Monday, 3 April 2017

(10.30 am)

LADY JUSTICE GLOSTER: The first question we have is: to what extent are the arguments going to be affected, or the issues going to be affected, by any decision that the Supreme Court may give in relation to the previous Waterfall appeal?

Obviously, as I understand it, the Waterfall 2B appeal, dealing with the releases, is going to be affected, if the concurrency conversion claims go.

MR DICKER: I think, depending on the outcome of the appeal, it may well impact on both part A and part B.

LADY JUSTICE GLOSTER: Because of general statements which the Supreme Court may make?

MR DICKER: For two reasons: one, there are some issues, in part A, which effectively assume the existence of currency conversion claims and then ask, for example, do you have to offset statutory interest when calculating the amount of the currency conversion claim.

If the Supreme Court were to hold that there is no such thing as a currency conversion claim, then that issue obviously disappears.

I think broadly, depending on the approach that the Supreme Court takes, the decision could impact on all of the issues in relation to part A. For example, if the



Supreme Court expressed certain views about the general effect of the statutory scheme, creditors first, members last, for example, that may in turn have an influence on how this court approaches questions like Bower v Marris, non-provable claims of interest, things of that sort.

LADY JUSTICE GLOSTER: But, obviously, everybody is agreed that this court should go ahead nonetheless; that we shouldn't all back up and go home and wait for the judgment.

MR DICKER: I don't think anyone -- as far as I'm aware -- has suggested the latter.

LADY JUSTICE GLOSTER: Yes.

MR DICKER: I'm afraid --

LORD JUSTICE PATTEN: That would, in fact, have been the sensible course. I'm not criticising you. It's unfortunate that we haven't had the judgment from the Supreme Court given it would have been plainly more sensible for this hearing to have taken place after the judgment had been handed down.

MR DICKER: And I certainly see -- if I may say -- the force in that. I think it's fair to say that we had hoped we would have received --

LADY JUSTICE GLOSTER: But, anyway, you are all agreed that we should crack on now. What is going to happen when we do get the judgment from the Supreme Court? Are you



looking for a further opportunity to make submissions in the light of that judgment?

MR DICKER: The answer is: yes, that would seem to be a sensible course.

LADY JUSTICE GLOSTER: And simply in writing or will -- it may depend. I mean, because it's always difficult to get the same constitution together again.

MR DICKER: The answer is: it may depend, but I suspect there will certainly be a keenness on the part of the parties to have an opportunity to make oral submissions if they think that is necessary.

LADY JUSTICE GLOSTER: Yes. Okay. You are all agreed about that, are you? Yes, fine.

Then we'll start and see where we get to.

Thank you for the issues paper, that was extremely helpful, apart from the typo -- which amused me -- in the first articulation of issue 2.

Submissions by MR DICKER

MR DICKER: Just a brief word in relation to that. There are obviously various ways in which you can order the issues. We've tried to order them in a way which we think makes some sort of logical sense. They plainly interrelate, and it's useful to see how the arguments fly in relation to each of them before, obviously, forming a view on any of them.



The other document which I hope the court has is a proposed timetable. The general idea in relation to that is that I should start and I should deal with all the part A issues, and whether or not I'm strictly the appellant or the respondent; that seemed to us to be a sensible course. But Mr Zacaroli on behalf of Wentworth will then respond. If the administrators have anything to add, they will do so at the start of replies.

Mr Smith, on behalf of York, is keen to open his two appeals. We've added those at the end of the part A section.

LADY JUSTICE GLOSTER: Yes.

MR DICKER: So for as part B is concerned, again, it's the same as the general approach, so the order is reversed.

LADY JUSTICE GLOSTER: Yes, Mr Zacaroli will go first.

LORD JUSTICE BRIGGS: That is the reason the supplemental issues have been pull out.

MR DICKER: That is the only reason.

LORD JUSTICE BRIGGS: Because otherwise seems quite clearly connected with the As and Bs from which they derive.

MR DICKER: They are. We didn't think it was practical to deal with each issue on its own. We will deal with them in the normal order. We've managed to achieve agreement on that in the main. Your Lordship observed Mr Smith is

the one exception.
LORD JUSTICE BRIGGS: Yes.
LADY JUSTICE GLOSTER: Unless we come to the conclusion that we're not happy with your order, at the moment, proceed on the basis that we'll go with your order.
MR DICKER: Thank you. I was going to start, then, with issue 2, which we have called: the issue in relation to the principle in Bower v Marris. It concerns declaration 3, subscribed in the judgment as issue 2, and dealt with by Mr Justice David Richards in his main judgment at paragraphs 13 to 164.
The issue here is how you deal with dividends which have been paid when calculating interest under rule 2.88; do you proceed on the basis that dividends have been paid in respect of principal, the principal has therefore been repaid, and calculate interest accordingly; or do you notionally reallocate the dividends first to interest, and calculate interest on that basis?
Now, the judge held that the answer was the former. You calculate interest on the basis the dividends have been paid in respect of proved debts, essentially principal, and the rule doesn't permit any notional reallocation in the event of a surplus. We say that was a surprising conclusion for him to have reached for



number of reasons. In short, that's not how things had operated in a liquidation between 1869 and 1986.
Prior to 1986, in the event of a surplus in a liquidation, interest was calculated by notionally treating the dividends as having been paid first in respect of interest; that was also the position in relation to bankruptcy between at least 1743 and 1883. No party has been able to find an authority in bankruptcy indicating that the position changed after 1883.
The same approach has actually been taken in every single other Commonwealth jurisdiction that the parties have been able to identify which have considered it. There is no case in any other jurisdiction where the principle has been criticised, let alone rejected.
LORD JUSTICE PATTEN: The issue is whether the 1986 Act changed the position, isn't it?
MR DICKER: Your Lordship is absolutely right. We say in short: your Lordship can't reach a view on that without seeing the context and what in one case has been referred to as the "intellectual freight" provided by the prior regime.
My Lady, in each case the courts have applied the equitable principle in Bower v Marris describing it as both a fair and a just approach. None of the material



leading up to enactment of the 1986 Act criticised the operation of the principle. Indeed, although applied as recently as 1984, it was not even referred to in those materials.
The judge, in his judgment, didn't criticise it or suggest any reason why the legislature might have decided to disapply the principle. His judgment simply doesn't deal with that aspect of things. Instead, he reached his conclusion based on the wording of rule 2.88(7) and (9).
What we say in relation to that is: all of the points on the wording that he relied on applied just as much to the prior statutory schemes, either in liquidation or in bankruptcy. Indeed, the points which he accepted had been raised in argument and rejected by the courts in relation to those prior statutory schemes.
Now, if the judge is correct, we say the consequences are remarkable. Creditors will not receive the interest that they were entitled to receive outside of insolvency. Instead, all or part of the surplus will be distributed to shareholders, despite the fact creditors haven't been paid and will never be paid the full amount they are owed.
We know, subject to the decision of the Supreme Court, from the judgment of this court in Waterfall 1,



that foreign currency creditors are entitled to be paid what they are owed before any distribution is made to shareholders, and in our submission there isn't a sensible reason why a distinction is to be drawn between, on the one hand, foreign currency creditors and, on the other hand, creditors entitled to interest. The general rule is: creditors first, members last; you would expect that to be reflected in the statutory scheme and, we say, properly construed, it is.
Now, as your Lordships know, this issue -- like most of issues on the appeal -- is one which involves a substantial amount of money. The administrators have estimated the unsecured creditors would end up receiving some 1.3 billion sterling less by way of interest because the principle in Bower v Marris does not apply and subordinated creditors and, financially, the shareholders would receive a corresponding windfall. We say, again, that would be an extraordinary result.
I was proposing to develop my submissions by doing seven things. First, to say a little bit about how the principle in Bower v Marris operates and why the issue arises.
Secondly, to look at the terms of rule 2.88(7) and (9), at this stage, to identify the various aspects of the rule that Mr Justice David Richards referred to in

reaching the conclusion he did, and to make our submissions, shortly, as to what we say they mean.

Thirdly, then to spend a little time, not too long, looking at the position prior to 1986, both in relation to bankruptcy and liquidation, to show your Lordships how Bower v Marris was applied and, as part of doing that, to show your Lordships that, as I said, all of the points on which Mr Justice David Richards relied arose equally in relation to the earlier statutory schemes and, indeed, were raised in argument during the course of various authorities on those schemes.

I also want to deal with the analogous position in relation to the administration of the deceased insolvent estate, a particular decision of Mr Justice Chitty in a case called Whittingstall v Grover and to refer to one of the Commonwealth authorities.

LADY JUSTICE GLOSTER: Deceased and insolvent estates?

MR DICKER: Yes.

LADY JUSTICE GLOSTER: Or ones flipping in and out?

MR DICKER: There is an interesting question depending on the difference between the two, but the administration of a deceased insolvent estate.

The fourth, to look at the materials leading up to the 1986 Act, in particular the Cork report and the White Paper, because we say Mr Justice David Richards



failed to correctly analyse the changes which were made in 1986. In particular, he was wrong to say that rules simply implemented the recommendations of the Cork Report and adopted the prior position in bankruptcy. That, with respect to him, is not right. There was a significant change introduced by the White Paper which introduced an alternative entitlement, namely the rate applicable to the debt apart from the administration.

What we say in fact happened in 1986 was that the two streams, both bankruptcy and liquidation, were combined. In analysing the rules, it's important to appreciate that combination of the two streams and the prior approaches.

A fifth, to say something about principle and policy.

Sixth, then to return to the wording of rule 2.88, to construe it in the light of the statutory history and the principles and policies underlying the statutory regime, and to make our submissions in relation to the wording in slightly more detail. As I say, in our submission, it's easiest to do that once one has seen the prior position.

Seventhly, and finally, to deal with various points made by Wentworth in relation to the concept of



appropriation, which the judge held was a necessary part of the principle.

So, subject to the court, I was proposing to start with the first topic, which is to say a few words about how the principle in Bower v Marris operates.

We say it's helpful to start by reminding oneself of why the issue arises. Interest accrues on principle not unless it's compound interest on interest, a creditor will therefore want to ensure that any payment is applied first to discharge interest, rather than principal. In other words, so as to discharge the non-interest bearing part of the debt so that what remains continued to accrue interest.

LADY JUSTICE GLOSTER: What happens if, under the terms of the contract, compound interest is payable; what happens in liquidation?

MR DICKER: Then, I think, in the main, subject to another issue which the judge dealt with, the principle in Bower v Marris is less important.

LADY JUSTICE GLOSTER: Right.

MR DICKER: Issue 3, which you will see next, considered the position in relation compound interest. One conclusion the judge came to was that on the basis of the rules you are entitled to compound interest only --

LADY JUSTICE GLOSTER: Under the contract.



MR DICKER: If you are entitled to it under the contract, yes, but only until the relevant part of the proved debt, ie the principal, has been paid --

LADY JUSTICE GLOSTER: I remember that now.

MR DICKER: -- at which point, he said compound interest stops running.

So, even at that stage, if you have an accrued claim to interest, which as a matter of contract would itself carry further interest, nevertheless, that right to interest stops. The judge said that's issue 3, and I will come to that --

LADY JUSTICE GLOSTER: Okay, well, don't let me take you off --

MR DICKER: You are quite right, there is an issue between Bower v Marris, on the one hand, compound interest, on the other. Bower v Marris essentially applies where you are dealing with a right to simple interest, and its importance is that in an insolvency it treats the payments which have been made as notionally paid first in respect of interest, so that the underlying principle for the purposes of principal debt, for the purposes of calculating interest, can continue to accrue interest.

Now, in a commercial context, this is often dealt with by express terms of an agreement, the agreement will provide that any payments are to be applied first

to interest or least permit the creditor to control the order in way payments are made.

We say, it's useful to have that image in mind when considering how the rule should operate.

Why does insolvency potentially raise an issue?

We say, it's important to understand it stems from the basic nature of bankruptcy or liquidation for this reason and in this way: in an insolvency the first task is to distribute the assets equally amongst creditors in accordance with the pari passu principle. That necessarily requires the existence of a cut-off date for provable claims, to ensure that all provable claims can be ascertained and valued by reference to a common date. One consequence of that, of course, is that you can't prove for post insolvency interest. In other words, interest for the period after the making of the winding up order, commencement of the bankruptcy or the administration.

The necessary consequence of those two basic features of the insolvency regime is that when an office holder comes to make payments of dividends, he is necessarily making payments in respect of proved debts, effectively principal, up to, and any interest up to the date of the commencement of the insolvency, and not in respect of any post-insolvency interest. That's simply



what's required to achieve pari passu distribution.

One can immediately see how the issue arises. Before you get to the stage of calculating how interest should be paid in the event of a surplus, the office holder has already paid dividends in respect of principal. If that's what's required for the pari passu regime, then how in those circumstances someone might ask can interest be calculated on basis that payment is instead applied first to interest.

So the starting point is: this is an issue which has necessarily existed ever since the origins of both bankruptcy and liquidation.

The answer has consistently been provided by the application of the principle in Bower v Marris. As your Lordships will see, prior to 1986, in our submission, the courts consistently held that in the event of a surplus interest is to be calculated on the basis that any dividends that were previously made in respect of principal are regarded as having been made on account and notionally treated as having been paid in respect of interest first and then principal.

LADY JUSTICE GLOSTER: When you say, "Paid on account", you mean paid generally on account?

MR DICKER: Yes.

We also say it's important to understand the



principle operates as a way of calculating how much interest should be paid to creditors in the event of a surplus.

There's a good explanation, your Lordship's will see in due course, in Re Lines Brothers No2, which is the last judgment to apply the principle prior to the enactment of the 1986 Act. It was decided in 1984, but it involves a notional approach. Dividends are paid in respect of principal because that's what the statutory scheme has always required. Nevertheless, in the event of a surplus, the authorities said you calculate the amount of interest to be paid, by notionally treating the dividends as if they had been paid first in respect of interest.

So that's topic number 1. Topic number 2 --

LORD JUSTICE BRIGGS: Before you move on, the effect of that might be if the surplus is only a small one but under the recalculator, the Bower v Marris recalculation, principal can be paid in full.

MR DICKER: Correct. That's absolutely right, and that relates to one issue which Mr Justice Mervin Davies initially had difficulty with in Re Lines Brothers 2. He said, essentially, once principal has been repaid, there's no room for the operation of Bower v Marris, because if it does apply beyond that, then, effectively,



you still have principal outstanding and that can't be right. Submissions were made to him by both parties in that case, to the effect that that's incorrect. That's not how the principle works and (Inaudible). Your Lordships will see that later.

So, my second topic is to identify the various aspects of the wording of the rule Mr Justice David Richards considered significant.

Now, you have rule 2.88 in the authorities bundle, bundle 1, tab 174. You also have -- if you would prefer it -- a copy of the rules in the form that they were in when LBIE went into administration, which is the relevant rules in the form of the copy of the Butterworths Insolvency Handbook, which I hope you have.

LADY JUSTICE GLOSTER: You have handed it up recently, have you?

MR DICKER: I think three copies were handed up.

LORD JUSTICE BRIGGS: Yes, thank you.

LADY JUSTICE GLOSTER: Oh right, I thought this was mine, sorry. Yes.

MR DICKER: I'm afraid it's only on loan.

LORD JUSTICE BRIGGS: I hope it has the owner's name on it.

LADY JUSTICE GLOSTER: "Mark Phillips", I have. Convey my undying thanks to him.

