the first one of which says just looking at the rules as a matter of construction, that is inconsistent with Bower v Marris.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: The second is effectively to say the rules are a complete and exhaustive code, and not merely do you not get interest calculated in accordance with Bower v Marris under rule 2.88, you never get it because it's inconsistent with the complete code.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: My Lord, there are elements of both arguments in certainly the position papers where Wentworth appears to have come out in its skeleton argument, certainly its reply skeleton argument, to essentially say, "It's a complete code; that's how you have to construe it". Having construed it -- and they construe it in a way that excludes Bower v Marris, and there's no option of

having it back in.

Obviously from their perspective, if it comes back in as a non-provable claim, then so far as the subordinated creditors and the shareholders are concerned, there may not be that much difference for them.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: My Lord, the administrators' position as we understand is to broadly similar effect.

So far as this argument is concerned, in other words the complete and exhaustive code argument is concerned, we say that the arguments made are similar to argument which your Lordship heard in relation to Waterfall 1 and rejected in the context of non-provable claims relating to claims denominated in foreign currencies.

We also say it's contrary to principle and authority. The extent of the argument now being made -- can I just show your Lordship one paragraph from Wentworth's reply skeleton. If your Lordship goes to its reply skeleton, paragraph 3.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: My Lord, in paragraph 3 they say -- I should probably start with 2:

"Many of the 'fundamental principles' which underpin much of the SCG's argument ... are incorrect or

overstated."

3:

"It is, for example, not a fundamental principle that all of the liabilities of the company that existed prior to insolvency must be satisfied in full before any assets are distributed to shareholders. The correct principle is that all of the liabilities which are required to be satisfied by the statutory scheme ... are satisfied in full before anything is paid to those lower down the priority waterfall, e.g. holders of subordinated debt or equity."

My Lord, we say it is of course true that the statute provides how the assets of the debtor are to be dealt with and the courts must do what the statute says, but we also say it has always been a basic aspect of the statutory scheme that creditors' underlying claims are not affected by the process of collective enforcement and are entitled to be satisfied in full before any distributions are made to members. That fundamental aspect of the scheme needs to be taken into account when construing rule 2.88.

MR JUSTICE DAVID RICHARDS: Mr Dicker, I wonder whether that might be a convenient moment for the shorthand-writers?

MR DICKER: It would be very convenient.

MR JUSTICE DAVID RICHARDS: I'll rise for five minutes.

(11.50 am)

(Short break)

(11.55 am)

MR JUSTICE DAVID RICHARDS: Mr Dicker.

MR DICKER: My Lord, we say it would be very surprising indeed if the legislature intended such a fundamental change as represented by the 'occupy the field' argument, even more surprising if it had chosen to make that change otherwise than expressly and unequivocally.

My Lord, that, we say, echoes a point your Lordship made in the Waterfall 1 judgment at 154 where your Lordship said:

"It might be thought surprising if the substitution under the insolvency legislation of statutory interest that non-provable contractual interest reduced the liability of members."

My Lord, we say there's nothing in the wording of the legislation which indicates such a change, nor do Wentworth or the administrators seek to explain why the legislature might have wanted to achieve this result. They have been unable to find any authority which contains any criticism of the previous regime. Indeed as your Lordship will see, the authorities repeatedly refer to the rule as being required as a matter of fairness and justice, nor is there anything in the

discussions leading up to the 1986 Act to suggest that legislative might have wanted to repealed rule in relation to companies winding up.

Their position, as we understand it, is simply this is what the rules require and they both say in terms that considerations of policy are irrelevant.

My Lord, just showing your Lordship that, if your Lordship just goes to the administrators' skeleton argument, paragraph 79.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: Paragraph 79, the administrators say:

"... considerations of policy (to which the SCG appeals) have no role in the court's task of construing the statute: the only relevant policy is the policy that is to be ascertained from the meaning of the words the legislature has actually chosen to use ..."

We say you cannot construe the Act without having regard to fundamental features of it held by the cases to have existed essentially since the regime first came into existence.

My Lord, so far as Wentworth is concerned, paragraph 60 of their reply, if your Lordship has that. They say:

"The SCG and York both contend ... no policy reason that creditors should not be able to appropriate the

dividends paid in the administration in respect of their proved debt towards interest first and then to principal. As explained above, this misses the point as rule 2.88(7) contains a complete statement of the extent to which statutory interest is payable on proved debts from an insolvency surplus."

In other words, "This is simply what the statute says. Don't spend too much time asking why".

My Lord, Wentworth's position appears to be even more extreme in one sense because the contention appears to be that the repeal of the rule was probably not consciously intended. The reason I say that is because they make the point in paragraph 84 of their skeleton, that there is no evidence that the drafters of the court report for the 1986 legislation had Bower v Marris in mind at all.

My Lord, presumably they would also say that distinguished members of their committee were also ignorant of the Humber Ironworks, given that that case expressly applied Bower v Marris, as your Lordship will see, in 1869.

My Lord there's one further point in relation to the argument that the statutory provisions contain a complete and exhaustive code and that's this: it's inconsistent with Wentworth's and the administrators'

own position on this application. My Lord, it's inconsistent with their position in relation to question 30. Can I just remand your Lordship? Question 30, if your Lordship has it, asks whether there exists a non-provable claim against LBIE where the total amount of interest received by a creditor, applying a rate applicable to the debt apart from the administration on a sterling admitted claim, when converted into the relevant foreign currency on the date of payment, is less than the amount of interest which would accrue applying the rate applicable to the debt apart from the administration to the original foreign currency claim.

So question 30 is concerned with a creditor whose claim is denominated in a foreign currency and who has a contractual right to interest.

Rule 2.88(7) requires interest to be paid on proved debts which have been converted into sterling as at the date of administration. One of the features of 2.88(7) is it's payable in respect of the sterling proved debts.

So assume that sterling has depreciated and the result is that the payments made out under 2.88(7), being calculated by reference to the sterling equivalent as at the date of administration, are less than the sums that the creditor would have been entitled to receive by way of interest on his foreign currency claim. The

question then arises: does the creditor have a non-provable claim for the difference?

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: The answer by all parties to your Lordship to that question is "yes"; in other words, Wentworth and the administrators accept that a creditor can get more than the interest which rule 2.88 gives him because at least in one situation where the interest he gets isn't sufficient to discharge interest that he's entitled to on his foreign-denominated claim he has a non-provable currency conversion claim in respect of the shortfall.

My Lord, we say it follows, therefore, even on the administrators' and Wentworth's own case, 2.88(7) is not a complete and exhaustive code.

MR JUSTICE DAVID RICHARDS: I suppose the administrators say that it's a complete code for the payment of statutory interest, leaving aside questions of non-provable claims which are themselves not the subject of provision in the Act or rules?

MR DICKER: Well, my Lord, certainly Wentworth go further than that.

MR JUSTICE DAVID RICHARDS: As you have shown me.

MR DICKER: And our understanding is that the administrators' position is the same as Wentworth's on this.

MR JUSTICE DAVID RICHARDS: I see, yes. Right.

MR DICKER: My Lord there's then the second issue your Lordship referred to earlier. The mere fact that there's not a complete and exhaustive code doesn't necessarily determine what 2.88(7) and (9) mean. One still has the question of whether or not Bower v Marris is consistent with the terms of 2.88(7) and (9).

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: That raises the question, well, what is it about the rule -- about rule 2.88(7) and (9) that's inconsistent with the rule in Bower v Marris?

The argument that Wentworth originally advanced was that the effect of the regime was that dividends were appropriated when they were made to the payment of provable debts. So you have paid a dividend that was appropriated in respect of a provable debt, i.e. principal, therefore they said it necessarily followed that when you calculate interest you have to calculate interest on the basis it's the principal that has been paid, rather than interest.

My Lord, your Lordship will see that in their reply position paper if your Lordship goes to file 1, tab 9, in the same file as the application, paragraph 13.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: Paragraph 13, Wentworth says:

"At paragraph 18(2) of its position paper, York suggests that neither the Act nor the 1986 rules provide for the appropriation of dividend payments to principal, (i.e. the proved debt) in advance of interest accruing post-administration. This is wrong. Since rule 2.88(7) applies only when all provable debts have been paid, it necessarily follows that dividends are appropriated -- when they are made -- to the payment of provable debts, (i.e. principal and pre-administration interest)."

So at the stage of Wentworth's reply position paper, the argument was essentially the process of collective enforcement involves the payment of dividends in respect of principal and it therefore necessarily follows that interest has to be calculated on that basis because the principal has been discharged.

My Lord, again, we pointed out in our reply position paper that precisely that argument, as your Lordship will see, was raised in numerous of the earlier authorities and Wentworth's position accordingly changed.

If your Lordship goes to Wentworth's reply skeleton, you'll see what we understand to be the latest position. Wentworth's reply skeleton is paragraph 25 and the important one is sub-paragraph (3).

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: 25, they say:

"In summary, once the principle actually applied in Bower v Marris is understood, it is clear that:

"(1) The principle has no relevance to the construction of rule 2.88(7), which involves the question at what rate, for what period, on what principal sum, is interest to be paid from the insolvency surplus in administration;

"(2) The requirement that the creditor has a contractual or other pre-existing right to interest in order for the principle to operate at all, is clearly fundamental ...

"(3) The SCG is mistaken in asserting that Wentworth's argument is one that was rejected in Bower v Marris. The argument rejected in Bower v Marris was that the payments of dividends did constitute an appropriation towards principal. Wentworth's case does not depend on showing there has been any particular appropriation."

So the first argument was it's been appropriated to principal. That's what they said in their reply position paper. The latest appears to be: actually that's not right; they don't have to show that dividends were in fact paid and discharged to principal, it's a question of calculation under the rules.

My Lord, we do respectfully say this is not just a forensic point, although it's certainly that. Wentworth needs to establish the legislature clearly intended to create a complete and exhaustive code on their first argument or, alternatively, intended to abolish the effect of the rule on their second. We say indications such as this strongly suggest that they cannot say this is something the legislature did clearly intend.

My Lord, we're less clear about the administrators' position on this particular issue, but if your Lordship goes to the administrators' skeleton, the paragraph 107, sub-paragraph (2), picking it up at paragraph 107, sub-paragraph (2), five lines down, they say:

"When dividends are applied to pay the debts proved, the principal is discharged in part. Contractual interest will no longer continue to accrue on the part of the debt that has been paid. There is no contractual right to interest on principal that has been discharged."

So, as we understand it, we have to meet two different arguments at this stage. The first is an argument that when dividends were paid they did in fact discharge principal and therefore interest must be calculated on the basis that the principal was paid.

The second is Wentworth's latest case, which is, even assuming that's not the case, assuming that Bower v Marris was correctly decided so far as it's said, the payments are by process of operation of law, they are treated as general payments on account, they didn't in fact discharge principal. Even accepting that's right, Wentworth's case is when one comes to constitute rules, nevertheless, the terms of the rules make it plain that the calculation that's now required is different from that which was previously performed.

My Lord, obviously, as Mr Trower, my learned friend, has already indicated to your Lordship, the consequences of who is right on this argument are considerable.

On a very general level, if Bower v Marris does not apply, the creditors will be prejudiced, in the sense that the amount of interest that they would have received had the debtor not become insolvent will not be satisfied in full by the payments made pursuant to the statutory scheme. It also means that they will be prejudiced, obviously, by delay in the payment of principal or eventual surplus.

My Lord, the other side of the coin is of course that shareholders will benefit. The amount the creditors would otherwise have been entitled to receive if the calculation had been done by treating payments as

applied first in respect of interest, that amount would be distributed in said to shareholders, and shareholders would also benefit from any interest earned on the surplus before it is eventually distributed. We say, in short, that can't be right. That essentially is a litmus test for the administrators' and Wentworth's submissions. If that is the outcome and that is the outcome which they accept follows from their positions, then we say that does not reflect the effect of the statute.

My Lord, a few brief words in relation to the relevance of question 3 in this context. Question 3 is concerned with the meaning of the phrase "the rate applicable to the debt, apart from the administration". We say this provision is intended to ensure creditors receive the full amount of interest which they would otherwise have been entitled to receive had the company not gone into administration.