LORD JUSTICE BRIGGS: I think I was only sent three copies

in about 2009.
MR DICKER: It's also in the form in which I'm going to use it. It is in volume 4, tab 174 of the authorities.
I think --
LADY JUSTICE GLOSTER: Could you just give that reference again?
MR DICKER: I'm sorry, it's volume 4, tab 174.
LADY JUSTICE GLOSTER: Thank you.
MR DICKER: I think the easiest way of dealing with this part of my submissions is if you turn up the judgment of Mr Justice David Richards, which is part A, core bundle A, volume 1, tab 2.
He deals with the question of construction in four short paragraphs, paragraphs 134 to 137. At this stage, just identifying the points he makes in giving you our short submission on them. 134, the first point he makes is:
"Rule 2.88(7) is a direction to the administrator as to how any surplus remaining after payment of the debt is proved is to be applied. The assumption for the purposes of the rule is that debts proved have been paid."
Now, we say, this aspect of the rule simply provides the proved debts are to be paid in priority to post-insolvency interest. In other words, it's



confirming the priority of proved debts over post-insolvency interest and, in turn, the priority of post-insolvency interest after any other purpose.
If one looks at --
LORD JUSTICE PATTEN: Are you saying the judge is -- I'm not quite clear what you are saying; are you saying that the judge's starting point is wrong or what?
MR DICKER: We say, the phrase he's focusing on, which is the phrase:
"Any surplus remaining after payment of the pre-debt."
That is his first point.
LORD JUSTICE PATTEN: That's just what the rule says.
MR DICKER: That is what the rule says. We say what that was intended to ensure is simply that proved debts have priority to post insolvency interest. This is effectively setting out the statutory Waterfall.
We know proved debts are paid after preferential debts. We know they're paid in priority to any distribution to shareholders. This provision essentially confirmed --
LORD JUSTICE PATTEN: It's only a surplus if they've actually been paid.
MR DICKER: Yes.
LORD JUSTICE PATTEN: So why is that any different from what



the rule says and what the judge says?
MR DICKER: It's not different. The question is: why are those words there and what are they intended to achieve?
We say, what they're intended to achieve is simply to make it plain that proved debts are paid first, in priority to post-insolvency interest. Then, post-insolvency interest is paid and that needs to occur before the surplus is used for any other purpose.
Now, what your Lordships will see in due course is there was a similar statutory provision in bankruptcy from 1825 onwards. Prior to 1986 in a liquidation, this priority element of the statutory scheme was a matter of judge-made law. It wasn't the subject of an express provision. The authorities had held that post-insolvency interest obviously comes after proved debts, but it also came before anything else. What we say this did was essentially to carry on what had previously been expressly provided for in bankruptcy, and codified the previous judge-made law in relation to a litigation. So that's the first point.
Just in relation to that, as I said, the priority of proved debt over post insolvency interest had obviously been a feature of the statutory scheme since their origins. This element of the statutory scheme -- in other words, that by the time you get to distribute



surplus in respect of post insolvency interest, you have already paid proved debts. That point was a point made in argument, repeatedly, in the cases.
The argument was essentially: well, the statutory scheme requires you to pay proved debts first, ie principal, how on earth can you proceed now on the basis that they notionally haven't been applied?
The courts repeatedly said, both in bankruptcy and in relation to liquidation, that what you are doing is essentially a notional calculation to work out how much interest you pay and, at that stage, although the proved debts have been paid in full, to ensure pari passu treatment of creditors has been achieved, nevertheless, for the purposes of calculated interest, you have a notional reallocation of the payments which were made, to treat it as having been made generally on account --
LADY JUSTICE GLOSTER: So it's just an accounting exercise, it doesn't displace the premise that the proved debts, ie the principal, has been paid.
MR DICKER: The principal has been paid. This is simply a matter of how you calculate the amount of interest paid. Essentially, you treat the payments as having been made, as having been made, essentially, to achieve pari passu distribution, because you can't, at that stage, pay post-insolvency interest. But, as having

been paid by process of law without any appropriation, so generally on account, which leaves the authorities said scope for notionally reallocating, notionally treating the dividends which have been paid, as if they were paid first to interest.

So, essentially, you have two stages: the first one to achieve pari passu distribution is you pay everyone pari passu in respect of their proved debts. That's what the scheme requires, has always required.

You then get to a stage when there is a surplus and you are no longer concerned with pari passu distribution in respect proved debts, where the courts say: the payments were made, but they were made by process of law without any appropriation. That gives us room for a notional calculation, a notional re-allocation. Essentially to say: we will treat them in calculating how much interest should be paid, as if they had been paid first in relation to interest.

The reason they do that is obviously to ensure -- one takes the example of the creditor who has a contractual right to appropriate payments, first, in respect of interest, to ensure that once you've been through the interest calculation, he actually gets his full entitlement and doesn't suffer a shortfall, and to ensure that that shortfall doesn't end up as a windfall



for shareholders.

I mean, I wanted to start by identifying the points of construction which the judge relied on because, plainly, this is ultimately a question of construction. We say it is striking that each of the points he relied on arose in relation to previous statutory regimes and were addressed and rejected in the context of those regimes.

The second point he makes, in 135, is --

LADY JUSTICE GLOSTER: Sorry, just stopping there, and you submit that there is no material distinction in the relevant wording. Although the wording may be different, the concept, as it were, is there in the earlier legislation.

MR DICKER: Yes. Absolutely --

LADY JUSTICE GLOSTER: Don't let me take you --

MR DICKER: I will come on in due course, because the 1986 Act obviously makes a substantial number of changes to insolvency regimes. It did make change to the regime in relation to post-insolvency interest, but one needs to be very careful identifying what those changes were. None of those changes, we say, had anything to do with, or leads one to the conclusion, that the principle in Bower v Marris has been disapplied.

The second point the judge makes, in paragraph 135



of his judgment, is:

"The direction given to the administrator is to pay interest on those debts in respect of periods during which they have been outstanding since the company entered administration."

Now, we say, this wording simply confirms creditors are entitled to interest on their debts for the period after the company went into administration, taking into account the payments which they have received. It doesn't tell you how you do the calculation. It simply says you get interest for the period for which your debts were outstanding. One still has the question: how, in calculating interest, do you work out when the debts are outstanding?

LORD JUSTICE PATTEN: Do I have this right: this whole problem only arises on the assumption, doesn't it, that, in the case of a insolvent liquidation, you don't have a single payment of a dividend which discharges 100 per cent the principal and accrued interest at the date of the liquidation or administration?

MR DICKER: I think your Lordship is --

LORD JUSTICE PATTEN: Because, otherwise, you wouldn't have this problem, would you? Because you would have paid 100 per cent, all the accrued interest, at the date of liquidation and the whole of principal, so you wouldn't



be concerned with asking the question: which is paid first? Because the answer is: they've both been paid first.

MR DICKER: I think that's absolutely right but, obviously, in practice --

LORD JUSTICE PATTEN: No, I understand in practice that is not how it works. You are likely to have, probably, a series of payments, depending on the realisations and so on.

MR DICKER: Yes, and if one thinks about how it operated in this case, a series of interim dividends were made, starting I think in 2012, the last one, final dividend, in April 2014. But, on the judge's approach, when the first dividend payment was made, some 25 per cent of that repaid, 25 per cent of the principal. So there may have been accrued interest up to the date of that dividend in 2012 but, on the judge's approach, because Bower v Marris doesn't apply, principal that carries interest has been repaid. The accrued interest hasn't and still has not been paid. One now has, four or five years later, a sum of interest accrued in 2012, not worth what it was then and the creditor not receiving what he would have received if one had done the calculation the other way.

LORD JUSTICE PATTEN: Yes. I mean, if you are in

a position, two or three years down the line from the date of administration, and it then becomes apparent, as a result of realisations, that you are going to, in fact, be dealing with solvent liquidation or administration in which this is a significant surplus, it's only at that point that these rules have any application because, up to that point, the administrator, presumably, is going to be paying dividends on the basis that there's a shortfall.

MR DICKER: Correct.

LORD JUSTICE PATTEN: As you've explained, on a pari passu basis, in which all the creditors will take an equal share of the hit.

But once that's no longer the position, and assuming that there have been, probably, payments of dividends properly so-called over that period of time, when you get to the point of which sub-rule 7 kicks in, which is that there is going to be a surplus and therefore statutory interest becomes relevant, at that point in time, one has to do a calculation of what the creditors have are still owed -- if I can put it that way -- notwithstanding the dividends which have been paid.

MR DICKER: My Lord, we would agree with that.

LORD JUSTICE PATTEN: If you've a scheduled series of payments -- or let's assume that they eventually add up



to a hundred per cent of date of liquidation debts, that's to say accrued interest and principal at that date, then, as I understand it, this principle is really trying to work out the order of payment because there hasn't been a single hundred per cent payment at the date of liquidation in order to compensate creditors in the position of your clients --

MR DICKER: Yes --

LORD JUSTICE PATTEN: -- for the fact that they haven't received the total amount of their indebtedness, having regard to fact that interest has continued to roll on in respect of the principal.

MR DICKER: My Lord, so one starts, as your Lordship said, with a (Inaudible) in this case, which for a long time everyone thought was going to be insolvent administration, no question of a surplus. The cases say: well, we do have rules dealing with how a shortfall needs to be dealt with. Obviously, assets distributed pari passu amongst creditors, but those rules were essentially designed to achieve pari passu distributions. When you suddenly realise you have a surplus, then, essentially, you are in a different world. Some of the cases pre-1986, in the context of liquidation, talk about remission to contractual rights, essentially a way of saying, "Well, you really now ought



to get, and plainly you should get, what, as a matter of contract, you are entitled to before any distributions are made to shareholders".

LORD JUSTICE PATTEN: Yes, but, I mean, what I put to you is a rather long way of simply making the point: when sub-rule 7 kicks in -- I mean, the judge is right that it presupposes -- and it has to, because otherwise the question doesn't arise -- that there's been payment of the proved debts which would, in the case we are talking about, would be principal plus interest. But what it's -- a question of construction, whether it answers how the statutory interest, in respect of the relevant periods, falls to be calculated.

MR DICKER: Yes.

LORD JUSTICE PATTEN: That's the real issue.

MR DICKER: Yes, and we say that isn't answered by the first point he makes. It's not answered simply by pointing to the way in which the statutory regime works. Pointing to the fact that dividends have to be paid in respect of proved debts first. It's not answered, either, by the second point he makes, in 135, that you are paying post insolvency interest in respect of the periods for which the debts were outstanding, because you then have to work out: how in the world, in which we are now in, do you calculate for how long the debts have been



outstanding?

LORD JUSTICE PATTEN: Yes.

MR DICKER: Now, again, the wording in 135 the learned judge refers to, you will find similar language to similar effect in statutory provisions in bankruptcy as long ago as 1825. Again, you'll see that.

The third point he makes comes in 136. 136, he says:

"2.88(9) specifies the rate at which interest, under 2.88(7), is to be paid. Insofar as interest is payable at the rate ...(Reading to the words)... because it is higher than judgment rate. It is, in my view, clear that the interest is nonetheless not been paid pursuant to the contract. The interest remains payable pursuant to rule 2.88, rule 2.88(9) does no more than specify the rate at which statutory interest is payable."

Now, the learned judge seemed to have thought that it was important that when 2.88(9) referred to the rate applicable to the debt, apart from the administration, it wasn't effectively saying, "You can now have your contractual interest". What it was saying was, "Here is a statutory right which gives you interest at the rate which was applicable apart from the administration". The learned judge seems to have thought that was one reason why the principle in Bower v Marris could not

operate.
I'll come on to precisely why he reached that conclusion later, but it's essentially to do with the doctrine of appropriation. He said part of Bower v Marris requires there to have been interest accruing throughout, so when one gets to this stage of saying, "Payments were made generally on account", we can now work out how they should be appropriated, that requires, essentially, interest to have accrued during the relevant period so that, when you look back, you find a sum of interest against which dividend can now notionally be appropriated.
Now, we say, that's not part of the operation of the principle. I'll come to that later.
Just focusing on the point he makes in 136, the distinction between, on the one hand, being entitled to your interest as a matter of contract underlying rights and, on the other hand, the rule says, (b):
"You will have statutory right to interest at the rate applicable to the debt apart from the administration."
We say, there's no sensible reason why that should change the position. No sensible reason -- mainly because the statutory rule essentially reflects your underlying right to interest at the rate applicable



apart from the administration. No reason why that should disapply the principle.
Put another way, when one focuses on the phrase: "The rate applicable to the debt apart from the administration."
We say, that was simply intended to ensure creditors received interest to which they were otherwise entitled before any distribution is made to shareholders. The mere fact the statute says that, can't be a reason for disapplying Bower v Marris. If it applies outside the administration, the statute says you should get what you would have outside administration --
LADY JUSTICE GLOSTER: If there isn't a contract you apply the judgment rate?
MR DICKER: Yes, well, there's a number -- I will come on -- there's a number of ways in which -- and situations in which Bower v Marris may apply. One is in relation to an underlying contractual right.
LADY JUSTICE GLOSTER: Yes.
MR DICKER: A second is in relation to an underlying right which is not contractual but, say, statutory, like judgment rate, where we say the principle also applies unless the statute expressly provides for the contrary.
And, thirdly, in relation to the other limb of 2.88(9), 2.889 gives you interest at a rate which is the greater



of --
LADY JUSTICE GLOSTER: Why does it do that if it isn't a statutory regime?
You are saying the judge is wrong to say, "This is a statutory regime, one is going back to the contract". One isn't going back to the contract entirely because (a) you are getting more than you do under your --
MR DICKER: Just two points: I'm not saying you go back to the contract. I'm saying that the mere fact that the statute essentially reflects your underlying rights, can't be a reason why, when previously you are entitled to interest calculated in accordance with Bower v Marris, now you are no longer.
LADY JUSTICE GLOSTER: I see. I see.
MR DICKER: Your Ladyship is absolutely right, an additional question that arises in relation to the reference to the Judgment Act right. 2.88(9) says you are entitled to the greater of the rate applicable apart from the administration and the Judgment Act rate. Now, that latter is a right which you have even if you weren't otherwise entitled to interest. It's essentially compensation to all creditors for the delay caused by the insolvency.
But, we say, just as in general, if you have an actual judgment, Bower v Marris applies, what this



element of the rules does is say, "We should treat you as if you had a judgment, because the moratorium has in general prevented creditors from obtaining a judgment". Again, if that's how the rule is intended to operate, ie treat creditors as if they had a judgment, why shouldn't it operate also in a way that is consistent with Bower v Marris applying?
Then, you will see, in due course, how the issue in relation to that is dealt with.
LADY JUSTICE GLOSTER: And normally, post judgment, a judgment creditor can appropriate in normal way, can he?
MR DICKER: Unless the statute applies otherwise, we say the general rule is: Bower v Marris --
LADY JUSTICE GLOSTER: Leaving aside insolvency, a judgment creditor can appropriate as he likes when a judgment debtor makes payments on account.
MR DICKER: Yes, and that's what the judge held, as you will see in due course.
There is one exception, which none of the parties have been able to find an explanation for, but the position in county courts expressly provides that payments made are appropriated first to principal not interest. That appears to be a specific exception. As I say, for reasons which no one has been able to --

LADY JUSTICE GLOSTER: That's to be kind to what is assumed to be a small-time debtor, presumably.
MR DICKER: That may well be the explanation.
LADY JUSTICE GLOSTER: Yes. I see, thank you.
MR DICKER: So that's the third point.

Again, this reflection of an underlying contractual right in the statutory scheme, you will also see was a feature of the Bankruptcy Act 1825. Section 132 had a materially similar provision.

Now, the fourth point the judge makes is in paragraph 137, where he says:

"Not only does rule 2.88 contain no suggestion that the principal in Bower v Marris should be applied in my view its whole tenor is contrary to it. It is a direction to apply the surplus in the payment of interest, it is not a direction to apply the surplus towards an element of the principal debt through a process of reallocation."

This, as I understand it, is essentially making the same point as his first point. You have a dividend in respect of principal. Principal has been repaid. When you come to 2.88, 2.88 is concerned with payment post-insolvency interest. If you apply the principle in Bower v Marris, then notionally, at least, because the payments that were previously made were applied first to



interest, you will necessarily have some notional principle left outstanding and, therefore, you will have a notional payment, the judge said, in respect principal. That is simply not what the rules say. That, as we understand it, is the judge's point.

We say, it is essentially the same as the first point he was making. It's focusing on the fact that dividends have been paid in respect of principal, following that reasoning through, it's saying that fact -- unless you are allowed a notional reallocation -- necessarily is inconsistent with now making the payments you want to make because some of those payments will necessarily be treated as being made in respect of principle.

LORD JUSTICE BRIGGS: It might be said that the more fundamental point is that -- because his first point is based upon an assumption, whereas this is simply based upon what the ruling says you are actually doing, which is paying interest.
MR DICKER: But the premise of both arguments, we say, is essentially the same. It's focusing on the first stage of the liquidation process and following the logic of that through. My Lord is right in the way you have expressed it, but we say the answer to that is -- again, this is a feature you will find in the previous



statutory regimes. If you go back to section 132, there was a section which said:

"In the event of a surplus you will pay interest."

The cases held: well, that doesn't prevent you from calculating such interest in accordance with the principle in Bower v Marris.

LORD JUSTICE PATTEN: Just in terms of statutory construction, which I suppose in the end this is a question of, what words in 2.88(7) does the judge actually rely on as indicating that you have to treat the dividend as being used to pay the principal part of the debt as opposed to any accrued interest?

Because, I mean, 7 doesn't, in terms, talk about principal and interest, it just talks about payments of the debts proved, which as we all know include both. So what's the judge fastening on as giving him that order of priority?

MR DICKER: The way we understand it is: the judge was essentially working out what the consequences of the first stage of the insolvency process is and he says, "Right, so the first stage is you pay prove debts", and those are essentially principal. There may be an element of pre-insolvency interest, but for practical purposes, the important distinction is between that sum and, on the other hand, post-insolvency interest.



I think his approach is to say, "Well, work out what has so far happened in the insolvency, proved debts have been paid, and that's what the first bit of 2.88(7)".

So the starting point of the analysis is you've already paid proved debts, then the judge says, "Well, you are paying interest on those debts, that's the proved debts for the period in which they were outstanding". Then, what he says is, "Well, when the dividends were paid, they were no long outstanding".

Then, he says, "This is a statutory right which only comes into existence when you conceive what is surplus", which is the third point I mentioned.

The fourth point, he says, is the rule talks about paying interest, as, my Lord, Lord Justice Briggs said, if you apply Bower v Marris, then, notionally, because you are treating the dividends as having paid interest first, necessarily, by the time you get to this stage, you will at least notionally you be saying, "I still have some principal outstanding, some of the money I have so far used to pay proved debts in full because it has been used to notionally pay interest means I can't have notionally paid my proved debts in full".

LORD JUSTICE BRIGGS: The judge says, consistent with the second line of 2.887, "What you do is pay interest on this debt. Not principal".

MR DICKER: Yes, and, we say, there's nothing in the rules that compels the conclusion that he reached. We say that if you look at the previous regimes, you look at the way the 1986 Act was intended to change those regimes, absolutely no indication that the legislature intended, essentially, to disapply Bower v Marris. Nothing in the rule that does so. No indication that it intended to do so.

One way of approaching this is -- your Lordships will see the phrase in case shortly -- intellectual freight, but there are, as your Lordships know, numerous provisions of the Insolvency Act which, at first blush, don't appear to provide what authorities have consistently held they do in fact provide. Even at the most basic level, if one looks 107 and 143, one talks about payments of proved debts and distribution to the surplus to the members. That leaves out the whole category of non-provable liabilities. But the courts have said, ever since 1743: well, there is that category and they do need to be paid before the surplus is returned to --

LADY JUSTICE GLOSTER: What, so there's no reference in the rules to the concept of non-provable debts?

MR DICKER: Non-provable debts are simply not dealt with in the rules. Even if one looks at the basic provisions,



107 and 143, talking about distribution of claims, distribution in respect of distribution of assets and the return of the surplus to members. That's all it says.

What the court is essentially saying, as early as 1743, is: you don't hand the surplus back to the bankrupt if, at the time you do so, creditors are still owed some money, whether it's provable or not.

LADY JUSTICE GLOSTER: But that actual concept isn't founded in an express provision of the Act or in an express provision of the rules.

MR DICKER: It's essentially the result of judge-made law. Interpretation of the logic of the statutory scheme.

LORD JUSTICE BRIGGS: Can I just follow your last submission through to 2.88(8) and ask you to assume that there is insufficient to pay Bower v Marris payments in full, all interest payable under paragraph 7 impacts(?) equally whether or not the debts (inaudible) rank equally. I quite see it has a fundamental application and levelling up, a want of priority between the underlying debts. But you would say that means all interest and principal being paid under the Bower v Marris calculation ranks equally, do you?

So if there was a shortfall of the Bower v Marris stage, you would treat the principal and the interest as



ranking equally?

MR DICKER: I think the answer is yes. Although, I might express it in a slightly different way.

Our submission would be: when you get to the stage of calculating and paying interest, under rule 2.88, what you do is you do the calculation required by the rule, including applying the principle in Bower v Marris, and you work out how much interest is due to each creditor on that basis. You compare it with the amount of the surplus you have, and if there is a shortfall, and you divide it up rateably as you otherwise would --

LORD JUSTICE BRIGGS: So even if the part of what's due to a particular creditor because of the Bower v Marris approach is principal, you treat it as interest for that purpose?

MR DICKER: Yes. It's not principal, it's simply that when you are calculating how much interest they are owed, that's the basis of the calculation.

LORD JUSTICE BRIGGS: I'm still not quite sure I understand that. You may get to it in due course, but the effect of the calculation for some particular creditor means that by applying dividends first, the interest -- he's had all his interest, but he hasn't had all his principal, then what you are paying him is principal,



isn't it? But I think you have to (inaudible) interest to make 2.88(8) work.

MR DICKER: Yes. I think was being slow.

As I understand it, your Lordship's point is essentially that the fourth point the judge made, this is in respect of interest --

LORD JUSTICE BRIGGS: Yes.

MR DICKER: -- to which our --

LORD JUSTICE BRIGGS: Just following through, the judge is pointing to a sub-rule which I don't think he needed to look at.

MR DICKER: We say the sub-rule doesn't raise an additional issue. Your Lordship's raised the question of what happens if there is a shortfall. We say you do the calculation that's required by the rule, applying Bower v Marris, you work out how much should be owed to each creditor, one has that bar on the basis of the submissions I've made so far and, then, if there's a shortfall --

LORD JUSTICE BRIGGS: You just treat that as interest even if it's in relation to a particular creditor, it's all personal(?).

MR DICKER: Yes, because, actually, you have already passed stage 1 which is payment proved debts in full. You have done the pari passu distribution, and now we are just

concerned with what happens to the surplus.
There's one other point made by Mr Justice David Richards. I should mention, at this stage, we also need to deal with in due course, and it concerns the relationship in Bower v Marris, the rules of appropriation. The judge dealt with this in paragraphs 144 to 150.
LADY JUSTICE GLOSTER: Sorry, the relationship between Bower v Marris and?
MR DICKER: The rules of appropriation.
LADY JUSTICE GLOSTER: Yes.
MR DICKER: He dealt with this, as I said, in 144 to 150. Just identifying the points he was making, in 144, he says:
"There's a further strong factor suggesting that Bower v Marris does not apply to the payment of post insolvency interest under the 1986 legislation. I earlier discussed the principle in this case is derived from the legal rules as to appropriation of payments towards debts. It's a basic part of the application of those rules that the date when a payment is made, there are two outstanding debts payable by the debtor to the creditor."
He goes on to say:
"The source of the debt may be but need not be



a contract, it may be a judgment carrying interest or some other basis of obligation."
So the first point is, according to the judge, Bower v Marris is derived from the legal rules as to appropriation of payments, and that requires there to have been two outstanding debts as at the date of notional appropriation. He says that in 145:
"In applying the rules as to appropriation of payments to the administration of estates, the foundation remains that at the date of payment from the estate, which is treated as being made on account, there are two debts payable by the estate to the creditor."
Then, the important point is at 149, where he says:
"The rights to interest out of a surplus under rule 2.88 is not a right to the payment of interest accruing due from time to time during a period between the commencement of the administration and the payment of the dividend, or dividends, on proved debts. The dividends cannot be appropriated between proved debts and interest accruing due under rule 2.88, because at the date of the dividends, no interest was payable at that time pursuant to rule 2.88. Entitlement under rule 2.88 to interest is a purely statutory entitlement arising once there is a surplus and payable only out of that surplus."



So the logic of the judge's approach just focuses on 2.88(9) and the reference to the rate applicable to the debt apart from the administration.
Imagine a creditor with a contractual claim to interest and a right to appropriate payments, first, to interest and, secondly, to principal. Such a creditor would satisfy the judge's requirement for two debts. Interest would have been accruing on the contract, at the date of any dividend, and you could subsequently say, "Right, I know they were paid in respect of proved debts but we can now notionally treat them as having been paid in respect accrued interest because there would have been such accrued interest".
The judge says that analysis is no longer possible because the statute has essentially replaced your contractual right to interest with a statutory right to interest, albeit one which reflects what you would have as a matter of contract. That statutory right to interest only arises if and when there is a surplus, with the result that he says it follows you couldn't have had any interest accruing during the prior period. Your right to interest only comes into existence as and when there's a surplus, because he says Bower v Marris requires there to have been two accrued debts at the relevant date, there aren't, as a result of 2.88.



Therefore, there's no room for the notional reallocation because the underlying requirement is missing.
Now, again, we say that's wrong for a number of reasons.
Your Lordships will also see in due course this was also a feature of the previous bankruptcy regime. It didn't stop the principle in Bower v Marris applying.
LORD JUSTICE PATTEN: I suppose you could have an alternative system which I think, to some extent -- don't ask me which of the issues it is but I think it is raised in one of the issues here -- is that if the judge is right and you simply treat 2.88 as applying only -- you operate 2.88 on the basis that the dividends are applied to pay off the proved debts which, for the most part, are going to be principal. Then you are simply calculating statutory interest in respect of the relevant periods up to those payments. That any further loss that you can say arises by reason of the fact that you are treating the dividends as payment of principal, first, rather than of statutory interest, could be compensated by reversion to your contractual rights at the very end of the insolvency process, just by analogy to the currency conversion claims. But the judge, I think, rejected that, didn't he, on the basis you couldn't have -- I think he said you can't have interest

on interest.
MR DICKER: He rejected it, your Lordship is quite right. He rejected it because he held that 2.88, is, he said, an exclusive code. It cuts across your existing rights and, effectively, he treated it as if whatever underlying rights you may have had, they've been extinguished somehow.
LORD JUSTICE BRIGGS: In relation to proved debts?
MR DICKER: In relation the proved debts.
LORD JUSTICE BRIGGS: He wasn't backtracking on the currency conversion?
MR DICKER: I'm not sure he would accept "backtracking", but your Lordship is right.
So 2.88 is exclusive code for interest in respect of proved debt, the judge said. So there's no room for a non-provable claim to the shortfall because, essentially, in respect of your proved debt statute, he said, "I don't care what your underlying rights are, this is all you are going to get. If it's less than you would otherwise have had, hard luck". Whatever the balance is, that goes to the shareholders.
One point the judge made, an additional point, was that he said it would be rather odd for the legislature to have said, "You will get this amount of interest under 2.88", and to have said, "If there is a shortfall,



you can pick up that shortfall as a non-provable claim".
One can see a certain amount of force in that. The question is: what's the conclusion that follows?
We say the conclusion that follows is: if it's odd, the natural reaction should be to go back to 2.88 to try and work out a construction of 2.88 that permits creditors to get their full entitlement so that oddity doesn't arise. But if that's impossible, for whatever reason, then we say the shortfall is picked up as a non-provable claim in the way that every other claim which cannot be proved gives rise to a non-provable claim.
Just so you know how I will be dealing with this, first topic, as you know, is Bower v Marris. Second is compound interest. The third is non-provable claims. So all the issues in relation to that then comes in that context.
So just to recap at this stage: the judge's conclusion appears to been based essentially on four aspects of the wording of the rules. Firstly, proved debts have priority over post insolvency interest. They have to be paid first.
Secondly, interest is paid out of the surplus in respect of the periods for which the debts have been outstanding since the date of the administration.



Thirdly, the right under the rule is a statutory right. This is the case even if it simply reflects creditors' underlying right whether contractual or otherwise.
Fourthly, the rule is concerned with payment of interest. His conclusion is also based, as I mentioned, on his views in relation to rules as to appropriation.
So those are the points which, essentially, I ask the court to have in mind when we go through the pre-1986 materials, because that was the next topic I was going to turn to.
I'm aware we have a transcriber. I don't know whether or not --
LADY JUSTICE GLOSTER: Do you want a break, shorthand writer? Would that be a convenient time --
MR DICKER: It would.
LADY JUSTICE GLOSTER: -- to take a break? Right, five minutes.
(11.45 am)
(A short break)
(11.55 am)
LADY JUSTICE GLOSTER: Yes, Mr Dicker.
MR DICKER: The third topic is to look at the position prior to 1986 both in bankruptcy and liquidation to see how and why the principle operated. We entirely accept the



effective rules, 2.88(7) and 9, obviously depends on their construction. But we do say those rules need to be construed in the light of the statutory regime as a whole, and the principles and policies which underlie it and also in light of the regimes that existed before 1986.
There is an approach along these lines, as your Lordships will know from Lord Justice Briggs' judgment in Waterfall 1. Just to give you the reference, 138 to 147. Also, by Lord Justice Moore-Bick, at 248.
Nothing surprising in this, we refer to some further authorities to similar effect in our skeleton argument on part A. Again, just so you have the references, paragraphs 23 to 26.
There is one additional case not referred to in our skeleton argument. I think it would be worth quickly looking at it. It's in the authorities bundle, tab 67A.
LADY JUSTICE GLOSTER: Which paragraph of your skeleton are we looking at, so I can link --
MR DICKER: 23 to 26. It's the skeleton in A1, tab 12.
LADY JUSTICE GLOSTER: Yes.
MR DICKER: Pages 10 and 11.
LORD JUSTICE BRIGGS: Cadbury Schweppes?
MR DICKER: Yes. Unless you would prefer that I read it, could I just ask you to read paragraphs 23 and 24 --

LADY JUSTICE GLOSTER: Give me the reference again. It's the authorities bundle.
MR DICKER: Volume 2, tab 67A, Cadbury Schweppes, judgment of Lord Justice Robert Walker, the relevant paragraphs are 23 and 24.
(Pause)
LORD JUSTICE BRIGGS: Is it a sort of intellectual freight (Inaudible) sort of.
MR DICKER: Yes.
LADY JUSTICE GLOSTER: Do you want us to read any more than that?
MR DICKER: Just 23 and 24. Just emphasising two points, one at the end Mr Justice Hoffmann's -- from his judgment in Re A Debtor:
"It does not, however, mean the language ...(Reading to the words)... comes to one entirely free depending on intellectual freight carried by word and phrases in earlier bankruptcy or other legislation."
The emphasis that Lord Justice Robert Walker gives to the fact:
"Although the English law of bankruptcy now has the appearance of a complete statutory code it is built on foundations that show much to past judicial creativity in development of far more meagre statutory material going back to Elizabethan times."



With the greatest of respect to the learned judge, whilst it's correct that aspects of the 1986 are new, we say he failed to understand the changes that were intended to be made in relation to post-insolvency interest in the way the new provisions related to the old. Put shortly, he didn't carry with him enough of the intellectual freight that, in our respectful submission, he should have done.
Now, just before turning to and dealing with a limited number of authorities and statutory provisions, it's helpful to start with a feature of rule 2.88, 7 and 9, which I've already mentioned, that is the distinction between the 2.88(9), the reference to, on the one hand, the rate applicable to the debt apart from the administration and, on the other hand, the Judgment Act rate. 2.88(9) says you are entitled to the greater of the two. So there are two separate strands in 2.88(9).
It's helpful just to outline, before I turn to the authorities and the statutes, how the two strands feature in the prior regimes, essentially to give you a quick overview of the way it's worked both in liquidation and in bankruptcy, because prior to 1986, the two regimes were different.
The position in relation to corporate insolvency



liquidation was relatively simple. Before 1986, there was no statutory provision expressly dealing with post-insolvency interest. However, the basic effect of the regime was exactly as you would expect: proved debts ranked ahead of post insolvency interest which had to be paid before any distributions could be made to shareholders. That was essentially the result of judge-made law.
In the event of a surplus, creditors were entitled to receive the interest they were entitled to on their underlying claims, whether that right was contractual or statutory, and the authorities often expressed this in terms of concepts like remission to contractual rights.
Creditors who did not have any underlying rights to interest were, however, not entitled to any compensation for delay. In other words, prior to 1986, in a liquidation, there was no general right to Judgment Act rate interest in the event of a surplus. So limb 1, 2.889, effectively existed, and, then, 2, the Judgment Act rate limb did not.
It's common ground that at all times between 1869, which are the origins of court winding up, and 1986, the amount of interest payable in the event of a surplus was calculated in accordance with the principle in Bar v Marris, ie, notionally treating dividends paid as



having been paid first in respect of interest.
The effect of this was that creditors who were entitled to interest would receive the full amounts that they were owed before any distributions were made to shareholders, so that's liquidation.
The position in bankruptcy was slightly more complicated and changed over time. Just to outline the position in bankruptcy: firstly, prior to 1824, the position in bankruptcy was essentially the same as the position in a liquidation, that I've just described. No statutory provision expressly dealing with post-insolvency interest. The general effect of the statutory regime was held to be that proved debts ranked head of post-insolvency interest, which had to be paid before any distributions were made --
LORD JUSTICE BRIGGS: Is it prior to 1824, did you say?
MR DICKER: Prior to 1824. Between at least 1743 and 1824, no statutory provision dealing expressly with post-insolvency interest. The general effect of the statutory regime was held to be proved debts ranked ahead of post insolvency interest which had to be held before any surplus could be returned to the bankrupt. In event of a surplus, creditors are entitled to receive the interest they were entitled to receive on their underlying claims. So that's pre-1824.