My Lord, as my learned friend Mr Trower indicated, there are certainly passages in the administrators' skeleton which make exactly the same point. Can I just show your Lordship three paragraphs.

The first is paragraph 124 of the administrators' skeleton, where they say:

"Consequently the 'rate applicable to the date apart

from the administration' in rule 2.88(9) is the whole amount of post-administration interest, taking into account every factor that determines the total amount of money that is payable by way of interest, including the numerical percentage and the way in which that numerical percentage is to be applied (i.e simple or compound). The payment of statutory interest at that rate mirrors the superior underlying contractual rights or other rights of those creditors who are the recipients of statutory interest calculated on that basis."

My Lord, 115, if your Lordship turns back two pages, they say:

"As a matter of construction, the word 'rate' is apt to include every factor that determines the total amount of money that is payable by way of interest for a particular period of time, including the numerical percentage and the way in which that numerical percentage is to be applied ..."

My Lord, one of the factors determines the total amount of interest that a creditor can receive is obviously whether or not he's entitled to say or to proceed on the basis that the payments he receives go first to interest or first to principal. The third paragraph, if your Lordship goes back to paragraph 65, deals with this point: The administrators say in 65:

"In short, in circumstances where creditors were remitted to their contractual rights in the event of a surplus in the liquidation, and in the absence of any legislative provision requiring a different result, the ordinary default rule, which would have applied in the absence of a winding-up, would be applicable to govern the calculation of creditors' entitlements. Creditors were remitted to the package of rights that would have applied in the absence of any liquidation, including the default rule."

Now, this is obviously dealing with the position before they say "everything changed". But in 65 they are effectively saying one of the package of rights which rule 2.88 now mirrors, one of the package of rights is the default rule; in other words, the rule in Bower v Marris.

My Lord, put another way, we say these passages in the administrators' skeleton indicate no difficulty in construing the phrase "the rate applicable to the debt, apart from the administration" as effectively including, as one factor, the rule in Bower v Marris. That's precisely what the administrators say those words mean.

Put another way, your Lordship may think it surprising if the legislature had intended to repeal the rule in Bower v Marris but had chosen to do so by using

a phrase of words which, according to the administrators' own skeleton, naturally encompasses the rule in Bower v Marris.

My Lord, Wentworth's position is rather different. Wentworth's original position on question 3 and the reason why it was included was that, according to Wentworth, "rate" meant simply the numerical percentage. Now, one can see if they had been able to make that good they might have been able to argue, "Well, rate simply means 10 per cent, 12 per cent, whatever, that's all it means, therefore there's no room for rule in Bower v Marris in the phrase", and that would have supported their overall case.

Now, my Lord, I think the day before we were due to exchange skeleton arguments Wentworth wrote indicating that they were abandoning that argument, accepting it was effectively unarguable, and the administrators agree the administrators don't view the argument as arguable either.

Wentworth's latest position is, "Okay, it's not just limited to the numerical percentage, it also includes compounding, but what it certainly doesn't include is the rule in Bower v Marris". Now, that's an assertion they make. It's not developed or explained but it appears that for some reason the only factor which

appears not to have made its way into rule 2.88(9), according to Wentworth, is the rule in Bower v Marris.

My Lord, there's very little I need to say by way of introduction so far as question 39 is concerned. The question logically arises after one has determined what the relevant rules mean, as my learned friend Mr Trower said, not merely questions 2 and 3 but other rules as well.

My Lord, just so your Lordship knows, our two main themes in relation to question 9 are, firstly, to the extent that creditors' rights have not been satisfied in full, once the rules have been construed, they have a non-provable claim for the shortfall, and are entitled to have that shortfall satisfied in full before any distributions are made to shareholders. Now, if those rights effectively include a right to compensation by way of interest or otherwise, the amount they get pursuant to rule 2.88 is less than the amount to which they're otherwise entitled. We say that's a non-provable claim like any other, just as your Lordship in Waterfall 1 held, where there was the lacuna on the rules the shortfall ranked as a non-provable claim.

My Lord, that, however, only deals with a situation in which a creditor has some underlying entitlement to

compensation. One also needs to deal with the fact that 2.88(9) says that creditors are also entitled to interest at the Judgments Act rate, whether or not their debt otherwise carried interest.

Our submission in relation to that is on the construction of the rules, creditors' entitlement is treated as payable from the date of the final dividend on proved debts, treated as payable in the sense that it constitutes a debt of LBIE's which has crystallised at that stage.

We're not alleging, just so everyone is perfectly clear, that the administrators are in any way in breach for having failed to distribute the surplus, but we say that's a separate question, just as it is in relation to an insolvent company. One can have a situation in which it's perfectly plain whether a company is insolvent; it owes a debt; it can owe a debt without the liquidators or administrators being in breach for having failed to pay dividends in respect of that debt because the process of collective execution requires steps to be taken.

So we say -- and I'll deal with this obviously in more detail in due course -- when one construes the entitlement under 2.88(9) it effectively constitutes a contingent right of creditors of a debt of LBIE's

which crystallises when the final dividend on proved debts has been paid. If that's right, then we say it straightforwardly follows that if there's a delay in payment, creditors are entitled to compensation for that delay, in particular on the basis of Sempra Metals.

My Lord that, I hope, was a helpful identification of the main themes.

MR JUSTICE DAVID RICHARDS: Thank you.

MR DICKER: What I now propose to do is take your Lordship through some of the detail. My Lord, I am conscious that we have dealt with this fairly fully in our written material.

MR JUSTICE DAVID RICHARDS: Yes, but I have read, obviously, the arguments, but I've not gone into the underlying authorities and --

MR DICKER: My Lord, I was going to say I'm also conscious that in the usual way your Lordship has not had very long.

MR JUSTICE DAVID RICHARDS: No. So don't -- it's helpful, of course, to have all your arguments, but they don't take the place of the oral exposition of the points.

MR DICKER: My Lord, can I then turn to question 2. The answer obviously depends on the construction effect of the rules. I've made the point that question need to be answered in the context of the Act and rules as a whole,

in the light of the statutory history and also the overarching principles governing statutory scheme. My Lord, there is a reference -- I won't take your Lordship to it -- that York have in their skeleton to the decision of the House of Lords in Mills v HSBC, paragraph 1, Lord Walker. Just so your Lordship has the reference, it's bundle 1E/156A.

MR JUSTICE DAVID RICHARDS: Right.

MR DICKER: Now, we say one needs to start therefore by looking at the position prior to the introduction of the 1986 Act and we have three basic propositions which, we say, one derives from the previous regime.

The first is that the features of the 1986 Act and rules that Wentworth and the administrators rely upon were equally features of the statutory regime before 1986.

Secondly, in substance, the arguments of construction that they now make based on those features were made in respect of the previous regime and authoritatively rejected.

Thirdly, rejected because the courts construed the statutory scheme as providing a mode of calculation for interest which proceeded on the basis that dividends were treated in the event of a surplus as having been general payments on account and therefore to be applied

first in respect of interest, notional interest, and then principal.

My Lord, the regimes are different as between bankruptcy, on the one hand, and company winding up, on the other, and I need to deal with them separately. So starting with bankruptcy for 1986 and beginning at the beginning. The rule in Bower v Marris can be traced back to the decision of Lord Hardwicke in the case of Bromley v Goodere. Before turning it up, just so your Lordship knows the statutory position at the relevant time, we summarise it in our skeleton at paragraphs 50 to 55.

The statutes are in the bundles. I don't think we need to turn them up.

Your Lordship should note that at this stage there was no express provision dealing with creditors' rights to interest in the event of a surplus.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: That said, the basic features of the regime were already fully familiar ones and included concepts of collective process of enforcement, pari passu distribution of the bankruptcy estate in respect of debts, a cut-off date for debts at the commencement of the bankruptcy, a surplus right of creditors to payment of any debts not satisfied by dividends out of any

surplus and the entitlement of the bankrupt to any residue.

The position in bankruptcy obviously did change in a significant way in 1705. Bankruptcy in 1705 introduced the concept of discharge of the bankrupt and that's one of the issues which Lord Hardwicke had to consider in Bromley v Goodere.

My Lord, can I ask your Lordship to take up bundle 1A, tab 5.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: I don't think your Lordship needs to go through the detail of the facts. The short point is your Lordship will see, from line 1, the debtor became bankrupt in December 1711. Three lines further, interest was allowed by the Commissioners only to 31 December 1711; in other words, at cut-off date of the date of commission. Plaintiff's debtors paid various sums, the result being, two lines further on, all the creditors received 20 shillings and a pound and, when the last was made, it appeared that Mr Gibson, one of the assignees, had monies still in his hands. The creditors sought an order that they were entitled to interest.

The judgment of the Lord Chancellor begins at the bottom of that page. There are some preliminary

discussions in relation to contribution monies which creditors had to pay to get the commission, but over the page, page 50, the first full paragraph, he says:

"That is agreed. The principal question therefore is as to the demand of interest and I think that ought to be paid likewise. It came before me originally upon petition and even then my first apprehension was that it would bear no great doubt, but as it was insisted there was no just foundation for the demand and that if I determined it that way my determination would have been subject to no appeal, I chose to have it come before me by way of bill."

He then says he will take notice of certain objections made not in relation to the merits. Your Lordship can ignore those.

Then going to four paragraphs from the end of that page, he says:

"Having laid these things out of the case, I come now to the main question whether creditors for debts carrying interest by contract are entitled to have subsequent interest and I think they are."

He makes the general point:

"All the bankrupts are considered in some degree as offenders. They are called so in the old Act and all the Acts made are made to prevent their defeating and

delaying their creditors and it would be an extraordinary thing if the delay of payment should prevent the creditors from having interest out of an estate able to pay it and interest in all cases is given for delay of payment."

Then he says:

"I will consider this case first upon the old Acts previous to the 4th and 5th of Queen Ann [that's the 1705 Act that introduced concept of discharge] and then upon that statute."

Your Lordship will see the first one he deals with, 13 Eliz. cap. 7. That's the 1571 Act. Again, your Lordship doesn't need to turn it up. What's worth noting is right at the bottom of 50, he says:

"The next direction in the Act is what the Commissioners should do in regard to the debts. They are directed to pay to every of the creditors a portion rate like according to the quantity of his or their debts."

So that's the pari passu rule.

Then he says:

"And the question is what debts are here meant? I am of the opinion it means debts due at the time of the bankruptcy or when the commission issued which is the same [that's the introduction through case law of

the cut-off date]. To prevent disputes about the time when he becomes a bankrupt, the Commissioners always find in general that he was a bankrupt at the time of commission issue but this construction must be confined to cases where there is a deficiency, for it is then only the creditors are to have a portion rate alike."

In other words, already drawing the distinction between the position in the event the debtor is insolvent and in the event there's a surplus.

Then he says:

"The Act goes on to take notice of the surplus which it directs to be paid ...(reading to the words)... as he should and might have done before the making of this Act."

Obviously this is before the concept of discharge.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: In the next paragraph, he says:

"This shows the surplus to be paid over to the bankrupt is only the surplus after the payment of the whole debts ...(reading to the words)... when it might have been recovered from him again by the creditors."

My Lord, there's then reference to two further statutes, 1603 and 1623. I think the only point to note is, in the very next paragraph, he says:

"Thus, it stands upon the 13th of Eliz. The next is

the statute of Jac. 1 cap. 15, that has not much in it, but the expression of full satisfaction in the clause which gives the bankrupt the surplus and is penned in these words."

So emphasising the concept of full satisfaction.

Then dropping to the paragraph which has the number 79 in front of it:

"But then it is said the practice has been for the Commissioners to ascertain the debts by computing interest only to the time of issuing the commission and that, being the contemporanea expositio, is to be relied upon."

He then says:

"There is no direction in the Act for that purpose. It is been used only as a best method of settling the proportion among the creditors. They might have a rate like satisfaction and it is founded upon the equitable power given them upon the Act."

Again, distinguishing the effect of the process of collective enforcement as between creditors, on the one hand, and as between creditors and the debtor, on the other.

Then towards the end of the page, at the bottom, he says:

"I come now to consider it upon the 4th and 5th of

Ann cap. 17 ..."

That's the statute that introduced the concept of discharge. His conclusion is that that doesn't affect the position.

Your Lordship will see, over the page, the first full paragraph:

"Consider therefore the effect of the discharge. The certificate is not to operate as a discharge of the fund before vested in the assignees but extend ...(reading to the words)... of the bankrupt or his future effects."

Then three points, as it were, on merits. If your Lordship goes down to about halfway, there's a paragraph beginning, "And suppose that ..."

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: He says:

"And suppose that from the difficulty of getting in the bankrupt's estate by his estate carrying interest there should be a surplus, it would be absurd to say the creditors should not have interest likewise."

In other words, if the bankrupt is himself earning interest, why shouldn't the creditors be entitled to interest?

Then a point we'll come back to because it's dealt with in subsequent legislation, he says:

"But it is objected there will be a difficulty in forming this decree. By this way creditors upon simple contract may have a better satisfaction than creditors by specialty. The specialty creditors cannot have more than their penalties while creditors by notes carrying interest will have their whole interest but no objection arises on that account because it is a frequent case in the disposition of trust assets."

In other words, creditors who are entitled to continuing interest will then benefit over and above those who aren't and, indeed, who don't have any right to interest at all.

Then he deals with the position in relation to set-off and what he essentially says, at the end, is:

"It is absurd to say they should stop interest on a creditor's debt at the time of issuing the commission" --

MR JUSTICE DAVID RICHARDS: Sorry, where is that?

MR DICKER: I am sorry, just at the end of the next paragraph:

"It is absurd to say they should stop interest on the creditor's debt at the time of issuing the commission and carry on interest on the bankrupt's demand."

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: Then:

"I mention this to show that an equitable rule ought to be followed in giving interest in these cases."

He then says:

"Upon the whole therefore I declare ..."

The relevant part of his order, your Lordship will see, is at page 53. It's the first full paragraph. He says:

"The Master to take account of what has been paid to such creditors by way of dividends and what has been so paid ...(reading to the words)... and afterwards in sinking the principal."

In other words, creditors are entitled to full satisfaction -- that's the words at the end of the paragraph immediately above -- and you achieve that by taking an account of what has been paid and applying it in the first place to keep down the interest and afterwards in sinking the principal. My Lord, that obviously is what became known as the rule in Bower v Marris.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: My Lord, two cases shortly after or after Bromley v Goodere. The first is ex parte Mills which is at tab 9.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: I say "shortly after", we're now in 1793. The summary in the first two lines:

"In a case of a surplus coming to a bankrupt, creditors have a right to interest where there is a contract for it appearing either on the face of the security or by evidence."

Obviously there's no provision yet for interest on debts that don't otherwise carry interest.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: Two passages. The first from the Lord Chancellor's observations during argument. 642, three paragraphs from the end --

MR JUSTICE DAVID RICHARDS: Do we know who the Lord Chancellor was here?

MR DICKER: I did. Lord Loughborough, I think.

MR JUSTICE DAVID RICHARDS: Thank you.

MR DICKER: It's argued for the petition:

"No Act has given authority [three paragraphs from the end] to apply the property of the bankrupt to any thing not a debt at the time of the bankruptcy. The statutes direct surplus to be paid to the bankrupt and by 1705 Act bankrupts are discharged from all debts due and owing at the time they become bankrupts."

Lord Loughborough says:

"That supposes an insolvent estate where there is no

surplus. The bankrupt is ...(reading to the words)... the clause with regard to the surplus he must have it after full satisfaction. The debt is antecedent to the bankruptcy and continues until payment."

Then his judgment, 643, in the third paragraph, it's recorded shortly that the argument in support of the order was stopped by the court. The Lord Chancellor says:

"It was with surprise that I heard the case of Bromley v Child question [my Lord, that, I think, is a typo by the editors. It's intended to be Bromley v Goodere]. It has now been above 50 years confirmed by every judge" --

MR JUSTICE DAVID RICHARDS: That may be a reference to Sir Caesar Child who was no doubt a party.

MR DICKER: My Lord, he then continues by saying:

"It has now been above 50 years confirmed by every judge who has sat in this court. I have never heard a criticism upon it, except an observation which is obvious enough that ...(reading to the words)... in one case is stopped by the penalty and the other goes on to actual payment."

Dropping two lines, he says, in the middle:

"That determination was by no means a rash determination. The case was argued with all the ability

of the Bar and the Chancellor determined it upon full consideration. I think it is perfectly well-founded. Any other conclusion would have been erroneous. I should think it would be removing landmarks to disturb it at the distance of 50 years but if the point was new my assent goes to the reasoning, as well as the authority."

Then dropping five lines, in the middle, he says:

"When the statute made the certificate a bar, it required very express words to declare the creditors to be totally precluded ...(reading to the words)... the surplus, after full satisfaction, belongs to the bankrupt. Until that in natural justice the creditors have a right to retain it against any claim the bankrupt can set up."

Then dropping to the last two lines, he says:

"As the argument in Bromley v Child was so much laboured, I dare say no other case could be found but cases have often occurred since that ...(reading to the words)... nothing would be fixed or certain in the law and practice of this court and the exposition of the statute law."

My Lord, a very short additional reference, if your Lordship just goes back to tab 8. There's a report of a judgment in a case called ex parte Champion.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: At the bottom of page 630, the Solicitor General against the petition says:

"The order already obtained is the same as was made by Lord Hardwicke in the case of Sir Stephen Evans [Bromley v Goodere]."

The editor has inserted:

"The terms of the order made in this matter now serve as a precedent and are invariably followed."

Does your Lordship have -- because there are two reports of this. I hope you have a report beginning at page 629.

MR JUSTICE DAVID RICHARDS: Yes, I have. That's the one I have here and I'm looking at.

MR DICKER: And the passage at the bottom of 630?

MR JUSTICE DAVID RICHARDS: Yes. Absolutely. Yes, I see.

MR DICKER: The statutory position changed in 1824 and 1825.

MR JUSTICE DAVID RICHARDS: Sorry, this is -- yes. Thank you.

MR DICKER: As a result of the enactment of the 1824 Bankruptcy Act which was promptly re-enacted in the form of the 1825 Act.

My Lord, can I show your Lordship the terms of the relevant section. If your Lordship goes in the bundles to bundle 3A, which is the first of the statutory

materials. My Lord, the 1824 Act is at tab 9. The 1825 Act is at tab 10. If your Lordship goes to tab 10, with one immaterial exception, they are in the same terms. The relevant section is 132 which your Lordship will see halfway down the second page.
MR JUSTICE DAVID RICHARDS: So it's page ...?
MR DICKER: Page 85, 132.
MR JUSTICE DAVID RICHARDS: So this is tab 10?
MR DICKER: My Lord, 3A, tab 10.
MR JUSTICE DAVID RICHARDS: There are some page numbers top left, sometimes top right.
MR DICKER: Ah.
MR JUSTICE DAVID RICHARDS: So, anyway, it's ...?
MR DICKER: It's 132.
MR JUSTICE DAVID RICHARDS: So it's the last page, "And be it enacted that the assignees ..."?
MR DICKER: Yes. It says:
"And be it enacted that the assignees shall, on request made to them by the bankrupt, declare to him how they have disposed of his real and personal estate and pay the surplus, if any ...(reading to the words)... who have proved under the commission shall have been paid shall be entitled to recover the remainder of the debts due to him."
So that's the entitlement of the bankrupt to the

surplus.
Then it says:
"But the assignees shall not pay such surplus until all creditors who have proved under the commission shall have received interest upon their debts to be calculated and paid at the rate and in the order following ...(reading to the words)... all other creditors who have proved under the commission shall receive interest on their debts from the date of the commission rate at £4 per centum ..."
Four points in relation to the terms of section 123. Firstly, the assignees were under a duty to distribute the surplus to the bankrupt on request by him and that duty obviously only arose after all proved debts had been paid in full; in other words, after all principal and interest at the date of commencement had been paid.
Secondly, the assignees were not entitled to distribute the surplus until they had first paid creditors' interest on their debts. In other words, part of their duty to distribute surplus to the bankrupt required them first to comply with their duty to pay interest to the creditors.
The third is interest first had to be paid on their debts at the rate of interest reserved or by law payable thereon. The reference to "reserved" obviously covered

a contractual right to interest. My Lord, the words "reference to or by law payable thereon", York point out in their written materials, appear to have reflected the fact that an creditor brought an action at law on an instrument payable on demand, he was entitled to interest at 5 per cent, whether or not the contract provided for interest.
Then the fourth point, after that, all creditors who had proved or entitled to interest on their debts from the date of the commission at 4 per cent per annum.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: That is obviously remedying the unfairness which Lord Hardwicke had identified in Bromley v Goodere. Some creditors being entitled to continuing interest, others not, and we say it is the direct ancestor of the reference to the Judgments Act rate in rule 2.88(9).
My Lord, the next authority, going back to bundle 1A, is Bower v Marris itself which is at tab 17 of bundle 1A.
MR JUSTICE DAVID RICHARDS: Mr Dicker, let's broach this at 2 o'clock so we don't have to break off halfway through it.
(12.55 pm)
(Luncheon Adjournment)
(2.00 pm)

MR JUSTICE DAVID RICHARDS: Mr Dicker.
MR DICKER: My Lord, Bower v Marris at tab 17.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: My Lord, obviously by this stage the 1825 Act had been enacted.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: So the essential question ultimately was: did that make a difference and, in particular, did it make a difference as to the way in which interest was calculated? In other words, was the order made by Lord Hardwicke still the right order to make?
My Lord, I think your Lordship should first look at page 352, just picking up the way the matter developed. Halfway down 652, the sentence beginning:
"In the year 1840 the Master made a separate report~..."
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: If your Lordship has that?
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: "... from the claimant, Jonathan Dent, under the decree by which ...(reading to the words)... from time to time remained due", and the assignees objected. They had insisted, the next paragraph, line 3:
"In substance that inasmuch as the debt in respect of which dividends were declared in bankruptcy was the

amount of principal and interest due at the date of the commission, the receipt of each dividend by the creditor operated as an extinguishment of such principal and interest respectively to the extent of the portion the dividend which was attributable to each, and consequently that in computing what was due upon the bond on the estate of Joseph Marris, the Master ought to confine himself on a calculation of interest on the principal from time to time remaining."

Essentially exactly the same as the argument made by the administrators and, until recently, by Wentworth as well. So the argument that debt is the amount of principal and interest due at the date of commission --

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: -- and the dividend extinguished that.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: The Master in the next paragraph, on 353, overruled those objections and the defendants:

"... the assignees presented a petition ...(reading to the words)... thereon at the date of commission."

Then going to the judgment of the Lord Chancellor, he refers at the bottom of 354 to the creditor claiming payment of what he's not received -- this is last two lines:

"... from the estate of the bankrupt and insists

that the amount ...(reading to the words)... payments on account, there would have been no question between the parties."

So that's position outside of insolvency.

Then he says:

"But it is said on behalf of the obligor's estate that payment ...(reading to the words)... principal money although sums were due for interest at the time."

My Lord, as your Lordship knows, the way in which the issue arose in Bower v Marris was essentially between obligee and co-obligor who was effectively saying, "Well, as between obligee and obligor, this what happened and I can take the benefit".

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: The judgment continues:

"The question, so far as it is a question of principal, turns upon the accuracy of this view of the case."

Again, the argument is repeated:

"The proposition rests upon this, the payments consisted of dividends ...(reading to the words)... such principal money as the dividends consisted of was on each payment discharged."

Now, then essentially the reasons why this is -- this argument was wrong. The first point the

Lord Chancellor makes is that as this mode of payment is regulated by Acts of Parliament, the doctrine for appropriation, which is founded upon the intention express or implied of the debtor or creditor, cannot have any place in the consideration of the present question. The estate of the obligor under administration is liable, and he then continues to explain the effect of the estate.

So, in other words, what he's doing here is not simply applying the doctrine of appropriation. He's saying this is a question of construction of the statutory scheme. One can see that, dropping six lines down on 356, the sentence at the end of the line:

"If therefore he is bound, because these payments are made under a bankruptcy, to apply them towards a part of the principal which bears interest and thereby to leave interest due, which does not bear interest, he is a loser by the bankruptcy."