The second point, the position changed in 1825 with the introduction of section 132 of the Bankruptcy Act. This introduced a specific --
LADY JUSTICE GLOSTER: Sorry, 1865 or 55?
MR DICKER: Section 132 of the 1825.
LADY JUSTICE GLOSTER: 1825, sorry.
MR DICKER: I'll speak up.
LORD JUSTICE BRIGGS: Was there a funny sort of (inaudible) in 1825?
MR DICKER: The provision initially came in in 1824, but, I'm sorry, slight shorthand, but section 132 of the 1825 Act is --
LADY JUSTICE GLOSTER: It's not outcome determinative as to whether it's 24 or 25.
MR DICKER: Which is why I wasn't going to trouble you with the detail. The judge, I think in his judgment, briefly alludes to 1824 and 1825 position.
Section 132 introduced a specific provision dealing with the payment post-insolvency interest in the event of a surplus. At this stage, it incorporated both strands of rule 2.88(9), if I can put it that way. Both the rate applicable to the debt, apart from the insolvency and Judgment Act rate interest. Creditors were entitled to receive the interest they were entitled to receive on their underlying claims. Creditors who



were not otherwise entitled to interest were entitled to interest at 4 per cent, being the rate which shortly afterwards was introduced in the Judgments Act.
Now, section 132, wasn't identical to rule 2.88, 7 and 9. One difference concerns priority. 2.88(9), ranks two strands equally. Section 132, provided that creditors with an underlying right to interest had priority over creditors with a right to interest at 4 per cent. So if you had an underlying right, you had to be paid first. If there was anything left over, then everyone had interest at 4 per cent. Subject to that, as you will see, it's very similar.
LADY JUSTICE GLOSTER: But they conferred the Bower v Marris benefit?
MR DICKER: Yes. The cases held that Bower v Marris applied.
LORD JUSTICE BRIGGS: You say there were two differences, so creditors with an underlying right had priority. What is the other bit?
MR DICKER: I said two --
LORD JUSTICE BRIGGS: Between 2.88(9) and the 1825 regime for bankruptcy.
MR DICKER: That's the significant difference.
LORD JUSTICE BRIGGS: Okay.
MR DICKER: So under 2.88(9) they rank equally. Under



section 132, if you had an underlying right to interest, you were paid first out of the surplus.
LORD JUSTICE BRIGGS: It wasn't just a matter of rate, was it, I think the underlying right might have given (Inaudible).
MR DICKER: Yes, again, we will see the way it's expressed it's entitled to interest but more.
The third point, between 1825 and 1883, it's common ground that Bower v Marris applied to the calculation of interest under section 132, at least so far as creditors with an underlying right to interest is concerned. We say in respect of both limbs. We'll come to that.
The judge himself at paragraph 65 refers to, he describes as, a very long line of cases, including Bower v Marris itself, that held that the principle applied in the case of a creditor who had an underlying right to interest.
Now, although at this stage no one's been able to find a case which expressly dealt with right to interest at 4 per cent, in our submission Bower v Marris also applied in that context. I'll deal with that issue in due course. We say between 1825 and 1883, Bower v Marris certainly applied to the first limb, section 132, and in our submission applied to the second as well.



The fourth stage is this. The statutory provisions in bankruptcy were amended at various stages. But the significant change, if there was one, occurred in 1883. There's an issue as to precisely the effect of the 1883 Act, which I'll need to deal with in more detail later, although it may not ultimately matter. But, put shortly, the judge held the 1883 Act limited all creditors, in the event of a surplus, to post insolvency interest at the Judgment Act rate.
Now, we say it's far from clear this was the effect. There is no case that anyone's been able to find between 1883 and 1986 which indicates that that is the effect it had and it seems to have been regarded as an open issue as late as 1984 but in any event it's a separate question. What is important in our submission is there's no suggestion in any of the legislative materials leading up to the 1883 Act, or any subsequent authority which indicates Bower v Marris ceased to apply. So it did apply between 1743 and 1883 and no authority to indicate it ceased to apply at that stage. Indeed, we say extraordinary if it had been, because, shortly before, in 1869, as you'll see, the Court of Appeal in Re Humber Ironworks referred to the position in bankruptcy with approval and adopted the same position in relation to liquidation. So, shortly

before the 1883 Act, the Court of Appeal essentially endorsed the principle and applied it for the first time in relation to liquidation as well.

In addition, shortly after the 1883 Act, indeed three years later in 1886, the principle in Bower v Marris was applied by Mr Justice Chitty in case called Whittingstall v Grover in the context of the administration of a deceased insolvent estate. Again, I'll show you that.

So that's the broad outline of the development in both liquidation and bankruptcy. What I now want to do is just show you the critical statutory sections and authorities. There are many and I'm not proposing to take you to all. What I'm proposing to do is limit myself to seven and they are firstly, Bromley v Goodere, where it all started.

LADY JUSTICE GLOSTER: Seven authorities, is this?

MR DICKER: Yes, seven authorities or statutory provisions firstly Bromley v Goodere.

LORD JUSTICE PATTEN: Where's that.

LADY JUSTICE GLOSTER: You're just giving us the last.

LORD JUSTICE PATTEN: Oh, you're giving us a list at the moment.

MR DICKER: Secondly, section 132 of the Bankruptcy Act 1825; thirdly, Bower v Marris; fourthly, Humber



Ironworks; fifthly, section 40 and section 65 of the 1883 Act; sixth --

LADY JUSTICE GLOSTER: You are just going a bit too quickly.

MR DICKER: Then Whittingstall v Grover and seventhly Re Lines Brothers 2 No 2.

LORD JUSTICE PATTEN: I'm not suggesting for a minute that you don't take us through the authorities, because we obviously need to understand what they do and don't say. But you don't, I think, criticise the summary of the legislative and judicial, so to speak, history that's set out in the judgment, do you? Because, I mean, the judge accepted that the principle applied for the relevant period. I mean, you may have a query about what the 1883 Act did but that's about it, isn't it?

MR DICKER: And it's a very fair summary. What we would say is that a number of the points which we would want to stress, in particular the way in which the judge's points on the wording of 86 were pre-configured prior to 1986 aren't as clearly identified in his judgment as perhaps we say they should have been and that may be the reason why in our submission enough of the intellectual freight wasn't carried over when he came to consider the wording of the rule.

LORD JUSTICE PATTEN: All right.

MR DICKER: I'm reminded, we do criticise the judge's



approach in relation to one authority, certainly Whittingstall v Grover. We also say that he misunderstood the way in which the principle in Bower v Marris works when he said it essentially depends on the rules of appropriation. We say it didn't. So there are differences.

LORD JUSTICE PATTEN: All right.

MR DICKER: Can I start -- and forgive me if I go right back to beginning but it is interesting in my submission to see how this started the first case is Bromley v Goodere. It's volume 1, tab 1 and it's 1743. For your note, the judge dealt with this case at paragraphs 47 to 49 of his judgment. So at this stage we have no express statutory provision dealing with post-insolvency interest. The issue in the case was that: ie, are creditors who were entitled to interest in the event of a surplus entitled to payment of the interest they are owed before it is distributed to the bankrupt, and the answer is yes. The order which was made required such interest to be calculated in the manner which subsequently became known as the rule of principle in Bower v Marris.

Just --

LORD JUSTICE BRIGGS: This was a surplus in a personal bankrupt estate.



MR DICKER: Yes. The judgment of the Lord Chancellor, who at that stage was Lord Hardwicke, starts at the bottom of page 49. I was going to pick it up two-thirds of the way down on page 50. Just below the second hole punch he says --

LORD JUSTICE BRIGGS: My electronic copy doesn't have hole punches.

MR DICKER: Two-thirds of the way down.

LORD JUSTICE BRIGGS: Is it where you've marked it, or somebody has marked it?

MR DICKER: It's the paragraph beginning "having laid these things out".

LADY JUSTICE GLOSTER: I thought on the death of the king a commission may be renewed sounded rather interesting, but maybe not. Would you like us to read the marked passage?

MR DICKER: It may be quickest if I were just to point out the points which we say are relevant. As I say, he starts two-thirds of way down 50 by saying:

"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."

Missing out a paragraph, he says:

"I will consider this case first upon the old Act previous to the fourth and fifth Queen Anne and then

upon that statute."
So just what one sees, what the previous statutory regime was, and the way it's developed, in last sentence on that page he says:
"The next direction in the Act is what the Commissioner should do this regard to the debts. They directed to pay to every of the creditors a portion rate like according to the quantity of his or her debts."
So that's pari passu distribution, and he says:
"And the question is what debts are here meant and I am of the opinion it means debts due at the time of the bankruptcy or when the commission issued, which is same."
So essentially the introduction the judge-made law of the cut off date. Then he says at the end of the paragraph:
"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."
And then in the next paragraph he says:
"The Act goes on take notice of the surplus which it directs to be paid to the bankrupt and it leaves full power to the creditor to recover the residue of his debt in like manner and form as he should and might have done before the making of this Act."



Obviously at this stage there was no concept of discharge in a bankruptcy. That was introduced subsequently. Dropping to the next paragraph, what he says is:
"This shows the surplus to be paid over to the bankrupt is only the surplus after payment of the whole debts, for it would be vain to pay any other surplus when it might have been recovered from him again by the creditors."
So, prior to a concept discharge, no point paying the bankrupt surplus if creditors are just going to sue the bankrupt. So part of the role of the Commissioners in bankruptcy at this stage, pay all sums which were due, ensure creditors paid by full entitlement before returning the surplus to the bankrupt. Then he deals with the subsequent statutory development of the scheme. Dropping to the page reference 79, which is about two-thirds of the way down, he says:
"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 exposito as to be relied on."
So that's essentially the introduction again and originally it seems as a matter of practice with the



rule that you can't prove a post insolvency interest and he goes on in the next paragraph to say:
"There's no direction in the Act for that purpose and it has been used only as the best method of settling the proportion among the creditors they might have a rate like satisfaction and its founded upon the extra power given them by the Act."
And then at the bottom of the page he says:
"I now come to consider it on the fourth and fifth of Anne 17 which was insisted upon as a strength of the case and the material parts to be considered are..."
This introduced the concept discharge in bankruptcy. And he considers the effect of that over the page. Page 52 he says:
"Consider therefore the effect of the discharge that the certificate is not to operate as a discharge of the fund before vested in the assignees but to extend only to any remedy to be take against the person of the bankrupt or his future debts. True it will be a discharge of the bankrupt not only as to debts proved but also as to creditors who have not come in but that is nothing as to present fund for such creditor who has not yet come in, may come in if he has not lapsed his time, which is a question between the creditors singly and therefore I am of the opinion it was meant to



discharge the person of bankrupt and his estate subsequently accrued and not the estate in the hands of the assignee."
So discharge has no effect on the estate or on the treatment of the surplus in the hands of the Commissioners. Then dropping two paragraphs he says:
"But suppose there is a surplus, it does not amount to 5 per cent and I think so much should be taken out of the creditors 20 shillings in the pound to make it up to 5 per cent. Then it may be objected that here is a case where the bankrupt should have a surplus upon the debt as stated by the commissioners without paying the subsequent interest. If I am right and the bankrupt is being entitled to that equity, it is not the case, for then it comes again to the rateable proportion."
And he makes the point, again dropping a paragraph:
"Suppose that, from the difficulty of getting in the bankrupt's effects and by his estate carrying interest there should be a surplus, it would be absurd to say the creditor should not have interest likewise."
I will come back to the example, but he is essentially saying imagine the bankrupt has assets consisting of debts which carried interest, that interest has continued to accrue for the benefit of the bankrupt during the course of the bankruptcy, it would

be absurd in that situation for the bankrupt to receive the interest but not have to pay creditors who have essentially a matching claim to interest.

Then at 53, this is the order which has essentially subsequently been described as the rule of principle in Bower v Marris. First of all:

"The Master to take an account of what has been paid to such creditors by way of dividends, what has been so paid to be applied in the first place to keep down the interest and afterwards in sinking the principal."

So we are at a relatively early stage in the bankruptcy regime. There is a concept of pari passu distribution in the statute. At this stage the position in relation to the cut off date and post-insolvency interest appears to be matter of judge-made law rather than in the statute.

LORD JUSTICE PATTEN: But this doesn't deal as such with the Bower v Marris issue, namely the fact that the creditors are entitled to add interest to the bankruptcy debt before the surplus is returned to the --

MR DICKER: Well, it does in the sense that he's considering are they entitled to be paid the interest they are owed out of the surplus before it goes back to the bankrupt.

LORD JUSTICE PATTEN: Yes.

LORD JUSTICE BRIGGS: He also applies interest before



principal.

MR DICKER: Absolutely.

LORD JUSTICE BRIGGS: In that paragraph you've just described.

MR DICKER: And the order that is eventually made is, when you calculate how much, even though at this stage the statute did say, well, you have to pay everyone ratably, ie pari passu. So it logically followed, whatever had been paid to date must have been paid in relation to pre-insolvency interest. Nevertheless, the order he ends up making says I don't mind, you've calculated by treating the payments as having been applied first to interest.

LADY JUSTICE GLOSTER: So that's the first emergence of the rule, is it?

MR DICKER: That is. The second thing I wanted to show you was section 132 of the Bankruptcy Act, which you will find in volume 4 at tab 118. It's section 132, which is over the page. There should be a line ruled against it. Again, it would be quickest if you would just read 132 to yourselves and then perhaps I can make my submissions in relation to it. (Pause)

LADY JUSTICE GLOSTER: Yes.

MR DICKER: Five points on the wording. Firstly, it contains an obligation to pay the surplus, if any, to



the bankrupt. That's lines 3 and 4. But secondly:

"Only after the creditors who have proved under the commission shall have been paid."

So proved debts have to be paid first. Three:

"But the assignee shall not pay such surplus until all creditors who have proved under the commission shall have received interest upon their debts."

So the next requirement after you've paid proved debts in full is to pay interest and that has to be paid before the surplus goes to the bankrupt. Then that's to be paid at the rate and in the order following, that is to say the fourth point is:

"All creditors whose debts are now by law entitled to carry interest in the event of a surplus shall first receive interest on such debts at a rate of interest reserved or by law payable there on to be calculated from the date of the commission."

Just to emphasise, at this stage the reference to the rate of interest, because the judge made a point in relation to that word "rate" in the context of rule 2.88. Then finally:

"After such interest shall have been paid, all other creditors who have proved under the commission shall receive interest on the debts from the date of the commission at the rate of £4 per cent."



LORD JUSTICE BRIGGS: Can you help me on some earlier words. It talks about the payment of the surplus to the bankrupt and I think we are in line 5:

"Every such bankrupt after the creditors who have proved under the commission shall have been paid shall be entitled to recover the remainder of the debts due to him."

What is this remainder of the debts?

LADY JUSTICE GLOSTER: Those are book debts, aren't they?

MR DICKER: In other words, if -- we're dealing with a situation where proved debts have been paid in full.

LORD JUSTICE BRIGGS: Yes.

MR DICKER: The bankrupt is entitled then to recover anything which isn't required for that purpose subject to payment of the surplus in respect of interest to creditors.

LORD JUSTICE BRIGGS: I just wonder what the words the "remainder of the debts due to him" are a reference to. Is it some part of the estate which consists of unpaid debts?

LADY JUSTICE GLOSTER: I thought I saw this was dealing with book debts somewhere.

MR DICKER: At this stage obviously the estate had vested in the trustee as assignee. I'm not sure off hand what the answer to your Lordship's point is.

LORD JUSTICE BRIGGS: No. I just didn't feel I knew what that bit meant.
MR DICKER: No, and on reflection I -- we'll think.
LORD JUSTICE BRIGGS: Okay.
LADY JUSTICE GLOSTER: Isn't it just debts owed to him, Mr Dicker? Just that category of assets. After that he is entitled to sue but not until all these people have been paid.
LORD JUSTICE BRIGGS: It looks like it. Anyway.
LADY JUSTICE GLOSTER: That's why it doesn't say all the other assets. That may be this --
MR DICKER: I mean, again, for present purposes, I'm not sure it matters in the sense --
LORD JUSTICE BRIGGS: There's a reference back to some earlier section we haven't looked at, I rather suspect. But there we are.
MR DICKER: Just seven points in relation to this. Firstly, this is -- it's obviously an express statutory provision dealing with proposed insolvency interest, effectively codifying previous judge-made law which you saw in Bromley v Goodere. Secondly, the right to interest only arose after all proved debts had been paid in full. Indeed it expressly so stated. It said it applied "after the creditors who had proved have been paid."
Thirdly, "the right ranked in priority to payment of



the surplus to the bankrupt". No surprise there:
"Fourthly it entitled creditors who had an underlying right to interest to interest at the rate applicable to the debt apart from the insolvency."
Expressly used the phrase "rate of interest":
"Fifthly, it also entitled creditors not otherwise entitled to interest, interest at 4 per cent."
We say essentially that was reflecting what was subsequently introduced in the Judgments Act itself, namely entitlement to interest. For some reason it seems to have originated in bankruptcy first. The view was obviously you should be entitled to compensation for delay. The rate selected was 4 per cent and that was subsequently effectively adopted when the Judgments Act was introduced.
Six, it entitled such creditors to interest from the date of commission of bankruptcy and it would obviously necessary to take account of any dividends that they had received since that date.
Seventh, we say in substance it differed from the 1986 rules only in that section 132 gave creditors an underlying right to interest priority over payment of the 4 per cent to creditors. With that exception, in substance we say this section is essentially doing the same as rule 2.88. The wording has changed, it's been



updated, but the substance remains materially the same.
So in construing section 132, and we say in turn rule 2.88, it's obviously important to see how it was applied.
That takes me to the next authority which is Bower v Marris itself. Authorities bundle 1, tab 6 --
LORD JUSTICE BRIGGS: Just before you go, it talks about creditors whose debts are now by law entitled to carry interest. Does that mean that would be contractual interest and judgment interest?
MR DICKER: I don't think it could have meant judgment interest because the Judgment Act obviously only came in in 1838, but there appear -- and we can dig this out if it's necessary -- to have been other provisions prior to that date which in certain circumstances entitled creditors to interest and I think there may always have been a right to interest under the law of merchants.
LORD JUSTICE BRIGGS: And because there are possibly provisions on the previous prohibition on interest as a form of usury(?). Just as it is as are now by law entitled to interest, I wondered what the mischief behind all that was.
MR DICKER: My Lord, we'll have another look. There was some material on this I think in front of the judge at first instance.



Sorry, Bower v Marris, which is bundle 1, tab 6. It was decided in 1841, some 15 years after the introduction of section 132, although the bankruptcy in that case had commenced as early as 1805. So it was a very long-running bankruptcy. Again, for your note, the judge dealt --
LORD JUSTICE BRIGGS: Sorry, can I just be difficult and ask again did the Bankruptcy Act therefore apply to this bankruptcy or not?
MR DICKER: Well, it's not entirely clear but the judge referred to the 1832 Act and you'll see that. It's certainly clear and indeed common ground that Bower v Marris applied to the bankruptcy regime between 1825 and 1883. There were a number of other authorities in front of the judge below, some of which are in the bundle by no means all.
Again, just for your note, the judge dealt with Bower v Marris, paragraphs 44 to 45 and 58 to 65 of his judgment. Now, as the judge observed, although the issue in the case arose between the debtor and a joint obligee, the same analysis applied as between a debtor and his creditor. You can see that reflected in the headnote, the held, just at the bottom of 351, where it says:
"The amount due to the obligee in respect of such

claim was to be computed by treating the dividends as ordinary payments on account, that is by applying each dividend in the first place to the payment of the interest due and the date of such dividend and the surplus, if any, in reduction of the principal and the same principle of computation is applicable in bankruptcy as between the bankrupt and the creditors where there is a surplus of the estate after payment of 20 shillings in the pound upon all the debts proved."

Now, the order below you will see at 352, the last half of the paragraph at the top of the page, the sentence beginning in the middle of that paragraph:

"In the year 1840, the Master made a separate report on a claim of Jonathan Marris under the decree by which he found that 15 guineas still remain due under bond having arrived at that result by treating the dividends which been received under the bankruptcy as ordinary payments on account, that is to say by applying each dividend in the first place to the payment of the interest which would have been due at the date of such dividend if no bankruptcy had occurred and the surplus only, if any, in reduction of the principal which according to that mode of applying the dividends from time to time remained due."

So the Master notionally applying prior payments



first to interest, then:

"The assignee's argument [so this is the trustee]. The defendants, the assignees, carried in objections to the draft of that report by which they had insisted 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 such dividend by the creditor operated as an extinguishment of such principal and interest respectively to the extent of the portion of dividend which was attributable to each and consequently that in computing what was due upon the bond from the estate of Joseph Marris the Master ought to confine himself to a calculation of interest upon the principal from time to time remaining."

So the argument was precisely, we say, essentially the same as the one made to Mr Justice David Richards, and, 353, the middle paragraph:

"The Master, having overruled these objections, having made his report to the effect aforementioned the defendants (the assignees) presented a petition praying that it might be referred back to the Master to review his report with a declaration that each successive dividend under the bankruptcy when declared and paid was to be attributed to the amount of the debt proved, that



is to the principal money and interest due thereon at the date of commission."

And the judgment of the Lord Chancellor begins at 354, the Lord Chancellor at this stage being Lord Cottenham. Five points to note. On page 355, having referred to calculating the interest by applying amount of dividends from time to time received in discharge of the interest then due and the surplus of any in discharge pro tanto of the principal, four lines down from the top at 355, he says:

"This no doubt is the ordinary mode of calculation and is the general course of dealing in cases of mortgages, bonds and other securities as the principal does and the interest does not carry interest. No creditor would apply any payment to the discharge of part of the principal while any interest remained due."

Then the last sentence of that paragraph, starting just after I've just read, refers to the argument:

"But It is said on behalf of the obligor's estate that payments by way of dividend under the bankruptcy of the co-obligor were appropriated and were paid to and received by the obligee on account of so much principal money and therefore that interest from that time ceased upon the amount of such principal money, although large sums were due interest at that time."



And the next paragraph also summarises the argument. Then at the bottom of 355, third point, he says essentially appropriation is irrelevant. He says:

"In the first place, there is this mode of payment that is regulated by acts of Parliament.

LADY JUSTICE GLOSTER: Is this argument or his view?

MR DICKER: I think this is his view. He identifies in the previous paragraph the question, which he then summarises, and, certainly as I read the judgment, bottom of 355, onwards, is essentially expressing his view. He says:

"In the first place, as this mode of payment is regulated by Acts of Parliament, the doctrine of appropriation which is founded upon the intention, expressed or implied, of the debtor of creditor, cannot have any place in the consideration of the present question."

And he points out dropping some eight lines at the end of a line, sentence beginning "if therefore". He says:

"If therefore he is bound because those payment are made under a bankruptcy to apply them towards discharge of 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, although the

whole of principal and interest is ultimately paid and what is more extraordinary the co-obligor will, as in the present case, be a gainer by it in the same proportion."

Then again dropping six lines, he says:

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

He then goes on to deal with the effect of the scheme. He says:

"The interest stops at the date of commission and, though subsequent interest becomes due, it is not provable under the commission. The bankrupt's estate is taken from him by the commission and the law in order to make an equal division amongst the creditors, pays to each a dividend upon the debt proved ..."

Then says this:

"But this is merely an arrangement for the convenience of the debtor's creditors. The bankrupt



continues indebted for the principal and the interest accrued since the commission, although his certificate, if he obtains one, protects him against the liability to the debt and, being so indebted, payments are made out of his estate to the obligee. Why should such payments have a different effect than they would have if made by a solvent obligor?"

Then the bottom half of the page, he turns to deal with section 132 of the 1825 Act, where he says:

"The bankrupt is not to receive the surplus until all creditors have received interest on their debts to be calculated from the date of the commission. This provision obviously intended to make good to the creditors that interest which by the course of administration in bankruptcy they had lost. Interest is stopped at the date of the commission because it is supposed the estate would be deficient. It proves to be more than sufficient. Why is the creditor to suffer and the bankrupt to benefit by attributing the dividends to principal instead of to the interest due. The creditor in that case will not have received interest upon his debt at the same extent as he would if there had been no bankruptcy and yet the Act must have been intended to place him in as favourable a position."

Just pausing there, no distinction drawn here in the



discussion of section 132 between the two limbs of section 132 and indeed, in the second line of that paragraph, he refers to bankrupt not to receive the surplus until all creditors have received interest on their debts."

He then over the page, 358, refers to the authorities. He says four lines down:

"I find from the year 1745, to the case of ex parte Higginbottom, a succession of cases in which this principle was acted upon, although it was not in all matter of adjudication they proved that such was the recognised rule so well understood as not to be the subject in question."

He says:

"It appears to have been carefully established by Lord Harwicke in Bromley v Goodere. The order indeed appears to have been framed by himself and so expressed as to leave no doubt of its having been most carefully considered. This was the opinion of that great judge of the justice of the case without the aid which the statute now affords."

There is then a reference to various other authorities and he ends, I think we can just go straight to the last paragraph on page 360, by saying:

"I am of the opinion that upon principle and



authority the Master's report was correct and therefore the Vice-Chancellor's order must be reversed and the petition excepting to the report dismissed."

LADY JUSTICE GLOSTER: What does the notation WW by the side --

MR DICKER: I think that means Wentworth, Mr Zacaroli's clients would like him to --

LADY JUSTICE GLOSTER: Okay. Thank you.

LORD JUSTICE BRIGGS: So he treats it as a matter of the assumed intention of the legislation in section 132.

MR DICKER: Yes. It may be that section 132 didn't apply in Bower v Marris, but there is a consideration of section 132, and no suggestion that the rule he ends up making or the decision he ends up making in Bower v Marris would not apply now that section 132 has been enacted and, as I said, it's common ground from 1825 onwards until at least 1883 it did apply.

Now the next stage is to turn from the bankruptcy to the origins of liquidation.

LADY JUSTICE GLOSTER: Humber, is it?

MR DICKER: As your Lordships know, the winding up of companies began for present purposes with the Companies Act 1962. There is in our submission a very useful explanation of its origins by the House of Lords in Oakes v Turquand, which is in volume 1, tab 13,

particularly by Lord Cranworth at pages 362 to 365.
Just to summarise, what Lord Cranworth said was, until the 1862 Act, certainly from 1844 onwards, the creditors were obliged in the first instance to proceed against the company. But if they failed to recover against the company, they could go directly against the shareholders and recover the full amount that they were owed. Now, 1862 changed that, because the concept of limited liability was introduced. Lord Cranworth explains that that wasn't intended to affect who were ultimately liable, it was intended to affect who were shareholders. Nor was it intended to affect how much a creditor would receive, subject only to the cap imposed by the introduction of limited liability. So in other words creditors should still be entitled to receive as much after 1862 as they could have received before if there were assets available to do so and obviously, before 1862, creditors were able to go against shareholders directly and recover in full.
The principle in Bower v Marris was adopted in liquidation in a series of four celebrated decisions of the Court of Appeal in 1869 and 1870.
LADY JUSTICE GLOSTER: So is this your fifth point or still your fourth?
MR DICKER: Yes, involving the liquidation of the Humber --



LADY JUSTICE GLOSTER: Sorry, Mr Dicker are you on your fourth point or on your fifth? Maybe it doesn't matter but --
MR DICKER: I'm on my fourth point. Four decisions of the Court of Appeal in 1869 and 1870 involving the litigation of Humber Ironworks and Shipbuilding Company and the Joint Stock Discount Company. I'm just going to take you to one of those, which is Humber Ironworks. It's volume 1, tab 16. The case concerns the treatment of interest in the event of a liquidation and it essentially decided two things. Firstly, creditors can only prove interest in respect of the period down to the commencement of the liquidation, ie you can't prove for post insolvency interest. But, secondly, in the event of a surplus, interest is paid and calculated in accordance with the principle in Bower v Marris. So the second part of the decision essentially introduces the principle in Bower v Marris into liquidation.
The first judgment is Lord Justice Selwyn, which starts at 644, and, again, just identifying the relevant points, he starts by saying:
"Several times considered the case, for the judge's met together with a view, if possible, of laying down some general rule. The result of that meeting was there appeared to be no uniform practice."



Dropping two lines, he says:
"It is surprising that after the number of years during which winding up proceedings have been going on in this court, and considering that this question must have continually arisen, the point has never yet been, so far as I am aware, the subject of judicial decision. It now comes before us upon the recommendation of the Master of the Rolls that we may decide, so far as the authority of this court can decide, what is to be the rule applicable to such cases for the future. Satisfactorily, then in forming the decision, we are not fettered by rule which obliges us to depart from what appears to be the justice of the case."
And then dropping to the next paragraph, he says:
"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 receive interest and others having debts not bearing interest."
Then he says:
"In the first place, it appears to me we must consider the case under two aspect: first, where there is and next where there is not a surplus."
He deals with surplus first. He says:
"I apprehend that in whatever manner the payments



have been made, originally they may have been made in respect of capital or in respect of interest. Still, inasmuch as they've all been paid in process of law without any contract or agreement between the parties, the account must in the event of there being an ultimate surplus be taken as between the company and the creditors in the ordinary way, that is in the manner point out in Bower v Marris. By treating the dividends as ordinary payments on account and applying each dividend in the first place to the payment of interest due at the date of such dividend and the surplus, if any, to the reduction of the principal. That disposes of the question where there is a surplus as to which there is no doubt or difficulty."
He then deals with the position where the estate is insolvent and you are not directly concerned with that. But what effectively he says is you can't prove for post insolvency interest and two-thirds of the way down he says:
"Justice, I think, requires that that course of proceeding should be followed. No person should be prejudiced by the accidental delay which in consequence of the necessary forms and proceedings of the court actually takes place in realising the assets; but that, in the case of an insolvent estate, all the money being

realised as speedily as possible should be applied equally and ratably in payment to the debts as they existed at the date of the winding up."

The consequence being you can't prove the post-insolvency interest. Five lines from bottom he says:

"But of course I have already guarded myself 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, 20 per cent if and when there is a surplus to pay it.

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 estate must be declared in respect of the debt so ascertained. Of course, it will be understood that we are laying down this rule as applicable to all cases under the recent Act where creditors actions are stayed."

So the tree must lie as it falls, essentially everybody's divided pari passu by reference to the position as at that date. It follows you can't prove for post insolvency interest. But in the event there is a surplus, you do get interest calculated in accordance



with Bower v Marris.

I see the time. I wonder whether that would be a --

LADY JUSTICE GLOSTER: Yes, and the other Lord Justice agrees with that, does he?

MR DICKER: Yes, he does.

LADY JUSTICE GLOSTER: Does he actually say --

MR DICKER: That I think is two-thirds of the way down 647. He says:

"As to rule which my learned brother has laid down, it is the rule bankruptcy. The rule was, as has been said, judge-made law. It was made after great consideration and no doubt because it works with equality and fairness between the parties."