So, as I say, what the judge is doing here is effectively construing the effect of the scheme. He's saying, "If the assignee is right, the creditor is a loser".

He goes on to say:

"Although the whole of the principal ...(reading to the words)... in the same proportion."

Then six lines further on, in the middle of the line:

"This would be to give to this mode of payment in bankruptcy the effect of depriving the obligee of part of his debt and of relieving the obligor from the liability to which he had, by his bond, subjected himself. That would be manifestly most unreasonable and unjust and is attempted to be supported only by the supposed appropriation of the dividends to the payment of so much of the principal but in fact there is no such appropriation."

So at this point he's answering the argument that the statute requires assets to be applied and distribution of accrued debts, and therefore the principal has been paid and therefore you can't now essentially perform the calculation in some other way.

His explanation as to why there is no such appropriation is in the following paragraph -- the following part. He says:

"The interest stops at the date of commission and though the ...(reading to the words)... payments are made out of his estate to the obligee."

So in short the effect of the collective process of execution is something that is a matter for the convenience of the debtor's creditors. It doesn't

affect the underlying obligations of the bankrupt.
Then continue at 357, line 5:
"Given that, why should such payments have a different ...(reading to the words)... suffer on the bankrupt's estate to benefit by the bankruptcy?"
In other words, the basic approach of the Act is of course creditors' claims are satisfied in full and the debtor doesn't get anything unless and until that has happened.
Now, that's all a discussion about the statutory scheme. He then goes on to refer to the section now enacted in the 1825 Act. He says:
"By the 132nd second section the bankrupt is not to receive the surplus ...(reading to the words)... must have intended to place him in as favourable a situation."
My Lord, your Lordship should note section 132, as your Lordship knows, has two interest provisions.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: One of which is interest to which creditors are otherwise entitled, and also the interest at the prescribed rate. There's no distinction by Lord Cottenham in this passage between those two rights. Indeed, to the contrary, in line 2 of that paragraph, he says:

"The bankrupt is not to received surplus until all the creditors have received their interest on their debt."
Then, over the page, having dealt with it as a matter of principle, he turns to the authorities at 258. He says:
"If there had been no decision upon this subject, I should ...(reading to the words)... without the aid which the statute now affords."
Can I just emphasise those words.
Essentially the conclusion which Lord Hardwicke reached in Bromley v Goodere, obviously he did in the absence of any express statutory provision. Lord Cottenham appears to have regarded the 1825 Act as essentially helping and making it clear that that is the position.
Then references to ex parte Morris, ex parte Mills, which I took your Lordship to --
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: -- and various other cases.
Then only two further short paragraphs. Firstly, 359, the first full paragraph in the middle:
"It is true that in certain cases the dividend has been considered ...(reading to the words)... work in justice and defeat the contract between the parties."

Then 360, the last paragraph:
"On the opinion that upon principle and authority ...(reading to the words)... must be reversed and the petition accepting to the report dismissed ...", et cetera.
My Lord, so that's Bower v Marris. Your Lordship can see how firmly established the rule was at least at this stage and established following the introduction of section 132 of the 1825 Act.
My Lord, I will come back to aspects of the subsequent legislative history later, but your Lordship should note that section 132 was re-enacted in substantially the same terms as section 197 of the Bankrupt Law Consolidation Act 1849.
Can I show your Lordship that quickly. It's in bundle 3A, tab 15.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: My Lord, the section is over the page, 605, and it's the last full section, CXCVII.
My Lord, your Lordship I think the only thing to note is that in lines 3 and 4 the reference is to:
"If there is a surplus, the court may order such surplus to be paid to the bankrupt."
That's the only change between this provision and section 132. 132 operated on a request by the bankrupt.

This section operates effectively by order of the court.
MR JUSTICE DAVID RICHARDS: Just show me those words again, sorry?
MR DICKER: Sorry, it's in line -- at the end of 3:
"The court may order such surplus ..."
MR JUSTICE DAVID RICHARDS: Yes, I see.
MR DICKER: That's the only change.
MR JUSTICE DAVID RICHARDS: Yes, yes.
MR DICKER: So we say one should proceed on the basis that Parliament was content to reenact section 132 in section 197, without, save for that exception, material amendment and was therefore happy with the rule in Bower v Marris.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: My Lord, there are a very large number of bankruptcy cases that I could show your Lordship too but I think that's all I need to --
MR JUSTICE DAVID RICHARDS: Very well.
MR DICKER: -- at least for present purposes.
What I was therefore now going to do was turn to companies winding up before 1986 to show your Lordship the cases which establish the rule applies in that context.
My Lord, can I start again with the statutory position. We summarise it in our skeleton,

paragraphs 89 to 91. In short, the relevant legislation which we're concerned with is the Companies Act 1862 and 1867. They're in the bundle. I don't think I need to show your Lordship them. The legislation is now, as your Lordship knows, in reasonably familiar form, the 1862 Act having introduced the concept of limited liability.

Now, section 170 of the 1862 Act applied the rules of Chancery as applicable in winding-up proceedings. Those rules were contained in an order in Chancery, dated 11 November 1862. Your Lordship has those in bundle 3A, tab 18.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: My Lord, the first extract behind tab 18 is from the 1862 Act and the last page of that, four pages in, contains section 170.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: I don't think I need to show your Lordship the detail. The rules are then -- an extract from the rules is then included. The relevant rule at the time, at least for the 1862 Act, as purportedly included, is rule 26. If your Lordship could just look at that.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: "Interest on such debts and claims as shall be allowed shall be computed as to such of them as carry

interest after the rate they respectively carry."

Then this also:

"Any creditor whose debt or claim so allowed does not carry interest shall be entitled to interest after the rate of 4 per cent per annum from the date of the order to wind-up the company out of any assets which may remain after satisfying the costs of the winding-up debts and claims established and the interest of such debts and claims as by law carry interest."

MR JUSTICE DAVID RICHARDS: Yes, I see.

MR DICKER: My Lord now on its face rule 26 is in broadly similar terms to section 132.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: There was, however, a problem which is part of rule 26 was held by the authorities ultra vires, and that's the second part.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: Just for your Lordship's reference, and we don't need to turn them up because there's reference to them later, the cases which so held are Re Hadfield's Patent Cask Company, which is 1A, at tab 22, and Re Herefordshire Banking Company, 1A, at tab 24.

My Lord, so all that existed at this stage was, in effect, the first two and a half lines of rule 26; that was the only statutory provision.

Now, the position was considered in four cases which your Lordship is no doubt familiar with involving the liquidations of Humber Ironworks Company and the Joint Stock Discount Company. My Lord, in all four cases it was argued that the statutory regime required dividends to be appropriated in respect of principal and therefore interest needed to be calculated on that basis.

MR JUSTICE DAVID RICHARDS: Can I just clarify one point?

MR DICKER: Yes.

MR JUSTICE DAVID RICHARDS: In rule 26 it provided that those creditors whose debts did not carry interest should be paid at the rate of 4 per cent per annum out of any assets which remain after satisfying the costs of the winding-up of the debts and the claims, et cetera, so all that had gone, was ultra vires.

MR DICKER: Yes.

MR JUSTICE DAVID RICHARDS: So was there provision for the fund out of which the intra vires interest was payable; in other words, was that interest postponed to the proved claims or debts or did it rank together with them?

MR DICKER: I think the answer to that is no, it simply followed from the structure of the statutory scheme. In other words, once you have a cut-off date and post-insolvency interest is not provable and you have an

obligation to distribute the assets pari passu amongst proved debts, it necessarily follows that you can only pay post-insolvency interest out of any surplus before (inaudible).

MR JUSTICE DAVID RICHARDS: I see.

MR DICKER: My Lord, the way we have analysed the position is at this stage essentially one can regard the position as not dissimilar from that which confronted Lord Hardwicke in Bromley v Goodere itself; in other words, we don't at this stage have a statutory code, we're still at the stage of the judges effectively, and that your Lordship will see from the authorities I was just about to turn to.

MR JUSTICE DAVID RICHARDS: Okay, right.

MR DICKER: The first is Re Humber Ironworks & Shipbuilding Company number 1 which is 1A, at tab 27.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: My Lord, it may well be that your Lordship is very familiar with this.

MR JUSTICE DAVID RICHARDS: The thing is you look at these cases for different purposes so I'm happy to treat it as if I've never looked at it before.

MR DICKER: My Lord, I was going to make precisely that point. The case is very well-known, although one confesses when one reads it it's generally for the

insolvent point, rather than the surplus.
MR JUSTICE DAVID RICHARDS: Quite, quite.
MR DICKER: My Lord, just starting with the short headnote:
"In the case of an insolvent company which is being wound ...(reading to the words)... and interest at the winding up."
So that's the cut-off date applies equally in companies winding up:
"It is only in the event of there being a surplus that they ...(reading to the words)... and then in reduction of principal."
My Lord, the two judgments start at page 644, just before looking at Lord Justice Selwyn's judgment, your Lordship should note in the middle of the page Sir Baggallay QC's submission that:
"Computation of interest shall be carried on and that dividends shall be applied first in payment of interest and then in reducing the principal. This is the rule in Chancery and ought to be followed here ..."
Then a reference to section 170.
Then below Mr Southgate makes the point that I mentioned to your Lordship that the 26th rule as to interest on simple contract debts was held to be ultra vires.
MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: My Lord, then Lord Justice Selwyn's judgment just emphasising the following points. First of all, 645, beginning three lines down:
"It is surprising that after the number of years during which ...(reading to the words)... from what appears to us to be the justice of the case."
The issue in the case was effectively two-fold. The first is: is there a cut-off date for post-insolvency interest in an insolvency; and, secondly, what happens in the event that there's a surplus?
Then 645, halfway down:
"In the present case we have to consider what are the positions of the creditors of the company when, as here, there are some creditors who have a right to interest and others having debts not bearing interest. In the first place it appears to me that we must consider the case under the two aspects; first where there is and next where there is not a surplus."
Then he deals in the surplus passage with the position in the event of a surplus. He says:
"I apprehend in whatever manner the payments may have been made ...(reading to the words)... that disposes of the question where there is a surplus as to which there is no doubt or difficulty."
My Lord, he then deals with the position where the

estate is insolvent and, as your Lordship observed, this is the passage that one usually reads the case for.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: I think the only parts that I need to draw your Lordship's attention to are, firstly, in the middle of the page, there's a sentence beginning, "Justice, I think, requires ..."
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: "Justice, I think, requires that course of proceedings shall be followed ...(reading to the words)... in payment of the debts as they existed at the date of the winding up."
My Lord, obviously that is explaining why there is a cut-off date in relation to an insolvent company, but I'll come back to the reference that no person should be prejudiced by accidental delay in the context of surplus later.
Then, at the bottom, he says that he's already guarded himself from being supposed to say the court takes upon itself to alter the rights of the creditors to any further extent or to deprive them of the right they have to interest at the full rate of 20 per cent if and when there is a surplus to pay it.
Then, I think, the tree must lie as it falls. It must be ascertained what are the debts as they exist at

the date of the winding-up. All dividends in the case of an insolvent company must be declared in respect of the debt so ascertained.
So that's going back to the situation where the debtor is insolvent.
Then he says:
"... understood that we are laying down this rule as applicable to all cases under the recent Act where creditors' actions are stayed."
My Lord, Lord Justice Giffard, on 647, he starts by dealing with the cut-off date; in other words, the insolvent situation, and he says, four lines down:
"The only argument really adduced in favour of computing interest subsequent ...(reading to the words)... which has been adopted as to dead men's estates than in favour of it."
So, in other words, you can't apply the position in the event of a solvent estate to an insolvent situation.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: Then he deals generally with the position in bankruptcy. He says:
"As to the rule which my learnt brother has laid down, it is the rule in bankruptcy. The rule was, as has been said, judge-made law but it was made after great consideration and no doubt because it works with

equality and fairness between the parties."

Then specifically the insolvent situation, he says:

"If we are to consider convenience, it is quite clear that where an estate is insolvent convenience is in favour of stopping all the computations at the date of winding-up."

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: "For these reasons, I am of the opinion that dividends ought to be paid on the debts as they stand at the date of the winding-up, for when the estate is insolvent this rule distributes the assets in the fairest way."

Then when the estate is solvent, he says:

"It works with equal fairness because as soon as it is ascertained there is a surplus ...(reading to the words)... under his contract and on the other hand a creditor who is not stipulated for interest does not get it."

One need to bear in mind no provision for interest on debts that don't otherwise carry interest at this stage.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: Then he adds at the end this:

"I may add another reason, that I do not see with what justice interest can be computed in favour of

creditors whose debts carry interest while creditors whose debts do not carry interest are stayed from recovering judgment and so obtaining a right to interest."

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: My Lord, obviously that last comment is made in relation to an insolvent company but applies equally in the context of a solvent company. There is no justice in either situation in one being entitled to interest but not the other. So if you have an insolvent company, no one gets post-insolvency interest. If you have a solvent company, similarly the position should be equal. That was the position in bankruptcy not yet incorporating insolvency.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: My Lord, that's the first of the authorities.

The second your Lordship will find in the next tab and it's the first of the Joint Stock Discount Company cases, otherwise known as Warrant Finance Companies case.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: My Lord, this concerned a creditor who had a right of proof for the same debt against two companies in liquidation. It had already received 20 shillings in the pound, claimed to be entitled to continue to prove

until all interest accrued since the commencement of the winding-up had been paid, the interest being post-insolvency interest.

Your Lordship will see that on page 86, just picking up the facts about eight lines down. It says:

"The Warrant Finance Company proved for the amount due on the bills against both estates [and then they received dividends, dropping three lines] ... making together 20 shillings in the pound. They claimed to continue to prove against the joint stock discount company to the full amount of 13,000 until the interest which had accrued since the commencement of the winding up was also satisfied."

Over the page, 87, your Lordship can see the argument by Mr Jessel QC. His argument was:

"The Warrant Finance Company's case is in point. This order cannot be reversed without overruling that case. The dividends paid to the appellants were appropriated to the payment of the principal and could not be applied by them to the payment of interest."

So the appropriation argument.

Lord Justice Gifford's response is at the bottom of 87, picking it up six lines down on 88:

"The only ground on which the argument to the contrary could be put is that taken by Mr Jessel, namely

that there has been an appropriation of the dividends to the payment of principal, but that is a mistake. The rule which has been made has no such effect. It is a rule adopted because it is found a just and convenient rule for the administration and realisation of assets under the particular bankruptcy or the particular winding-up. It is not meant at all to interfere with the rights of the creditor if he can get payment from other sources to combine and retain all that he can obtain from all those sources until he has paid not only his principal but all his interest and so the debt is entirely satisfied."

So in a slightly different situation, namely proof against two insolvent estates. The same argument, essentially, "You have received dividends, they were paid in respect of principal and therefore your interest needs to be calculated on that basis".

MR JUSTICE DAVID RICHARDS: Just give me one moment.

(Pause)

MR DICKER: My Lord, the next case is Humber Ironworks number 2 which is at the next tab, tab 29.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: The issue here was slightly different. It was whether a creditor who held security was entitled to receive dividends in the liquidation to the full amount

of principal and, at the same time, realise his security until the full amount of interest had been satisfied.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: So it's no longer a claim against two estates, it's a claim against one, plus reliance on security.
The decision your Lordship will see in the held at 88:
"The rule that a creditor of a company which is being wound up is not entitled to dividends towards payment of interest accrued since the commencement of the winding-up does not prevent a creditor who holds a security from receiving dividends to the full amount of the principal and at the same time realising his security until the full amount of principal and interest has been satisfied."
My Lord, again, picking it up with the argument, page 91, your Lordship will just see a reference in Mr Baggallay QC's submissions at the bottom of that page to Bower v Marris.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: Then:
"The present case is similar to re Joint Stock Discount Company ...(reading to the words)... appear he has a security given by the principal."
Mr Southgate re-runs the appropriation argument.

Your Lordship will see that in the last three lines of his submissions:
"Payments made to the appellants have been appropriated to reduction of the principal. At all events, they have never been treated by them as paid on account of interest."
Lord Justice Giffard, halfway down that page, picking it up about ten lines down, says:
"I think the question is concluded by the case of In Re Joint Stock Discount Company ...(reading to the words)... the creditor may have and does not amount to an appropriation in any shape or form."
Then he deals with the result in that case:
"The result is that, as in many cases, the creditor has a claim on two or more estates ...(reading to the words)... upon for a series of years and must now be taken to be the law."
Then the last four lines of that paragraph:
"Although the proof in terms is in respect of principal, that does not amount to any appropriation or preclude the party who approved from appropriating the sum received for the payment of interest so long as interest is due."
My Lord, the final authority in this group of four is the second Joint Stock Discount Company case.

Your Lordship has that at tab 31.
My Lord, this is effectively the next stage in the dispute. The previous decision had held that the creditor was entitled to receive dividends from both estates until his claim had been satisfied in full. What happened in this case was that the liquidator admitted the creditor therefore for a further sum but calculated the amount he was due on the basis that dividends had been appropriated to principal, thereby reducing the creditor's claim to interest. Your Lordship will see that in a moment from the facts. But just noting the "Held" at the top:
"The secured creditor cannot be deprived of his security until he has been paid in full ...(reading to the words)... which were in liquidation and receive dividends from both estates."
Then:
"The liquidator of company A applied for an order for delivery up of the bills ...(reading to the words)... payment of interest and then as to surplus in reduction of the principal."
Your Lordship will see the detail over the page, page 12. The first full paragraph:
"The balance of £79, which the liquidator of the Joint Stock Discount Company now admitted to be due to

the Warrant Finance Company [in other words, as a result of the last judgment] was arrived at in this way: the dividends paid previously to November 1867 were all treated as applied in reduction of principal debts."
Then eight lines from the end of that paragraph:
"The Warrant Finance Company contended this balance was calculated altogether on an erroneous principle and that the dividends of the Joint Stock Discount Company, like those of the contract corporation, ought to be treated as applied in payment of interest and then as to the surplus only in reduction of principal and they claimed payment of a much larger balance before giving up the bills."
Then at the bottom of 12, your Lordship will see Mr Jessel having another go at the appropriation argument. He says:
"We admit all sums received from the contract corporation are as between us and the holders of the bills to be treated as applied in the first place as payment of interest, then in reduction of principal, but we say that sums paid by us are applicable only to payment of principal and cannot be treated as applied in any other way."
Mr Baggallay, probably becoming a little weary by now, responds at page 13, four lines into his argument

he's recorded as saying:
"But in the Warrant Finance Company's case the Lord Justice says that is simply a convenient rule for the administration of the assets and the winding-up ... not meant to interfere with the rights of creditors."
Then eight lines or so from the end of the argument, at the end of the line, he says:
"That is an appropriation simply for the convenience of the court, not such as to deprive the creditor of his right to appropriate payment in any way he thinks most beneficial according to the principle laid down in Bower v Marris."
Mr Jessel in reply, page 14, tries to distinguish Bower v Marris on the basis it only concerned effectively the co-obligor:
"In Bower v Marris there was no question of appropriation of payment ...(reading to the words)... and the bankrupt obligor which is the point in this case."
My Lord, obviously not a correct explanation of Bower v Marris. Lord Rommily deals with it very shortly. He says:
"I am very clear as to the principle on which this case is to be decided. I treat the case as if there were no winding-up at all and these sums that been paid

simply on account."
The last paragraph:
"Therefore of the opinion the Joint Stock Discount Company cannot be entitled to the benefit of any remedy they may have on these bills against the contract corporation until the Warrant Finance Company has received principal, interest and costs in full."
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: My Lord, so two propositions from those four well-known cases. First of all, the process of collective execution and the payment of dividends in accordance with that process do not constitute an appropriation so as to deprive creditors of the right that they would otherwise have, when they have it, to payment in full.
Secondly, an application of Bower v Marris, in other words payment in full, means payment calculated on the basis that those dividends were treated as having been applied first to interest and, secondly, to principal.
My Lord, so far as subsequent legislation in relation to companies winding up is concerned, the legislation was amended on various occasions, obviously prior to 1986. My Lord, there's no material amendment in the sense of no amendment made that's relevant for these purposes. It was the 1986 Act that effectively

introduced for the first time an express regime insofar as companies winding up was concerned dealing with post-insolvency interest.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: Obviously such a regime had existed in bankruptcy since 1824.
My Lord, carrying on the history. There was then a new Act in bankruptcy, the Bankruptcy Act 1883. I need to show your Lordship that, given the submissions which are now being made by the administrators in relation to it. Your Lordship will have it in 3A, tab 27.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: My Lord, there are two relevant sections. The first, section 40. 40, sub-section 1 provides:
"In the distribution of the property of a bankrupt shall be paid in priority to all other debts."
Then there's various preferential debts. Your Lordship isn't concerned with that.
4, sub-section 4:
"Subject to the provisions of this Act, all debts proved in the bankruptcy shall be paid pari passu."
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: So that's now enshrining that.
Section 40, sub-section 5:

"If there is any surplus after payment of the forgoing debts, it shall be applied in payment of interest from the date of the receiving order at the rate of £4 per centum per annum on all debts proved in the bankruptcy."
That provision effectively mirroring section 132 of the 1825 Act providing for interest at 4 per cent.
MR JUSTICE DAVID RICHARDS: Right.
MR DICKER: Then section 65:
"The bankrupt shall be entitled to any surplus remaining after payment in full ...(reading to the words)... expenses of the proceeding under the bankruptcy petition."
That is obviously preserving a creditor's right to payment in full of his creditor's -- payment in full, including any interest to which he's entitled as a matter of contract or otherwise.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: Now, my Lord, on the administrators' argument, as it's now advanced, these provisions are critical because the administrators' submission is --
MR JUSTICE DAVID RICHARDS: Sorry to interrupt you. When you said that this was the same as section 132, section 40, sub-section 5, seems to be providing for a flat rate of 4 per cent on all debts proved in the bankruptcy,

whereas section 132 had two limbs. First of all, you had contractual post-bankruptcy interest and then you had the 4 per cent for everyone else.
MR DICKER: You're absolutely right that the two have effectively been split out.
MR JUSTICE DAVID RICHARDS: Right.
MR DICKER: The last part, in other words the 4 per cent, is covered by section 40, sub-section 5, and the other part is covered by the rubric in section 65 which is "the bankrupt shall be entitled to any surplus remaining after payment in full of his creditors with interest", which obviously brings in as well the new provision or, rather, not the new provision, the provision for payment at 4 per cent as by this Act provided.
MR JUSTICE DAVID RICHARDS: So payment in full of his creditors includes post-bankruptcy interest on those debts which carried interest?
MR DICKER: Yes.
MR JUSTICE DAVID RICHARDS: I see.
MR DICKER: Your Lordship will remember the phrase "payment in full" was a phrase that Lord Hardwicke picked up, I think, from one of the early statutes. Can I just remind your Lordship of that? It's in Bromley v Goodere where he refers to the 1603 Act and he says:
"The next is the statute at the 1st of Jac. 1 cap.