LORD JUSTICE PATTEN: Just remind me. Under the Act, there were no express provisions dealing with statutory interest, were there?

MR DICKER: Correct. So no express provision dealing with statutory interest. Therefore, at this stage, no provision equivalent to entitlement to the Judgment Act rate. That's why the case discusses it entirely in terms of contractual rights.

LADY JUSTICE GLOSTER: Is that convenient moment? 2.00 then thank you very much.

(1.02 pm)

(The short adjournment)



(2.00 pm)

LADY JUSTICE GLOSTER: Yes, Mr Dicker.

MR DICKER: Can I deal with one short point arising from this morning. I think I said I couldn't remember whether Bower v Marris, whether section 132 applied in the case of Bower v Marris or not. The answer to that is it didn't. There was a decision in the bundles called ex parte Sammon 1851, authorities, volume 1, tab 5, which held that the effect of section 132 was not retrospective, and it didn't apply to commissions which already existed by the date it was introduced.

LORD JUSTICE PATTEN: Sorry, what was the case called?

MR DICKER: Ex parte Sammon. S-A-M-M-O-N.

As we say, it doesn't matter because it's common ground that Bower v Marris did apply at all times between 1743 and at least 1883. It's the 1883 Act which I want to turn to next.

LADY JUSTICE GLOSTER: Yes.

MR DICKER: There are two separate issues in relation to the 1883 Act. There is a question as to whether or not it limited creditors solely to 4 per cent interest. The judge held that it did. We say he was wrong about that.

But, in any event, there is a separate question as to whether or not the principle in Bower v Marris continued to apply after the 1883 Act, and we say every



indication is that it did.

Now, just dealing with, firstly, the issue in relation to the 4 per cent, again, for your note, the judge dealt with the 1883 Act at paragraphs 53 to 56 and paragraphs 139 to 142. Just to remind you of the priority position under the 1825 Act, creditors with an underlying right to interest were paid first. In the event, there was a surplus remaining, creditors had interest at 4 per cent.

Now, we say that what the 1883 Act was intended to do was to alter that priority, essentially to provide that interest was payable to all creditors in the first instance at 4 per cent.

LORD JUSTICE BRIGGS: Only if there was a surplus.

MR DICKER: Only if there was a surplus. With the balance being payable before any distribution could be made to the bankrupt. So no longer giving priority to those who had an underlying right to interest, everyone had 4 per cent. Anyone with a greater right was entitled to recover it before a distribution was made to shareholders. We say, you get that from a combination of two sections --

LORD JUSTICE BRIGGS: Sorry, you don't mean distribution to shareholders in this context.

MR DICKER: Sorry, the bankrupt. I have failed to move from

liquidation to bankruptcy, I'm sorry.
The two sections in the 1883 Act applicable in bankruptcy, you will find in the authorities volume 4, tabs 145A and 146. Starting volume 145A, you will see a section 40 of the 1883 Act, 40(1):
"In the distribution of the property of a bankrupt there shall be paid in priority to all other debts."
And there are various, at that stage, preferential claims. Subsection (4):
"Subject to the provisions of this Act, all debts proved in the bankruptcy shall be paid pari passu."
So that's the general distribution in respect of proved debts, pari passu. Then, 5:
"If there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest from the date of the receiving order at the rate of £4 per centum per annum on all debts in proved in the bankruptcy."
Pay your proved debts in full, then everyone gets 4 per cent on their proved debts.
The other provision that's relevant is section 65, which is at tab 146. Section 65 states:
"The bankrupt shall be entitled to any surplus remaining after payment in full of its creditors, with interest, as by this Act provided and of the costs



charges and expenses of the proceedings under the Bankruptcy Act."
Just focussing on the wording of section 65, the critical phrase, we say, is the phrase "after payment in full of his creditors". A creditor who is not entitled to payment in full, of the interest that he is owed, has not been paid in full.
LADY JUSTICE GLOSTER: Did authority decide that?
MR DICKER: No, you can't -- neither party has been able to find any authority post-1883 on this issue or on whether the principle in Bower v Marris continued to apply. So this is question, as far as the bank has been able to identify, as to the construction. The only indication you will get -- and from my point of view I accept it's potentially unhelpful -- is in the Cork Report.
LORD JUSTICE BRIGGS: But the core phrase is:
"After payment in full of his credits with interest, as by this act provided", which sort of says to me: you go back to section 40.
MR DICKER: We would say no. You have payment in full of proved debts, you have 4 per cent under section 40(5) which makes it plain that it's surplus after payment of the foregoing debt. At that stage, you have only paid proved debts and what you get is interest at 4 per cent on all debts proved.



Then you come to 65, which has a different turn of phrase. Section 65 talks, in our submission, as one would expect it to say:
"The bankrupt only gets the surplus after payment in full of his creditors."
You need to include the words "with interest", because the Act itself provides under section 40(5) for payment of interest at 4 per cent.
If you think about section 65, you can trace section 65, effectively, all the way back to the statute of Elizabeth referred to by Lord Hardwicke in Bromley v Goodere, which uses the phrase "in full satisfaction". So one starts with a statutory scheme which has always provided that creditors have to be paid if full before the surplus is returned to bankrupt.
So, in a sense, one starts with section 65. That is a section which has been there right from the start. That reflects the very basic principles of the regime. Namely, creditors first, bankrupts last.
Now, that section can remain simply saying:
"Bankrupt shall be entitled to any surplus remaining after payment in full of his creditors, for so long as the Act doesn't, itself, provide for a payment of interest."
But once you include a right to interest at



4 per cent, then obviously you need to tinker with section 65 to make it plain that it's not merely payment in full, ie of the underlying claims, but it's payment in full, plus interest, as by this Act provided.
LORD JUSTICE PATTEN: I mean, before considering the previous incarnations of it -- I'm just looking at 65 as drawn -- it might be said, I suppose, that the phrase "after payment in full" didn't comprehend the payment of interest because it's a bit odd to talk about "in payment in full with interest".
MR DICKER: In one sense, I see that. But, again, if one just thinks how this ended up being bolted together, and the way it arose. We have, essentially, a provision equivalent to section 65: bankrupt gets surplus but after everyone's been paid in full.
We then think -- and that goes back to Bromley v Goodere -- it means payment in full both of principal and of interest. In other words, before you get to distributing surplus, you have to make sure every creditor has been paid in full.
You then introduce a regime of payment of interest to everyone at 4 per cent, that goes in as section 40(5). That's where the right is granted. You then need to amend section 65 because, otherwise, if it simply said, "Payment in full", at least according to

prior law, you wouldn't have covered the right to interest which you've just introduced.
LORD JUSTICE PATTEN: Let's assume the word "with" means including. What do the words "as by this Act" refer to, then; just simply the rate?
MR DICKER: Well, it refers to all rights under the 1883 Act, which obviously include, now, the right under section 40(5).
LORD JUSTICE PATTEN: Are you saying that the words, "As by this Act", don't qualify only the words "with interest"?
MR DICKER: There's a comma both before and --
LORD JUSTICE PATTEN: Well, I know.
MR DICKER: So you get payment in full -- comma -- as by this act provided. We say, that's essentially meaning: as you would expect. Everyone gets paid what they're owed, in full, before anything goes back to the bankrupt. That's how the regime has worked since 1743.
LORD JUSTICE BRIGGS: What happens to a post cut-off date debt under a modern bankruptcy regime?
MR DICKER: They have to be paid, in full, before the surplus is returned. There's a number of examples of this in the context of liquidation. Post-commencement tort claims, cases like RR Realisations and Re T&N, holds the mere fact they arose after the commencement of the liquidation did not arise by reason of an obligation



incurred before, is irrelevant. The cut off date is intended to achieve pari passu distribution. The issue when you get to the stage of non-provable claims is: have you, at this stage, a claim which needs to be paid before you hand the money back to --
LORD JUSTICE BRIGGS: I think I understand in relation to insolvency because, generally speaking, once you have completed the adding up the company is dissolved; is that also correct in relation to personal bankruptcy?
MR DICKER: So far as the estate is concerned, yes. The bankrupt is obviously discharged. So far as the discharge is concerned, that only discharges him in respect of --
LORD JUSTICE BRIGGS: Pre-cut off date.
MR DICKER: Correct.
LORD JUSTICE BRIGGS: That's what I thought, so if he gets the estate back he still has to pay the correct --
MR DICKER: Correct, that's why, as Lord Hardwicke said in Bromley v Goodere, in bankruptcy, in a sense, it's a bit of a non-issue because, you know, if you give it to him back, he then has the pay it anyway; that's one of the points that doesn't make sense to construe the 1883 Act in the way suggested. Because if you are talking about a post-insolvency right to interest which is not provable, then it's not discharged by what's now



section 30(2) and you can pursue the bankrupt, in any event.
LADY JUSTICE GLOSTER: As of 1883, there was no discharge of his debt.
MR DICKER: There was a discharge. There had been a discharge ever since statute of --
LADY JUSTICE GLOSTER: Why are you saying he would have to pay post bankruptcy debt?
MR DICKER: Because the discharge only discharges in respect of provable debts and the post insolvency interest isn't provable.
LADY JUSTICE GLOSTER: Yes, I see.
LORD JUSTICE BRIGGS: So it would be an administrative inconvenience but not an injustice if one read section 60 as giving him the estate back, subject only to what the Act provides should be paid to his creditors?
MR DICKER: It depends on how efficacious it would be to hand the surplus back to the bankrupt and to leave creditors to recover from the bankrupt.
If one assumes that, subject only to the cost and expense of different proceedings, the money would end up with creditors anyway and --
LADY JUSTICE GLOSTER: He might be just about to make a quick departure from the UK.



MR DICKER: In practice, one can't guarantee that the result would be the same.
LADY JUSTICE GLOSTER: But are you saying the position would have been different if the comma had been removed after "interest"?
MR DICKER: No.
LADY JUSTICE GLOSTER: I mean, are you relying on the fact that there is a comma there?
MR DICKER: The comma helps our submission, but it's not necessary.
LADY JUSTICE GLOSTER: It's not necessary.
LORD JUSTICE BRIGGS: Sorry, if I could help you: if the comma's there, so that as by this Act provided applies to both payments of his creditors and with interest, you could find somewhere in the Act that provides for a payment out of his estate to a creditor from whom he gets it back. All you could go back to is section 40. I know that's not what Bromley v Goodere says.
MR DICKER: Well, if by "as by this Act provided" you mean you have to find an express provision, your Lordship is right. If "by this Act provided" means the Act in the way that it's been interpreted to operate by the courts ever since 1743, then the answer is no. It's one of the oddities I mentioned earlier about section 107 and 143. If one reads those and asks: where a non-provable

claims, liabilities? They don't refer to them.
LORD JUSTICE BRIGGS: No.
MR DICKER: These sections have been there for ever. If one approached them from an entirely clean slate, you might construe them in one particular way but, if you did so, you would be construing them contrary to 300 years of authority.
Now, section 65 is essentially just the reflection of that overarching position with, as I say, the addition of express reference to the right to interest which has been inserted and is now found in section 40(5).
LADY JUSTICE GLOSTER: Are you saying section 65, is, itself, a provision that can be relied upon, within section 65 --
MR DICKER: Yes.
LADY JUSTICE GLOSTER: -- because it is providing the payment in full for its creditors? It's a bit self-serving.
MR DICKER: Self-referential reference but that's what it says: you have to pay everyone in full.
Unlike subsection (5), which refers to interest on your proved debts, section 65, the language is different. It's not just talking about payment in full of proved debts, it's talking about payment in full of



creditors. We say, if one approaches that as one would have previously, as one naturally would, you test it in each case by asking: has the creditor been paid in full?
LORD JUSTICE BRIGGS: Is there a predecessor to section 65, in the 1832 Act, or was the practice reflected in Bromley v Goodere, whereby the courts in certain situations didn't just hand the property back, but made sure all the other debtors paid as well something that was judge-made and operated outside the statute.
MR DICKER: I need to check the answer to that.
LORD JUSTICE BRIGGS: You say -- I understand where you are coming from -- section 65 merely replicates what has been going on for centuries, but I'm not sure it has been in the Act for centuries.
MR DICKER: I need to check. If one remembers what I was referring to, it's the reference by Lord Hardwicke to -- I think it's from a statute Elizabeth picks up or King James' statute, full satisfaction, which was certainly in the Act, at that stage, and which he interpreted as meaning: everyone is being paid in full a loan(?).
LADY JUSTICE GLOSTER: But creditors, there, can't include post-bankruptcy creditors, can they, if they're not creditors at the date of proof?
MR DICKER: Except that's exactly how the surplus is applied, go back to Bromley v Goodere. For provable



debts you have a cut-off date as at the date of commencement of the bankruptcy or liquidation. You don't when you come to distributing the surplus.
The example I gave a few minutes ago about post-insolvency tort claims, any claim which was for whatever reason not provable, because it post-dated the cut-off date, nevertheless has to be paid before the surplus is returned. It's less important in bankruptcy, on one view, if the bankrupt isn't discharged, you can pursue him. It's obviously extremely important in liquidation.
LADY JUSTICE GLOSTER: So trustee has to go round and work out if, in the intervening period, there's been any incurring of debts by the bankrupt?
MR DICKER: The answer to that is yes. The Australian cases actually have a phrase of a second round of proofs to give it a slightly more sort of formal element to it.
LADY JUSTICE GLOSTER: Right.
MR DICKER: But a liquidator and a trustee has always been under an obligation to discharge extant debts out of the estate before handing anything back to bankrupt or to shareholders. It's just the way the system has always worked. Not, as Lord Justice Briggs explained in the Waterfall 1 judgment, something which has ever been covered, and certainly not something that's ever been



covered in detail in the statute. But that's how --
LADY JUSTICE GLOSTER: Was it so unlikely?
MR DICKER: That's how the authorities have --
LORD JUSTICE BRIGGS: Surpluses aren't that unlikely in a bankruptcies context. They are pretty unusual in a corporate context.
MR DICKER: Sorry, I missed that.
LORD JUSTICE BRIGGS: I think you were saying surpluses are so rare that they don't become an issue.
MR DICKER: Forgive me, I think the point I was trying to make -- and maybe I am misunderstanding what your Lordship is referring to -- if, in bankruptcy, the bankrupt isn't discharged and the creditor can proceed against the bankrupt, then subject to the possibility the bankrupt may have just spent the money in the meantime, it all comes out in the wash. In a liquidation where the money is returned to shareholders, that's not possible because the general law is: once a distribution has been made to shareholders, it's irrecoverable. So once it's gone out of window, it has gone. That's why liquidators need to discharge debts out of a surplus before saying to the shareholders, "This is the balance of your investment as at today's date. Here it is".
LADY JUSTICE GLOSTER: Right.

MR DICKER: It may just be worth reminding you of the passage I had in mind in Bromley v Goodere. Forgive me, if you go back to authorities bundle 1, tab 1. It's page 51. It's the third full paragraph beginning:

"Thus it stands upon the 13th of Elizabeth. The next is the statute of first 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 these words: that the Commissioners shall make payment of the overplus of the lands and goods et cetera if any such shall be to the bankrupt, his executors, administrators and assigns, and that the bankrupt after the full satisfaction of his creditors, shall have full power and authority to recover and receive the residue and remained of the debt to him owing."

We will try and identify how that was tracked through into the 1832 Act.

Just so your Lordships know, this interpretation of section 40(5), and section 65, is not so outlandish as being incapable of being adopted. Again, I won't take you to it, but there's an Irish decision called Re Hibernian Transport Companies Limited, where Mrs Justice Carroll, page 269, construed the equivalent legislation --

LADY JUSTICE GLOSTER: Could you give the tab number?



MR DICKER: Authorities 2, tab 55.

LADY JUSTICE GLOSTER: Thank you.

MR DICKER: It's page 269. It's the second paragraph to the end of the page.

I won't take you to that. The Court of Appeal essentially held the issue didn't arise. Mr Justice Richards said the authority, therefore, wasn't of enormous value but, you will see from that, he construed legislation in materially the same terms in the way that I've just described. I'm reminded, sotto voce, from behind: and applied Bower v Mariss.