15 ... not much in it but expression of full satisfaction in the clause ..."
And he refers to that --
MR JUSTICE DAVID RICHARDS: I may have misunderstood you, but my understanding was the -- sorry, whichever Act this was, the 1825 Act, was the first Act to make provision for the payment of post-bankruptcy interest, whether it was due under the contract or otherwise.
MR DICKER: Yes.
MR JUSTICE DAVID RICHARDS: So before then, is this right, once a concept of discharge was introduced into the legislation, the bankrupt got his property back but he could still be sued for post-bankruptcy interest presumably? Am I misunderstanding it?
MR DICKER: Before one starts with the period before 1825. Before 1825 there was no provision in relation to statutory interest -- no provision in relation to post-insolvency interest as such.
MR JUSTICE DAVID RICHARDS: Absolutely.
MR DICKER: One effectively had to deduce it from the inherent nature of the scheme, which is what Lord Hardwicke did. He effectively said that the creditors are entitled to satisfaction in full. Discharge doesn't affect that because that's intended to provide the bankrupt with a discharge. It's not

intended to release his estate.
MR JUSTICE DAVID RICHARDS: I see Lord Hardwicke was saying that if you have, let's say, a contractual right to interest, then the creditor with that right is entitled to payment of that sum before the estate is handed back to the bankrupt?
MR DICKER: Absolutely. That comes --
MR JUSTICE DAVID RICHARDS: That answers the question, I think.
MR DICKER: You then have 1825 which --
MR JUSTICE DAVID RICHARDS: Which spells that out.
MR DICKER: -- and adds a new provision which is the 4 per cent.
MR JUSTICE DAVID RICHARDS: Indeed. Then we get to 1883 and they no longer spell out the bit of contractual interest, which they did in 1825, but they preserve -- and you say that comes in the phrase "payment in full of his creditors".
MR DICKER: Yes.
MR JUSTICE DAVID RICHARDS: I see. Thank you.
MR DICKER: Just dividing up the language in a slightly different way.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: Now, my Lord, what the administrators say is that this provision is critical and the reason they say

it's critical and the reason why they say it abolished the rule in Bower v Marris was because, according to them, before 1883 there was no "mandatory direction requiring the surplus to be applied in payment of interest". Before 1883 the relevant Acts merely provided for payment of interest to be a pre-condition to the payment of surplus to the bankrupt.
My Lord, after 1883 a major change had occurred because there was, so the administrators say, for the first time a mandatory directional that surplus shall be applied in the payment of interest.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: My Lord, just for your Lordship's note, I think that's most clearly expressed in paragraph 53 of the administrators' skeleton argument. It may be worth just turning that up. If your Lordship just glances at 53, I think I have fairly summarised the point. (Pause)
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: The effect of that, they say, is that given we now have a mandatory direction for the payment of interest, for some reason there's no room for the rule in Bower v Marris.
My Lord, in our submission there is absolutely nothing in the difference between the 1825 Act and the 1883 Act which indicates the legislature intended the

subsequent Act to have this significant effect.
My Lord, we say the submission that there was no obligation on the trustees to apply the surplus in payment of interest under the earlier Acts is incorrect. There was -- plainly in substance they were under a duty to provide the surplus to the bankrupt. They were also not entitled to provide that surplus without, first, paying creditors' interest. There really is no difference in substance between the two, we say.
My Lord, we also submit there's no reason for believing that such a change was intended. The administrators don't give any reason why the legislature wished to make this change; my Lord, on any basis it's surprising if the legislature wished to make it only shortly after the rule in Bower v Marris had been enthusiastically adopted for companies winding up. This is only some ten years or so after the four cases I've just shown your Lordship, and in the absence of any authority that suggests there was ever any criticism of the rule in Bower v Marris, the only criticism that has evidence been made is that it's unfair that it's only creditors with contractual rights to interest who should be paid interest, and that, as I said, was cured by section 132 of the 1825 Act.
York, in their skeleton, refer to two textbooks in

1894 and 1904 which continue to refer to the rule in Bower v Marris. I'll leave Mr Smith to show your Lordship those.
The other consequence of course is this, on the administrators' latest case, that we then logically had two different regimes running after 1883. In bankruptcy, for some reason, Bower v Marris did not apply. In companies winding up it did apply because it was held to have applied in the four cases I've just shown your Lordship. My learned friends are unable to point to any new statute containing any slight change in wording that would enable them to say that rule had gone as well.
So one ends up with this odd position, in our submission, that you start off with Bower v Marris in bankruptcy. It gets introduced into companies winding up in 1869/1870 on the basis the bankruptcy rule is a good rule. According to my learned friends, it's abolished in bankruptcy ten years later in 1883, but continues in corporate insolvency all the way through to 1986. My Lord, it is on any basis a curious state of affairs.
My Lord, can I just finish the statutory history before looking at Re Lines Brothers. Obviously last Bankruptcy Act before the 1986 Act was the

Bankruptcy Act 1914. If your Lordship goes to tab 36 there are extracts of that Act there.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: My Lord, section -- the relevant sections, if your Lordship goes to section 33, 33.1 is the preferential claims that my Lord saw under the relevant section of the 1883 Act. Then going on to sub-section 7 and sub-section 8, 7 and 8 again mirror the provisions of the 1883 Act.
Section 66(1) is a new provision. It's referred to subsequently by the court committee and it caused an enormous account of grief to liquidators over the years. It's section 66.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: 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 paid in full."
MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: So, in other words, pre-commencement interest limited to 5 per cent.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: In the event of a surplus, you can get all of the higher interest to which you're entitled.
My Lord, in 66(2) there are various anti-avoidance provisions which were inserted to deal with various ways in which creditors sought to avoid this, one of which was effectively restating the account monthly, turning the accrued interest into principal, and a new loan in the higher amount on which interest was also due.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: That's one of the things dealt with by 66(2).
My Lord, the other provision, again, your Lordship has already seen, section 69 in the same terms as the 1883 Act.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: My Lord, just, if I may, before we break, if it's convenient to your Lordship, a reference to one authority.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: It's the Vice Chancellor in Re Rolls-Royce which your Lordship will have at 1B, at tab 83. My Lord, the only reference, and it may be necessary to come back to the case later, but if your Lordship just looks at 1588,

letter D, there's a reference to section 317 of the Companies Act.

Then at later F, the Vice Chancellor says:

"That section sends one to the Bankruptcy Act 1914."

There one finds these two provisions: section 33(8), and that is the provision your Lordship has just seen the 4 per cent; and section 69, which is the other provision.

Then the Vice Chancellor said:

"The provision contained in section 33(8) reproduces in substance a provision which has been in force since the Bankruptcy Act 1849 at least."

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: My Lord, I wonder if that might be a convenient moment?

MR JUSTICE DAVID RICHARDS: Yes, certainly. I'll rise for five minutes.

(3.13 pm)

(Short break)

(3.20 pm)

MR JUSTICE DAVID RICHARDS: Yes, Mr Dicker.

MR DICKER: Re Lines Brothers number 2. 1C, tab 95.

MR JUSTICE DAVID RICHARDS: 1C?

MR DICKER: 1C, tab 95.

My Lord, as your Lordship knows, this case concerns

companies winding up. It applied the rule in Bower v Marris. Everyone agrees that it was right to apply the rule: the Senior Creditor Group on the basis that the rule has always applied both in bankruptcy and in companies winding up; the administrators and Wentworth on the basis that although it disappeared in bankruptcy in 1883, it didn't disappear in companies winding up until 1986. So this is effectively an accurate reflection of the state of law in 1984.

Your Lordship is familiar with the issue in Lines Brothers number 1 --

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: -- where the court dealt with currency conversion claims.

What then happened in Lines Brothers number 2 was that the bank came back and wanted to argue that when you deal with statutory interest -- when you deal with interest, to which they were now restricted as a result of the judgment in the Court of Appeal, you were entitled to calculate the interest by reference to the claims denominated in the foreign currency. The liquidators' argument in response was, "No, when you get interest, it's again on your proved debt by reference to your claim converted into sterling on the date of the commencement of the winding-up". So one had these two

competing approaches to the calculation of interest.

What both approaches shared was an assumption that the rule in Bower v Marris applied; in other words, the liquidators, when working out how much would be due if you converted claim into sterling and paid interest on that basis, calculated it by treating the prior dividends as payments of interest before principal and, again, the bank did the same in respect of their foreign currency claim.

My Lord, so far as Bower v Marris is concerned, much proceeded on the basis of common ground. There was one issue which arose which Mr Justice Mervyn Davies raised towards the end of his judgment, which your Lordship will see in a moment. The argument was essentially that isn't there a problem when we get to the stage of the final dividend having been paid and proved debts, i.e. principal having been paid in full.

Mr Justice Mervyn Davies said, "Well, what is there on which interest can continue to accrue?" So he said he was minded to stop the Bower v Marris calculation on the date of final payment. There was argument at that stage, in the sense that both sides came back and submitted to him that he was wrong. He ended up agreeing.

But, my Lord, just showing your Lordship firstly the

relevant discussion in the record of the argument. It starts at page 440.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: David Graham QC, Robin Potts QC and Martin Moore for the liquidators. The question is whether the post-liquidation interest on a foreign currency debt should be calculated according to the rate of exchange as on the liquidation date or some other date. It is not a case where there is a surplus for return to contributories but still a competition between creditors; sterling creditors on the one hand and foreign currency creditors on the other.

So the first issue is: what was the relevant date that applied?

Mr Potts QC following, at page 441, letter B, deals with how much is due between letter F and G. He said:

"It is common ground the position relative to post-liquidation interest in winding-up is governed by the Humber Ironworks case and Bower v Marris. Under the rules laid down by those authorities, dividends are notionally applied first in satisfaction of post-liquidation interest accrued down to the date of the relevant dividend and thereafter to capital. Interest is then calculated on the notionally reduced capital balance down to the next dividend", and so on.

MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: Then at 442, just above letter B, he says:
"The Humber Ironworks calculation aims to show the amount which would remain due had there not been a winding up, not merely in respect of interest but also in respect of capital."
Then the argument for the bank starts between E and F. Mr Stubs QC and Mary Arden, as she then was:
"It is clear from Bower v Marris, the Humber Ironworks case and Line Brothers ...(reading to the words)... the respective contracts by which such debts were governed."
They use that essentially to say, therefore, when you calculate interest, you have to do that by reference to the underlying foreign currency claim.
Mr Potts, at 444D, says:
"... common ground that the Bower v Marris approach, which requires dividends to be treated as ordinary payments on account going first to interest and then to principal, is the proper one."
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: My Lord, then that is recorded in the judgment of Mr Justice Mervyn Davies at 446, just below letter D; he says:
"In these circumstances there remains for decision

some question ...(reading to the words)... this sum appears in appendix A to this judgment. Appendix A is an agreed document."
He then deals with the bank's submission that you ought to do it by reference to the foreign currency denominated sum. He rejects that at 451 G to H. He says, between G and H, second sentence:
"I hold that such interest is claimable by reference to the exchange rate prevailing at the date of the winding up. My principal reason for this view is grounded on some words from Lord Wilberforce's speech in Miliangos."
His conclusion is at 453, letter D. He says at letter D:
"It follows that question 3(b) in the summons is answered in the sense of 3(b)(i), i.e. interest accrued after commencement" --
MR JUSTICE DAVID RICHARDS: Sorry, where are you?
MR DICKER: My Lord, I am sorry. 453 at letter D.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: "... interest accrued after the commencement of the winding-up of Lines Brothers Limited ...(reading to the words)... as at the date of the winding-up. Appendix A applies."
Then the issue which I mentioned which the judge

raised. He deals with between E and G. He says:
"In saying that Appendix A applies, I desire to add this caveat. Appendix A includes interest in the sum of 173,000-odd for the period 20 June 1978 to 31 December 1982. It would be brought up-to-date by adding to that figure interest for the period from 21 December 1982 to the date of payment; in other words, Appendix A proceeds on the footing that interest has continued to run since the payment of the final dividend on 20 June 1978. It is supposed, as I understand, that interest continues to run on the notionally unpaid capital thrown up by the Bower v Marris calculations. I am not satisfied that interest ought to be charged in respect of the period after 20 June 1978. I say that because all principal was in fact paid off on 20 June 1978 so that thereafter there was no principal owing that could carry interest. The capital sum of 589,000-odd is to my mind merely a notional figure not capable of supporting an interest claim."
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: My Lord that was effectively simply a variant of the appropriation fallacy, one limited to looking at the payment of the final dividend.
The parties return for further submissions.
Your Lordship will see that at 456 at letter F.

Mr Potts QC says:
"The calculations of both sites have been effective in conformity ...(reading to the words)... accrued down to that date was deemed to remain outstanding."
And, similarly, he then says in relation to Appendix B the position was the same.
457, between A and B:
"As to whether interest falls to be computed after the final dividend payment on the principal sum deemed under Bower v Marris to remain outstanding upon such final dividend being paid, the view of the liquidators and of the bank is that interest does continue to be computed on the principal deemed outstanding until further payments have been made satisfying in full that deemed outstanding amount of principal. The reason is the principal in Bower v Marris aims to bring out a payment to the creditor of precisely that sum he would have received had no liquidation taken place. By treating dividends paid as ordinary payments on account falling to be appropriated in the first instance and keeping down interest and thereafter capital. The Bower v Marris calculator stops at the date of the final dividend. The creditor does not get payment in full of his debt and contractual interest and is thus not committed to his contract in the full sense."

Then it is plain from the authorities that interest continues to be calculated until the notional principal balance is extinguished by actual payment. Bromley v Goodere, Mills, Bower v Marris and Humber Ironworks are referred to, together with various other cases.

MR JUSTICE DAVID RICHARDS: I have read to the end of the argument.

MR DICKER: I am grateful to your Lordship.

So, Mr Justice Mervyn Davies in the end satisfied there wasn't a reason for stopping at the date of payment of the final dividend and the calculation continued.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: My Lord, we mention in our skeleton that the rule is not merely a rule applicable in England but it appears to have been adopted in every Commonwealth jurisdiction that we can find which has considered the issue, in particular it's been applied in Australia, Canada, Scotland, Ireland, Hong Kong and the United States. As far as we're aware, no common law jurisdiction has rejected the rule and all of them have considered it, as I have said, and adopted it.

My Lord, I was going to refer your Lordship to a mere handful of those cases. One thing your Lordship

will note, I think, in going through those cases, is the extent to which they have all referred to, relied upon and effectively approved the English cases, Bromley v Goodere, Bower v Marris, Re Humber Ironworks. There has been an extraordinary amount of cross-fertilisation, if that's the right word.

My Lord, the first is a case from New South Wales. It's in bundle 1D at tab 135. My Lord, the reason we refer this authority to your Lordship is that it holds that Bower v Marris applies not merely in relation to a creditor with a contractual right to interest but also to a creditor with a statutory right to interest, in this case pursuant to a judgment.

My Lord, the judgment is by Mr Justice Barrett in the Supreme Court of New South Wales. Picking it up at paragraph 7, he deals with the provisions governing debts and claims admissible to proof. He says:

"These are found in section 438 of the Companies (New South Wales) Code."

438(1), debts admissible to proof. 438(2), application of the Bankruptcy Act 1986. In 8 he refers to 439(1):

"The amount of a debt of a company including a debt that is for or includes interest is to be computed for the purposes of the winding-up as at the relevant date."

So that's the relevant date.

Then at 9 he refers to 438 causing provisions of the Bankruptcy Act to apply. That Act providing that a debt is not provable in bankruptcy insofar as the debt consists of interest accruing in respect of the period commencing on or after the date of the bankruptcy is provable in the bankruptcy.

So that's the cut-off date.

Your Lordship will see a reference in 10, in the quotation from the judgment in Tahore Holdings at the end of the quotation a reference to Lord Justice Giffard in Humber Ironworks.

Over the page in 16, a reference to WW Duncan.

Then this in paragraph 11:

"These observations apply equally to the present case under the Companies (New South Wales) Code but with one note of explanation or clarification. Implicit in those observations is the assumption that an obligation to pay interest will be contractual."

The earlier cases referring to remission to contractual rights and expressions of that sort. He says the same assumption appears in the judgment of Mr Justice Windeyer in Spedley Securities.

"These references to contractual interest do not mean that interest payable by virtue of some other

legally binding obligation stands on some different footing and is not comprehended by the principles stated. It is just that the interest obligation before the court in the particular cases was a contractual obligation."

At 12 he says:

"The source of the obligation to pay interest in the present case is section 95 of the Supreme Court Act 1970 New South Wales."

He concludes, in the last half of 13, by reference to an affidavit of Mr Kershaw in the last five lines saying that that:

"... also recognises and proceeds upon the principles as regarding post-liquidation that I have referred to above and consider to be correct. Those principles should be applied in relation to all debts upon which interest was continuing to accrue at the time the winding-up order was made, regardless of the nature or the source of the legal obligation to pay interest."

In other words, interest first, and interest first whether one is talking about a contractual right to interest or pursuant to a judgment.

My Lord, the second is at tab 137, Gerah Imports v The Duke Group.

MR JUSTICE DAVID RICHARDS: Just give me one moment.

(Pause)
Yes, is this right, there was no provision in the Australian legislation for post-liquidation interest if there wasn't some independent legal right to it?
MR DICKER: My Lord, precisely. I think your Lordship will see the position more clearly from the next case which contains a rather longer --
MR JUSTICE DAVID RICHARDS: Thank you.
MR DICKER: 137 is Gerah Imports v The Duke Group. It's a decision of the Court of Appeal in South Australia. Just looking at the held: The Duke Group was ordered to be wound up in 1989. All creditors were paid their proven debts in full with a substantial surplus remaining by January 2000. The liquidator called for proofs of debt in relation to post-liquidation interest. The case was stated to the full court as to whether such claims were barred by section 439(1) of the Companies (South Australia) Code 1981:
"Held: Anderson, Mullighan and Nyland agreeing that such claims were not barred and could be dealt with by the liquidator because 439(1) of the Companies (South Australia) Code was never intended to alter the common law position."
My Lord, at paragraph 5 the issues are identified. Firstly, does section 439(1) of the Companies

(South Australia) Code bar claims for post-liquidation interest by creditors who have a contractual or statutory right to interest at an agreed or specified rate for a period extending beyond the relevant date for the purposes of section 439(5)?
2, if "no" to question 1, is the liquidator entitled to deal with claims for post-liquidation interest in accordance with the principles set out in paragraph 30 and the affidavit of John Sheahan sworn 25 June 2003?
My Lord, your Lordship should just note Wentworth says, in paragraph 53 of its skeleton, that this case didn't mention Bower v Marris. If your Lordship, however, looks at paragraph 6, it sets out paragraph 30 of Mr Sheahan's affidavit. Mr Sheahan says:
"As referred to above, I also received written advice from ...(reading to the words)... in summary, the advice was to the following effect ..."
My Lord, it may be quickest if your Lordship were just to read 30.1 to 30.6. (Pause)
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: So Mr Karkar and, as a result, Mr Sheahan, appearing to be very familiar with the rule in Bower v Marris.
Paragraph 8 says:
"The argument concerned the interpretation of 439(1)

of the Companies Code which was the relevant ...(reading to the words)... provided a bar to creditors' entitlements to post-liquidation interest."
So that's the issue.
13 sets out 439.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: The amount of a debt of a company, including a debt that is, for, or includes, interest, is to be computed for the purposes of a winding-up as at the relevant date.
The answer to the question of whether that changed the position is dealt with beginning at paragraph 19:
"There was a rule at common law which allowed for what has been called a second round of proofs where there was a surplus after payment of all debts and interest proved in the normal way as at the commencement of the winding-up."
Then a reference to the judgment of Mr Justice Dixon, as he then was, in MacKenzie v Rees, being a convenient summary of the law.
If your Lordship turns over to 21, just to note, at line 9, the reference to Bromley v Goodere, at line 17 a reference to ex parte Mills. There's also a reference in paragraph 3 to a decision of Chief Justice McLelland in Midland Montagu Australia v Harkness, again in the

bundles but I won't show your Lordship it.
Then at 24:
"Counsel for TDGL emphasised the difference between a substantive rule of law and the rule of convenience described in the cases. As he pointed out, the history of the way a surplus was dealt with and the law which was applied in cases where there was a surplus was not a matter of dispute. It is only because of the enactment of section 439(1) that any dispute has arisen. Put simply, did the enactment of that section alter the common law position applied consistently over many years?"
The answer to that, my Lord, will see in 38, certainly so far as the legislative materials interpreting the legislation are concerned, the court says:
"In my view the second reading speeches tend very much to support the argument ...(reading to the words)... in the event of a surplus to recover post-liquidation interest."
That ultimately is the conclusion that's reached in 53 and 54:
"In my view, therefore, the introduction of 439(1) never intended to alter the common law position ...(reading to the words)... than clearly pointing in

the opposite direction."
So you can recover interest.
And then the second issue dealt with more shortly. If your Lordship looks at 56:
"In relation to the case stated I would therefore answer as follows...", question 1, no, and then question 2, whether Mr Karkar's advice was correct and set out the relevant approach, answer yes.
My Lord, the third and fourth cases are two decisions from Canada.
The first, an early case of 1851 called Re Langstaffe which is in bundle 1A, tab 19.
My Lord, again, the issue is: is interest payable in the event of a surplus and, if it is, on what basis?
Again, trying to take this shortly, paragraph 4 from the argument your Lordship will see a number of cases, again including Bromley v Goodere, Bower v Marris and other authorities, many of which are in the bundles. Vice Chancellor Esten's judgment begins at paragraph 9. Picking it up at paragraph 10, he starts with a point on what one might call the merits.
He says:
"I would premise that reason and justice are all in favour of the ...(reading to the words)... on debts which he had thereby delayed the recovery."

Then he says, well, that may be, but it's a question of construction. He says:
"If the law is against such claim it must be enforced whatever may ...(reading to the words)... new and positive enactment must govern all questions arising under it."
My Lord, then two lines further on, he says:
"... useful to attend to the bankrupt law in England from the introduction of that system until the passing of our own Act."
My Lord, he then deals for the rest of paragraph 10 with the position in England. I won't take your Lordship through it but there's a lengthy citation from Bromley v Goodere and an even longer one from Bower v Marris. A conclusion about eight lines up from the end of paragraph 10, in the middle of the line, he says:
"The law continued in this state until the passing of 6th George 4 [that's -- we're now in 1824/1825] and the rule which had prevailed in bankruptcy with regard to the surplus was recognised and extended by that statute which provided by its 132nd section that the surplus should not be handed to the bankrupt until interest after the date of commission should be paid on all debts ...", et cetera.

He then deals with the position in Canada in paragraph 11 with the Canadian Act having been passed in 1843. Five lines down he refers to section 132 of the '85 Act imposing a further charge upon the estate. Authorised the addition introduction of interest at rate of 4 per cent. And says:
"It is not easy to account for our own legislature having adopted this provision either in terms or in substance but nothing can be more just than that a bankrupt estate should pay interest on all debts of every description whatsoever before the bankrupt himself should be allowed to receive any part of it."
At the bottom of the page, he says:
"No doubt the whole of our Bankrupt Act was borrowed from ...(reading to the words)... strictly consonant to the dictates of natural justice and reason."
So Bower v Marris, it appears, known and established in Canada in 1851.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: A more recent Canadian decision is a decision called Attorney General of Canada v Confederation Trust which is 1D/133. My Lord, this case is important for two reasons. First of all, the court had to consider whether the enactment of the express provision dealing with post-insolvency interest abolished the previous

approach; and, secondly, the statute provided for interest on all debts which did not otherwise carry interest.
MR JUSTICE DAVID RICHARDS: Right.
MR DICKER: My Lord, the administrators' submission is that this case wrongly decided on the basis that Mr Justice Blair failed to appreciate that the Canadian statute included a mandatory direction and therefore effectively repealed the previous regime.
I want to just, again, dealing with this as quickly as I can. The facts, I think, if I just pick them up at page 2, five lines down:
"The dispute was over whether the interest was to be paid in accordance with the provisions of section 95(2) of the Winding-up and Restructuring Act or on some other basis" --
MR JUSTICE DAVID RICHARDS: Where are you, sorry?
MR DICKER: Page 2, five lines down.
MR JUSTICE DAVID RICHARDS: Oh yes, I have it.
MR DICKER: I am sorry.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: "The dispute was over whether the interest was to be paid in accordance ...(reading to the words)... payment of interest and then to the payment of principal."

The judgment, page 3, begins with a quotation which is in fact from Fine Industrial Commodities. The liquidators of the company, who were also PricewaterhouseCoopers, made the following recommendations which your Lordship will see at page 4:

"(a) the holders of all proper claims against Confederation Trust's estate receive out of any surplus post-liquidation interest on the outstanding balances of their claims from the date of liquidation to the date on which final payment of full principal amount of their claims is made."

Then (c):

"Depending on the amount of the available surplus, distributions to creditors should first be made on account of interest and thereafter on account of the principal balances of their claims as more particularly set out in the liquidators' reports."

So in this case PricewaterhouseCoopers suggesting that Bower v Marris should be applied.

The analysis starts towards the bottom of page 5, paragraph 15:

"To answer the questions posed above, it necessary in the first place to determine whether or not section 95.2 of the Winding-Up Act applies to the Confederation Trust."

There's a reference in 16:

"Prior to the enactment of section 95(2) the Winding-Up Act did not contain any provision for the payment of post-liquidation interest. Section 95 read as follows ..."