LADY JUSTICE GLOSTER: That's a modern case, isn't it?

MR DICKER: Sorry.

LADY JUSTICE GLOSTER: That's a modern case. It was in the 1990s.

MR DICKER: Yes. Four further points in relation to the 1838 Act. First of all, no one has been able to find any indication whatsoever in the materials leading up to the 1883 Act, that the legislature intended to change the regime so as to mean that the bankrupt would get part of the assets back even though certain creditors have not been paid in full.

Secondly, if the judge was correct in relation to the 1883 Act, the effect on creditors with a contractual right to interest above 4 per cent could have been



significant; money goes back to the bankrupt, the bankrupt spends it, they don't get paid in full.

Third point, I've already made. Not enormously easy to see why, as a matter of policy, the decision should have been made, anyway, if the bankrupt isn't discharged from post-insolvency debts, anyway.

The fourth point is certainly no one's been able to find any authority post-1883 that holds that this was indeed the effect of the 1883 Act. This point, in a sense, goes both ways. We say it's a slightly surprising change, not reflected in any pre-legislation legislative materials and no authority subsequently saying it did have that effect.

But, in any event, we say that actually is just not the issue, in a sense, in this case. The issue in this case is a different one, which is whether or not Bower v Marris continued to apply. It certainly applied up to 1883. We say there's no reason, regardless of the answer to the point I've just been addressing, why it fell away in 1883.

So that's point 5 in my list of seven.

Six is an authority called Whittingstall v Grover, which you will find --

LORD JUSTICE BRIGGS: Just before you go there, are you saying that on (Inaudible) under section 40 of



Bower v Marris, when it's already under section 60(5)?

MR DICKER: No, we say Bower v Marris applies to both.

LORD JUSTICE BRIGGS: At the moment, you get surplus over approved debts, then you apply Bower v Marris. I just want to be sure.

MR DICKER: I will come to this in due course but, in a way, the contractual analysis is easier.

LORD JUSTICE BRIGGS: Yes.

MR DICKER: We accept that because you simply say, "Well, creditors are obviously entitled to be paid in full, and this is what's necessary to ensure that they are".

But the same, we say, applies in relation to underlying statutory rights to interest, for example, a judgment debt. Leaving aside the county court oddity. If all that section 45 is essentially doing, as we say it is doing, is saying, "Look, we have a moratorium, the moratorium prevents creditors from getting a judgment, given that they're prevented from getting a judgment, it's only fair that they ought to be entitled to interest at the judgment at rate".

Now, if Bower v Marris applies normally in the case of an actual judgment, why doesn't it apply in a case where the statute says you ought to be treated as if you had a judgment and get interest at the Judgment Act rate. As I say, I'll come to that.

LORD JUSTICE PATTEN: Are you saying -- if it becomes relevant -- there's any material difference between whatever they mean -- between section 40(5), well, (4) and (5) perhaps, and rule 2.88(7)? It looks to me as if the relevant parts of the language is very similar, isn't it?
MR DICKER: What has changed throughout this period is, essentially, a sub-issue. Namely, what's the priority for payment of interest?
Section 132 says you ought to get your underlying creditors with an underlying right to interest should paid first. Then, 4 per cent.
1883 said: no, everyone should get 4 per cent.
In our submission, if there was an excess, it should be paid that.
The 1986 rules say: no, it ought to be treated, essentially, pari passu.
As your Lordship says: in substance, what's going on in all of these provisions is the same and the wording reflects that. You have to pay proved debts in full. So the question is: does that drive the calculation of interest or not?
Prior to 1986, everyone has held that it didn't, judge says, "Not so". If you have to pay debts for so long in respect of periods that are outstanding. It's



blindingly obvious, we say. The mere fact you reduce underlying contractual right into an express statutory provision, reflecting that underlying contractual right can't make a difference. No reason why Bower v Marris should disappear, at that stage.
The point about the provision being in payment of interest, Bower v Marris effectively saying it's in payment of principle. Exactly same point could be made in relation to the 1825 Act and all the subsequent Acts.
Now, Whittingstall v Grover is not a bankruptcy case. It's not a liquidation case. It's concerned with the administration of the deceased insolvent. But it is interesting, because there's a similar provision for payment of interest to those who aren't otherwise entitled to interest. It's bundle 1, tab 24.
Just before I go to the detail of the judgment, could I just ask you to turn up bundle 4, tab 122, because that contains the relevant order of 1841 that the case is concerned with.
LADY JUSTICE GLOSTER: So general order, is it a Practice Direction?
MR DICKER: Yes, it's an order of the court.
LADY JUSTICE GLOSTER: It's sort of that, isn't it?
MR DICKER: The provision, at bundle 4/122.
LADY JUSTICE GLOSTER: Paragraph 46.



MR DICKER: Paragraph 46, just looking at the wording --
LORD JUSTICE BRIGGS: It's a Chancery practice direction, which then needed consent from the Lord Chancellor and the Master of the Rolls.
MR DICKER: 46:
"A creditor whose debt does not carry interest shall come in and establish the same before the Master and ...(Reading to the words)... from the date of the decree, out of any assets which may remain after satisfying the costs of pursuit, the debts established and the interest of such debts as by law carry interest."
LORD JUSTICE BRIGGS: Sorry, where are you?
MR DICKER: I'm reading at 46. It's on the second page.
LORD JUSTICE BRIGGS: Thank you. Yes.
MR DICKER: So it might be said to be similar to the second limb of section 132.
LORD JUSTICE PATTEN: What is this? I mean, this is a sort of general provision, is it, about debts? It's not in any particular context. I was just looking through the other paragraphs which obviously apply to proceedings in equity, generally.
LADY JUSTICE GLOSTER: It's not dealing with insolvency, it's dealing with any old question.
MR DICKER: It's not a provision in bankruptcy.



LORD JUSTICE PATTEN: No.
MR DICKER: It's a provision which certainly applied in the administration of a deceased estate.
Now, I'm not sure --
LADY JUSTICE GLOSTER: It's a precursor to section 35(a), is it, effectively? Which gives the court the power to award interest.
MR DICKER: Except it's not. Can we just --
LADY JUSTICE GLOSTER: You make your submissions, Mr Dicker. I'm sorry.
MR DICKER: Mr Smith suggests you just note 45:
"Every decree for an account of the personal estate ...(Reading to the words)... or parts of any of such personal estate are outstanding or undisposed of, unless the court shall otherwise direct."
We say Whittingstall v Grover is the authority for two propositions. First, it demonstrates the principle in Bower v Marris can apply in circumstances where a creditor is given a right to interest only in the event of a surplus.
Secondly, it follows that it also demonstrates that Bower v Marris can apply, even where at the time of any dividend no interest had accrued due.
The learned judge Mr Justice David Richards rejected the second proposition. He did so in paragraph 112 of

his judgment. What he said was:

"A decree for the administration of an estate operates as a judgment in equity, and that the orders of 1841 were intended to bring a judgment in equity into line with a judgment at law on which interest was payable under the Judgments Act. Interest on a judgment debt accrues due whilst it is outstanding just as much as does interest under a contract."

In other words, he said Whittingstall v Grover is effectively a case in which you have a judgment, you therefore have interest accruing day-by-day, and there is, therefore, no difficulty in applying Bower v Marris.

Now, we say this case is in fact, in substance, indistinguishable from the nature of the right under rule 2.88(9), where it refers to the Judgment Acts rate. The distinction that the judge sought to draw within Whittingstall v Grover is incorrect. It is correct that a decree for the administration of estate does operate as a judgment in equity, but it's obviously not a judgment for the payment of any sum of money. So it doesn't, itself, entitle creditors to interest on decrees or orders in equity under section 18 of the Judgments Act. If it was, then this order, paragraph 46, would have been unnecessary. So you may have a decree, maybe a judgment in equity, but it



doesn't, itself, carry interest. The interest arises as a result of paragraph 46 of the order.

Second point, we say paragraph 46 of the order is effectively structured in the same way as rule 2.88 in the sense that it says: if there's a surplus, everyone is entitled to interest at 4 per cent whether or not they otherwise have it.

The justification for that right your Lordship sees from the judgment of Mr Justice Chitty. It is essentially because there was a similar moratorium in this situation and, given the existence of the moratorium, it was only fair to treat creditors as if they have a judgment. So it may be the rule says: you only get interest if there a surplus, but the rationale for it is: you ought to essentially get interest as if you had a judgment.

Importantly, the case applied principle in Bower v Marris. They were calculating the amount of the interest which was due.

Can I just show you a couple of points from the judgment. Before I get there, you will note, at the top of 216, column 1. A reference both to Bower v Marris and to Humber Iron Works. Humber Iron Works having been decided a little less than 20 years previously.

The relevant part of the judgment -- and it does



need to be read in its entirety -- is on page 217. If I can just identify the points which we rely on. Just picking it up at the top, Mr Justice Chitty says:

"It is only now, when further assets of the testator have become available for distribution, the question has arisen. The next question which arises relates to interest. After payment of 20 shillings in the pound to the joint and separate creditors of the testator a surplus will remain. The question is left open by the order of 1861 already stated. It declared generally the priority of the testator's separate creditors to his joint creditors. This declaration was, I think, confined to the principal of the debts. The declaration as to interest was confined to negativing any claim of the testator's separate creditors whose debts did not by law or special contract carry interest."

Then, if you drop to about a third of the way down, in the middle of the column 1, there's a sentence beginning, "But the question is ..."

LADY JUSTICE GLOSTER: Yes.

MR DICKER: "But the question is between the joint creditors of the testators, on the one hand, and the separate creditors whose debts do not, by law, carry interest, on the other hand. All these creditors have received or will now receive 20 shillings in the pound out of the



principal of their debts. Separate creditors contend for priority, the joint creditors contend for a distribution of the surplus pari passu. Admitted there is no decision on the point, which quite possibly has never arisen until this time. The question must be decided on principle."

Then, this:

"Previously to orders of 1841, the court of Chancery did not give interest to a creditor coming in under a decree for the administration the estate of a deceased person where the debts did not, by law, carry interest."

So rather like prior to section 132 of the 1825 Act:

"The orders of 1841 relating to interest --

LADY JUSTICE GLOSTER: Can I just interrupt and stop you there to clarify my mind. The orders aren't limited to interest in the administration of an estate, are they?

MR DICKER: No.

LADY JUSTICE GLOSTER: Or are they? It's not clear from the previous paragraph 45.

MR DICKER: I need to check, precisely, the position in relation to that. Our submission is, simply, that they do apply in the context of the administration.

LADY JUSTICE GLOSTER: I accept that. I'm just not understanding whether they're wider, "any equitable claim".

MR DICKER: I need to provide with you an answer to that.
LADY JUSTICE GLOSTER: Sorry, go back to --
MR DICKER: "The question which must be decided on principle, previously to the orders of 1841 the court of Chancery did not give interest to a creditor coming in under a decree for the administration of the estate of a deceased person where the debts did not accrue or carry interest. The orders of 1841 relating to interest were in substance repeated in the consolidated orders of 1861 now embodied in the subsisting rules of court order 65. The rules of 1841 were founded on the 17th section of the statute previously to that enactment ...(Reading to the words)... to recover judgment for his debt. Consequently, after the passing of the statute, the court of equity, while interfering with this legal right for the common benefit all the creditors, was bound on equitable principles to put him in the same position as if he had exercised it, hence the order of 1841."

So there is a moratorium, you therefore should be entitled to interest as if you had a judgment:

"Lord Romilly explained the matter in The Herefordshire Banking Company that the court allowed interest at 4 per cent from the date of its decree, because the decree is a judgment in equity for the benefit of all the creditors and prevents them for



getting a judgment at law which would give them interest. The right of the creditor whose debt does not carry interest by law is therefore based on the provisions of the statute and the orders of 1841 and the existing rules of court would give effect to such right."

Just dropping to about a third of the way down, sentence in the middle of the paragraph, says:

"Nor I can find any reason which in regard to subsequent interest would justify the drawings of any distinction between creditors whose debts carry interest by law and those whose debts carry interest under the ...(Reading to the words)... which appears on the face of the general orders themselves. The sound rule, therefore, appears to be that as between a joint and separate creditors, the question of interest should be decided in accordance with established rules as to the principal."

Then, he says this:

"The remaining question relates to the manner in which the dividends received ought to be accounted for in ascertaining the amount of interest due, all the dividends have been paid in process of law, and the account ought to be taken in the manner pointed out in Bower v Marris and the warrant to finance companies



case."

That's another name for Humber Iron Works:

"By treating the dividends as ordinary payments on account and applying each dividend in the first place to the payment of interest calculated to the day of such dividend and the surplus, if any, to the reduction of the principle."

So, just stepping back, essentially two points: first of all, if one looks at paragraph 46 of the order, it says: if there is a surplus, everyone is entitled to interest of 4 per cent. Very much like rule 2.88(9).

The second point is: Mr Chitty appears to have not regarded that as any problem in applying Bower v Marris, despite the fact in this context, as well, payments will already have been made.

Now, there are a series of cases to similar effect. I'm not going to take you to them at this stage, but just for your note, in the bundles they are a case called Garrard v Lord Dinorben, volume 1, tab 7, Aitchinson v Lee 1, tab 10, Hadfield's Patent Cask Company, 1, tab 12, Herefordshire Banking Company, 1, tab 13, and a more recent case Re Bracey decide in 1936, 1, tab 36.

LADY JUSTICE GLOSTER: Are those are all administration of



estate cases?
MR DICKER: They are, but they all essentially -- well, not all of them. Herefordshire is the winding up of a partnership, banking partnership.

The importance of those cases is that they set out, in a similar way to Mr Justice Chitty, a basic rationale that if you are prevented from obtaining a judgment by a moratorium, you really ought to be treated as if you had a judgment. That's what we say, essentially, section 132 was originally doing, and 2.88(9) is now doing.

Mr Justice Chitty said in the context of a provision like that, which only applies in the event of a surplus, applies to creditors who have no other right to interest. Nevertheless, there's no difficulty in applying the principle in Bower v Marris.

There's one other point which I ought to simply mention, at this stage, which is Mr Justice David Richards' judgment does appear to produce an anomaly now, between the administration of a deceased's estate which considered to be solvent, on the one hand, and the administration of a deceased's estate which is considered to be insolvent, which subsequently turns out to have a surplus.

The reason for the anomaly are the rules that

Mr Justice Chitty was referring to, can be found in similar terms, now, in CPR 64.2B and 40A Practice Direction 14. So if you have an administration a deceased estate which is solvent, presumably the same regime operates as operated in Whittingstall v Grover.

Conversely, if you have an administration which is considered insolvent, that's administered in accordance with the Insolvency Act. The judge's judgment therefore applies, on his basis Bower v Marris doesn't operate.

So whether Bower v Marris applies in relation to the administration of the deceased estate, it appears to turn on whether or not it was thought to be solvent, in which case it does. Or merely is subsequently realised is solvent, in which case it doesn't.

Now, the final authority I wanted to refer to -- English authority -- was Lines Brothers Number 2.

LORD JUSTICE BRIGGS: Are the rules and references to that in your skeleton? You have quoted from CPR.

MR DICKER: Can I just give you the references?

LORD JUSTICE BRIGGS: Thank you.

MR DICKER: Sorry. CPR 64.2B.

LORD JUSTICE BRIGGS: Which is that; solvent or insolvent?

MR DICKER: These are both dealing with the solvent position because the insolvent position is dealt with --

LORD JUSTICE BRIGGS: Is of the Act.



MR DICKER: The Act. 64.2B. You also need to look at CPR 40A, Practice Direction 14.

LADY JUSTICE GLOSTER: Can you speak up? 40A?

MR DICKER: I'm sorry, 40A, Practice Direction 14.

LORD JUSTICE BRIGGS: In other words, APD14?

MR DICKER: Yes.

So Lines Brothers Number 2, I can show you that. It's volume 1, tab 48. There were, as you know, a series of Re Lines Brothers cases. This occurred after the decision of the Court of Appeal dealing with currency conversion claims. The issue that then arose, essentially was: it having been established that the post insolvency interest is payable first, upon what basis is that interest payable?