Then 17:

"Section 95(2) was added. It states: any surplus referred to in sub-section (1) shall first be applied in payment of interest from the commencement of the winding-up at the rate of 5 per cent per annum on all claims proved in the winding-up and according to their priority."

21, there's a reference to:

"At common law the interest stops rule applied in winding-up proceedings."

In other words, cut-off date.

Reference at the top of page 7 to Humber Ironworks, Bower v Marris, et cetera.

22:

"Even without specific reference to post-liquidation interest in winding-up legislation, there were circumstances at common law where such interest could be paid out of surplus."

Then the last three lines of 22:

"The dispute is over whether the interest is to be

paid in accordance with the provisions of sub-section 95(2) ...(reading to the words)... or a principal first focus as a starting point."

24, he says:

"95(2) applies in relation to the liquidation."

Then deals, at 29 onwards, with the calculation of interest under 95(2). Again, in terms, in our submission, remarkably similar to those in authorities your Lordship has already seen, 29:

"The traditional rule in insolvency situations that dividends are to be applied first ...(reading to the words)... and contend for the reverse methodology."

30:

"Nothing in the language of section 95 itself to indicate that Parliament intended to alter this traditional methodology in the case of a post-liquidation surplus."

Then you have, yet again, the appropriation argument:

"The respondents submit, however, that post-liquidation interest is only payable under payment in full of all proven claims and there is nothing in the legislation to suggest a recalculation is to be done regarding distributions already made which would be necessary if the interest portion of the surplus is to

be distributed on a payment of interest first basis. Section 95 therefore mandates that distributions are to be credited first to the proven claim amounts they say."

My Lord, 32:

"I see no reason why section 95 should be interpreted in a fashion that departs ...(reading to the words)... proven claims that been paid on the winding-up."

Reference to Canada Deposit Insurance v Canadian Commercial Bank.

My Lord, if your Lordship just notes in the quotation, the judge in that case referred to Lord Selwyn's statement in Humber Ironworks, that no person should be prejudiced by the accidental delay which in consequence of the formal proceedings of the court in other circumstances actually occur in realising the assets; and adds a further caution that no person should be prejudiced by such delay in the distribution of assets.

33:

"In the circumstances of this case, not so much the unsecured creditors ...(reading to the words)... its creditors call for the application of the generally accepted rule."

My Lord, the next jurisdiction is Scotland. The

decision a case called Gourlay v Watson. It's at file 1B, tab 51. My Lord, the case is relevant for two reasons. Firstly, it held the ruling of Bower v Marris was also applicable in Scotland. Secondly, it's another example of a case that rejects an argument based on appropriation.

My Lord, Mr Smith, I think, deals with the decision in some detail in his skeleton and I was going to leave it to him to deal with the detail of it. Can I just --

MR JUSTICE DAVID RICHARDS: Do you have the reference in his skeleton, just out of interest?

MR DICKER: Yes, York's skeleton, paragraphs 56 to 62.

MR JUSTICE DAVID RICHARDS: Thank you very much.

MR DICKER: My Lord, just so your Lordship, as it were, identifies the critical point, I can do it from one judgment. It's that of Lord Moncrieff at 769. The case actually concerned a trust deed. Lord Moncrieff said:

"This case must be treated as that of a trust of the distribution of an estate which was actually or in all likelihood insolvent at the commencement of the trust. The Lord Ordinary proceeds upon the ground that trustees, whom he identifies not correctly I think with the debtors, appropriated the payments which they made to the creditors to reduction of the principal of their debts, and that this appropriation was acquiesced in by

the creditors was evidenced by the receipts which they granted."

He says:

"I do not think this is a correct view of the case."

The next paragraph:

"When, as here, an estate is insolvent or thought to be insolvent and there is not any present prospect that the creditors will be paid even the principal of their debt in full, payments of debts/dividends are made and accepted on a different footing."

A reference to, at the time, the creditors' claim for accruing interest ignored and the dividends are paid nominally in extinction of the accumulated debt.

MR JUSTICE DAVID RICHARDS: Just out of interest, Mr Dicker, at the top of that page there's a general proposition about solvent debtors. Is that, just out of interest, the position in English law, do you know?

MR DICKER: My Lord the answer to that is "yes", unless otherwise agreed or provided for by statute. There is a decision of the Privy Council in the bundles, called Nemichand, which states that if a debtor, as it were, attempts to appropriate a payment in respect of principal, the creditor is entitled to turn round and say, "I'm not having that" --

MR JUSTICE DAVID RICHARDS: I reject the payment, yes.

MR DICKER: Absolutely. Then obviously outside of the insolvency a creditor is also able to say, "You haven't paid me. I'm commencing proceedings", and therefore to recover the full amount.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: My Lord, I said absent agreement or statutory provision to the contrary, it's obviously open to creditors to ultimately agree something different and there is one example that the parties have managed to find where statute has done that which is in relation to counter court judgments.

MR JUSTICE DAVID RICHARDS: Oh, yes. Right. Thank you for that.

MR DICKER: Then the only thing I was going to say is the second paragraph from the end where he says:

"The analogy of the law of bankruptcy, both here and in England, in accordance with this view", and at the end of that paragraph there's a reference to Warrant Finance Company's case, Humber Ironworks.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: My Lord, if your Lordship permits me, I'd like just to deal quickly with Ireland.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: There are three judgments, all in the same case, in relation to a company called Hibernian Transport

Corporation. The first one is at bundle 1C, tab 107.

My Lord, these decisions are relevant because, firstly, like the others, they hold that the approach in Bower v Marris applies in Ireland. But they're also relevant because the Irish legislation includes a provision for statutory interest at the Judgments Act rate.

It's clear that in Ireland Bower v Marris also applies to statutory interest at the Judgments Act rate; in other words, not just where you're dealing with a contractual right. The only wrinkle being that the relevant provision providing for statutory interest at the Judgments Act rate only applies in bankruptcy. It doesn't apply in relation to companies winding up. It doesn't apply in relation to companies winding up for similar reasons as it doesn't apply in England as held by Vice Chancellor Pennycuick in Rolls-Royce, the legislation being very similar.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: My Lord, starting at 107, the first of two first instance decisions essentially on the same issue, as your Lordship will see. The facts just below the reference to section 86 of the Bankruptcy Act:

"During the course of the liquidation monies realised from the sale of its assets were held on

deposit earning interest. As result of the interest earned, the funds in the possession of the official liquidator were more than sufficient to discharge all the debts of the company ascertained at the commencement of the winding-up, together with the creditors' claims for interest and costs."

Dropping a paragraph:

"The official liquidator brought an application to court to determine whether the unsecured creditors of the company were entitled to interest on their debts as ascertained in priority to the shareholders' claim to the residue."

Held, by Mr Justice Carroll:

"Unsecured creditors entitled to be paid on their debts as ascertained. Existence of a surplus in the liquidation of a company through interest earned on monies held on deposit did not mean that the company was solvent at the date of the commencement of the winding up (Fine Industrial Commodities distinguished)."

That was the approach at first instance.

In 2:

"Therefore the rules of bankruptcy implied accordingly unsecured creditors entitled to interest on their debts as ascertained payable at the rate from time to time payable on judgment debts."

3:

"Those creditors entitled to contractual interest entitled to be paid the balance of the sum due after giving credit for the amount received in respect of statutory interest."

That's Humber Ironworks.

If your Lordship goes to the judgment, 266, at the bottom, ten lines up:

"The creditors argued they are entitled to interest either on a statutory interpretation of 284 of the Companies Act or, alternatively, on equitable grounds. Section 304 of the Irish Bankrupt and Insolvency Act provided if the produce of the estate of any bankrupt or insolvent shall be sufficient to pay 20 shillings in the pound ...(reading to the words)... to be paid to such bankrupt or insolvent. This direction has been amended by section 86."

That's at 267:

"If the estate of any bankrupt is sufficient to pay £1 in the pound at any rate of interest currently applicable on judgment debts and to leave a surplus, the court shall order such surplus to be paid or delivered to or vested in the bankrupt, his personal representatives ...(reading to the words)... to be paid at the rate currently payable on judgment debts."

My Lord, then dropping a paragraph, there's a reference to section 284 of the Companies Act.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: "Providing the same rules apply in the winding up of insolvent companies are in force under the law of bankruptcy."

This obviously raised exactly the same issue as in Rolls-Royce.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: The judge, however, coming to a different conclusion because the facts. Your Lordship will see that at 269, the second paragraph:

"I do not disagree with that interpretation but I do draw a distinction between those cases and the present case. In the present case the company's surplus does not arise from the realisation of assets but from massive amounts of interest earned over a long period."

In the next paragraph, he says:

"In my view the reality of the situation is that this company, unlike the companies in the cases cited, could not be deemed to have always been solvent. Therefore section 284 of the Companies Act applies, as does the bankruptcy rule relating to interest."

So there's a reference to the bankruptcy rule. Rolls-Royce is distinguished because you can't really

say this company was always solvent and therefore within the territory of the bankruptcy rules.

In that basis, in the penultimate paragraph on that page, he holds:

"After payment of the statutory interest, the contractual creditors are entitled to be paid the balance of the sum for contractual interest ...(reading to the words)... to contractual interest and the surplus to reduction of capital (see also re Lines Brothers number 2)."

Now, that obviously was felt not to be clear enough so far as the parties were concerned because they came back, at tab 108, essentially to have the same issue determined all over again. The last half of the first paragraph, Mr Justice Carroll says:

"The question which arises is whether the dividend paid to the creditors in 1983 and 1986 must be appropriate" --

MR JUSTICE DAVID RICHARDS: I am sorry, where are you now?

MR DICKER: I am sorry, it's the first paragraph, line 4.

MR JUSTICE DAVID RICHARDS: Page 271?

MR DICKER: 272.

MR JUSTICE DAVID RICHARDS: Thank you.

MR DICKER: "The question which arises is whether the dividend paid to the creditors in 1983 and 1986 must be

appropriated first to statutory interest and the surplus to reduction of principal or whether the payments were made solely in reduction of principal."

The last paragraph, line 4, refers to the Irish Bankruptcy Law Committee which took the view that in England interest was to be computed as running interest, treating the dividends as ordinary payments on account, and applying each dividend in the first place to the payment of the interest which would have been due at the date of dividend if there had been no bankruptcy and Bromley v Goodere, ex parte Morris, Bower v Marris, et cetera, referred to.

At 273 there's reference in the bottom third to section 86 and the conclusion, right at the bottom of that page, is:

"If statutory interest is payable, it seems to me it should be computed as running interest following Bower v Marris."

MR JUSTICE DAVID RICHARDS: Yes. Thank you.

MR DICKER: My Lord, that case then went to the Court of Appeal and the judgment is at tab 112.

My Lord, what the Court of Appeal essentially did was hold that Vice Chancellor Pennycuick's reasoning in Rolls-Royce was correct.

MR JUSTICE DAVID RICHARDS: I see, right.

MR DICKER: In other words, the bankruptcy provision doesn't apply in relation to companies winding up.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: The reason given by Mr Justice Carroll wasn't a good enough point of distinction. It didn't suggest that in bankruptcy Bower v Marris wouldn't apply to statutory interest. There's no criticism, as it were, of what would have been the position in bankruptcy and it also held that in companies winding up, although one was therefore limited simply to contractual rights of creditors because the bankruptcy provision giving you 4 per cent didn't apply, in relation to contractual rights of creditors Bower v Marris did apply.

Your Lordship will see that, I think, most shortly right at the end, page 6. There are three points at the end which are declarations. Firstly:

"Contractual creditors are entitled to interest on their debts at their respective contractual rates.

"2. A declaration that for the purposes of determining ...(reading to the words)... towards interest then due and then towards principal."

MR JUSTICE DAVID RICHARDS: Yes, I see.

MR DICKER: My Lord, I have one more Commonwealth authority to take your Lordship to but it may be more convenient to do that tomorrow morning.

MR JUSTICE DAVID RICHARDS: Right. Very well. Thank you very much. 10.30 tomorrow morning.

(4.25 pm)

(The court adjourned until Thursday, 19 February 2015 at 10.30 am)

INDEX