Bower v Marris was cited in the earlier decisions, but this is the decision in which its operation was considered. The other element is: it was decided after the Cork Report but before the White Paper, and that may have a significance that you'll see when we come to the White Paper.

It was common ground between the counsel involved that Bower v Marris applied. You'll see the counsel involved identified at 440F and at 442 between E and F, on any basis distinguished insolvency counsel.

Mr Justice Mervyn Davis said, at 446, between D and F:



"In these circumstances, there remained for decision some question about the claims enforceable against the liquidation of surplus in respect of post liquidation interest. It's common ground that since there is a surplus it should be used so far as it will go ...(Reading to the words)... the interest due to the bank is said to be [sums given]."

The calculation of the sum appears in appendix A, which is an agreed document.

Now, there was then an issue which Mr Justice Mervyn Davis raised and you can see that at 453D. Just above E, 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 periods 20 June 1978 to 31 December 1978 which was brought up to date by adding to that figure interest for the figure from 21 December 1982 to the date of payment. In other words, Appendix A proceeds on 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 a notionally unpaid capital of 589,000-odd thrown up by the Bower v Marris calculations."

Then he says this:



"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."

So, essentially, the judge was saying: you can apply the principle in Bower v Marris, but only until principal has been repaid because from that date, essentially, there's nothing on which interest could follow.

LORD JUSTICE BRIGGS: You mean only until principal was in fact repaid by way of dividends on approvements.

MR DICKER: Yes. Then, there are further submissions which your Lordships will see starting at 456F.

LADY JUSTICE GLOSTER: So the case comes back then, as the judge says he's going to deal with other submissions?

MR DICKER: Yes. Comes back on a later date, which looks to be -- if one goes back to start -- about a week later:

"The calculations of both sides have been effected in conformity with what both sides had assumed to be the principles annunciated in Bower v Marris. Calculations proceed by applying the dividends received in the first instance towards satisfying interest accruing at the

contractual rate and the outstanding principle and thereafter in diminution of principal."

Then, over the page, 457B:

"As to whether interest falls to be computed after the final dividend payment on the principle sum deemed under Bower v Marris remained standing upon such final dividend being paid. The view of the liquidators and of the bank is 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 principle in Bower v Marris aims to bring about payment to the creditor of precisely that sum she 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 to keeping down interest and thereafter to capital. The Bower v Marris calculator stops on the day of the final dividend, the creditor does not get payment in full of his debt and contractual interest and is thus not remitted to his contract in the full sense. Plain from the authorities, interest continues to be calculated --"

LADY JUSTICE GLOSTER: This all Mr Potts submissions.

MR DICKER: This is all Mr Pot's submissions. Mr Stubbs agrees with them at the top of 458, and Mr Justice



Mervyn Davis says, in the last paragraph:

"Having considered the submissions made to me, I am satisfied I should not adhere to the suggestion made in my judgment. I propose to say no more than this: I think it would be right to apply Appendix A in the admission of this liquidation in the way it is suggested. That is to say on the footing of notional unpaid capital of 589,000-odd, notionally owing on 20 June 1978, continues to bear interest at the contractual rate until there has been a full discharge of that notional principal by the liquidator."

So it's right that because Bower v Marris notionally reallocates dividends to interest, of course the same sum can't discharge the same amount of principal, so there must still be some principal outstanding. But that doesn't stop the principle in Bower v Marris applying. Mr Justice Mervyn Davis initially thought it did persuaded to the contrary by Mr Potts and Mr Stubbs. This is the last word on subject before the White Paper and the introduction of the 1986 Act.

LADY JUSTICE GLOSTER: If there had been a point there, you say Mr Stubbs or Mr Pots certainly would have taken it. Or Mr Graham.

MR DICKER: She now is Lady Justice Arden, or any of the others.



Now, that's all I was going to show you so far as English authority is concerned. I mentioned the principal in Bower v Marris appears to have been applied in every Commonwealth jurisdiction where the issue appears to be considered. That includes Scotland, Ireland, Australia, Canada and even the United States.

The judge dealt with those decisions in his judgment. I wasn't going to say any more in relation to them, save this: one authority the learned judge cited an extract from at length was the decision of Mr Justice Blair in the case called Attorney General of Canada v Confederation Trust.

He held that in his judgment, at paragraph 123 to 128.

The importance of this case is that it is another case which contains some express statutory provision which we say is essentially akin to a second limb in section 132, or the reference to the Judgments Act rate in rule 2.88. In other words, giving creditors a right to interest, in the event of a surplus, regardless of whether or not they were otherwise entitled to interest.

Mr Justice Blair held Bower v Marris applied. All I wanted to show you was the relevant section that he was considering. As I say, the judgment, itself, was cited at length by Mr Justice David Richards and I don't



want to waste time going back through it. But the relevant provision he was dealing with is in bundle 2, tab 69 --

LORD JUSTICE PATTEN: You are talking about section 95, are you?

MR DICKER: Yes.

LORD JUSTICE PATTEN: It's just in the judgment. I was just wondering whether there is --

MR DICKER: Maybe I don't need to -- just for your reference it's paragraphs 16 and 17:

"Any surplus referred to in (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 approved in the winding up according to their priority."

So you have a right to interest, whether or not you had any underlying right payable to a surplus. It doesn't matter, Bower v Marris applies.

LADY JUSTICE GLOSTER: The judge doesn't give any reasons for why he disagrees with this, 128.

MR DICKER: The judge did deal with the prior history, the intellectual framework, if I may say, at length and, in fairness --

LADY JUSTICE GLOSTER: But with this particular case.

MR DICKER: He dealt with this particular case at length.

He says, in fact, it's a powerful -- he dealt with it at 123 --
LADY JUSTICE GLOSTER: I have that. But, at 128, he says they're powerful, the submissions are powerful support, but he doesn't say why they're wrong, does he?
MR DICKER: He says the wording of the section is not in identical terms to rule 2.8 --
LADY JUSTICE GLOSTER: It's 127 where he gives his reason.
MR DICKER: What he essentially does, having dealt with the background, is then move on in his judgment, as I said, in four relatively short paragraphs, to look at the wording of 2.88. We say insufficiently taking into account the intellectual freight provided by the prior position and concludes that whatever the position may have been before 1986, it had changed. That was simply a consequence of the wording of the rules.

The next topic I wanted to deal with concerns preparatory materials leading up to the introduction of the 1986 Act.
LADY JUSTICE GLOSTER: Shorthand writer, would you like a break?
THE SHORTHAND WRITER: 20 past.
LADY JUSTICE GLOSTER: We will go till 120 past.
MR DICKER: The judge dealt with the prior materials, again for your note, in paragraphs 93 to 95 of his judgment.



We say he made three errors in dealing with that material.

Firstly, he placed too much weight on the Cork Report and ignored the effect of the White Paper.

Secondly, he assumed that the effect of the recommendations in the Cork Report necessarily involved the rejection of Bower v Marris, when they didn't.

Thirdly, he failed to, in our respectful submission, appreciate precisely what alteration was the legislature intended to make to the previous regimes and why.

Now, as far as the first point is concerned, as I said, the judge approached the 1986 Act on the basis it largely gave effect to the recommendations of the Cork Report and essentially adopted the previous position in bankruptcy.

Now, we say it's important to be clear here: the Cork Report did make a number of recommendations in relation to the treatment of interest, both prior to and after the commencement date. In particular, it suggested there should be a common code for bankruptcy and liquidation. So the same regime should apply in both and hadn't previously been the case. It also recommended that post insolvency interest should be specifically dealt with in the Act, that had been the case in bankruptcy but it had not been the case in



liquidation. But it's important to know what was not ultimately enacted from the Cork Report. The Cork Report suggested that creditors should receive post insolvency interest at the Judgment Act rate. That's all they expressly referred to, which the judge regarded as, effectively, an adoption of previous the regime in the 1883 Act. So the judge regarded the Cork Report as essentially saying, "Let's look to bankruptcy, that provides interest at the Judgment Act rate that's what creditors should be entitled to".

Now, we say it's not actually clear that is what the Cork Report intended. Regardless of that, it's important to note that recommendation was not adopted.

What one then gets is the White Paper, and that recommended that creditors who had an underlying right to interest should be entitled to interest at that rate. I think you should just probably see the reference in White Paper. It's authorities bundle 5, tab 212. Volume 5, paragraph 212. Paragraph 88:

"If there is a surplus in a winding up or bankruptcy, once all the creditors have been paid in full, including claims for pre-insolvency interest, the surplus will be used to pay on a pro rata basis post insolvency interest to all creditors whether or not interest was previously reserved on their debt at a



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

"If, however, a higher contractual rate applies to the debt insolvency interest will be chargeable at that rate subject to the discretion of the court as to excessive agreements."

So what the White Paper did was essentially insert the reference to the rate applicable to the debt apart from the administration.

Now, when one asks: what was the White Paper doing?

We say there's no reason why the word "rate" should mean anything different than it did in the context, say, of section 132 of the 1825 Act. Essentially, the intention was to ensure creditors would be entitled to receive interest which they otherwise would have received, absent the insolvency. In other words, saying you are not just going to get 4 per cent -- or you are not going get, rather, the Judgment Act rate, you are also entitled to interest that you would have been entitled to receive as a matter of contract.

Interestingly, perhaps I could just refer you to one reference to Mr Justice Richard's supplemental judgment, where he described what the phrase "the rate applicable to the debt" in rule 2.88 was in substance seeking to achieve. You will find it in part A, core bundle

volume 2. It's tab 1, the relevant paragraph is paragraph 34. It's the last five lines of paragraph 34, where he says:

"It was discussed in my judgment in Waterfall 2A, the purpose of providing the alternative of interest at the rate applicable apart from the administration is to ensure the creditor received what it would have receive if there had been no administration, if that would be more than interest at the Judgment Act rate."

So we say that's right. So what this part of 2.88(9) was doing was essentially saying creditors should be entitled to their full entitlement by way of interest before any surplus is distributed to the bankrupt or to shareholders.

LORD JUSTICE BRIGGS: You have to read that in the context, don't you, it's addressing a granular submission?

MR DICKER: He used the phrase in a way that we say that's what it naturally means, that indeed at one stage is how the judge himself explained the provision.

The important point is the judge said, "We have the Cork Report that says you adopt the regime in bankruptcy. Everyone gets judgment at rate interest". We say not so. It's essentially a melding of two streams. The White Paper said they should be entitled to receive the rate applicable to the debt apart from



the insolvency, and both of those were included.

What does that phrase mean?

We agree with the judge, what it naturally means is you should get what you otherwise would have been entitled to get. Now, pre-1986, the common ground that in liquidation what that meant was entitled to get applying the principle in Bower v Marris. So how on earth did Bower v Marris suddenly disappear when this phrase which was designed to capture creditors' full entitlement, was inserted on the recommendation of the White Paper into the legislation?

The second point and, briefly, before --

LADY JUSTICE GLOSTER: We will take the second point before you rise.

MR DICKER: It will take, I hope, no more than a minute. The judge appears to have assumed that entitling creditors to interest at the Judgment Act rate is inconsistent with the principle in Bower v Marris.

LADY JUSTICE GLOSTER: What paragraph of which judgment are you referring to?

MR DICKER: It's part of his --

LADY JUSTICE GLOSTER: General analysis.

MR DICKER: It's part of the four points he made. It's essentially premised on -- what you now have is a statutory right, which only gives you right to



interest in the event of a surplus. Therefore, Bower v Marris simply doesn't work.

We say, to the extent that is his reasoning, it's flawed. The rationale for giving creditors interest at the Judgments Act rate is simple. We've made the point already: there a moratorium, it's only fair they should be treated as if they had a judgment. Just as the judge held that if you have an actual judgment the principle in Bower v Marris can apply, subject to the county court oddity, there's no reason why the position should be different if rather than having an actual judgment, essentially, the statute treats you as if you had a judgment.

So the judge, we say, said: if you have a judgment, Bower v Marris can apply. That was the basis on which he distinguished Whittingstall v Grover. He also referred to an authority, Tahore Holdings to similar effect. We say it can't make a difference whether you have an actual judgment or the statute says you ought to be entitled to interest, effectively, as if you had a judgment. Bower v Marris can apply in first case, so too in the second.

LADY JUSTICE GLOSTER: Would that be a convenient moment? We will take a break of five minutes.

(3.22 pm)



(A short break)

(3.28 pm)

LADY JUSTICE GLOSTER: Yes, Mr Dicker.

MR DICKER: There is a third and final point on the three statutory materials. It's simply this: when reading the Cork Report the White Paper, it's also important to know what is not discussed. There's no criticism anywhere of the principle in Bower v Marris, let alone any suggestion that it should not apply.

If the judge is right, we do respectfully submit that is surprising, take the position in liquidation, we know it applied between 1969 and 1986, introduced by Humber Iron Works, a case which every solvency practitioner worth his salt knows, Selwyn's comment about the tree lying where it falls. It's not as if that part of the judgment had been lost sight of, when one gets to Lines Brothers number 2, two years before the Act, it's common ground before all the insolvency counsel involved that Bower v Marris applied.

LADY JUSTICE GLOSTER: There is no mention in Cork about it?

MR DICKER: Absolutely none at all. If the consequence is the creditors end up with less interest then they otherwise would, that is something which appears to have been achieved without any discussion. More interestingly, in a sense, if you go back from 1743

onwards, there is no criticism of the principle at all. Every case in every Commonwealth jurisdiction that has considered it, has applied it. They have all described it as a matter of fairness and justice, common sense.

Indeed, the judge himself, his judgment, doesn't contain any criticism of the principle, doesn't seem to provide any explanation of why the legislature might have wanted to get rid of it. He moves from prior history, essentially stops. He looks at the wording, he deals with the effect of construction of rule 2.88 and that's essentially an end of it.

We do respectfully say, as a matter of policy and principle his judgment has a number of consequences which the legislature simply could not have intended, and certainly could not have intended to achieve without at least there having been some prior discussion of those issues. I have made the point all ready, creditors first, members last. That's no longer the case.

It also doesn't make any commercial sense in a more general way. If the legislature's intention is that you should be compensated by receiving interest at a particular rate, it doesn't make any sense to disapply Bower v Marris. Imagine a situation in which the creditor is owed a thousand pounds and accruing interest



at 10 per cent. One year on, he's paid that thousand pounds, by which stage a hundred pounds of interest has accrued. It doesn't make any sense for the legislature to say, at that stage: we now don't care how long it takes the debtor to pay that hundred pounds worth of interest. Whether it's one year, or ten years, we are happy with whatever value creditor eventually receives. If the legislature intended creditors to receive the contractual rate to which they were entitled, again Bower v Marris should apply. If you focus on the Judgment Act rate of 8 per cent, and say, "Oh, the legislature intended creditors to be compensated by receiving interest at an effective rate of 8 per cent", you don't achieve that by saying, "We'll allow interest to accrue until the principal has been repaid. Then if the debtor takes ten years to pay whatever that amount of interest is, it doesn't matter. It doesn't make any commercial sense.

It also doesn't make any commercial sense if one looks at the position more widely. Imagine a situation, perhaps not a million miles from that in relation to LBIE, where the insolvent company's assets are claims which carry interest, and their liabilities are debts which carry matching entitlements to interest. On the judge's approach, effectively throughout this period,



whilst the administrators take steps to recover the assets, the debts that are owed continue to accrue interest and will be received. But at the time he receives a sum, he pays it out to creditors essentially their interest stops running at that stage. So you effectively end up with a situation in which part of the money which the debtor is receiving is being siphoned off at each stage, isn't ultimately used to pay the matching liabilities to creditors but ends up being paid to subordinated creditors or shareholders. Again, it simply doesn't make any sense.

Again, a point I made right at the start. The Court of Appeal decided, in Waterfall 1, the way the statute works is that foreign currency creditors should be entitled to be paid in full before any distribution is made to shareholders. Why are foreign currency creditors in a better position with creditors in a right to interest. Policies in relation to that we say should apply equally in relation to a claim to interest. It doesn't mean for some reason rule 2.88 hasn't abolished such an entitlement but, in our submission, it should mean one looks very closely at rule 2.88 before deciding that is indeed its effect.

So that, as it were, all by way of precursor to coming back to the judge's points on construction and



appropriation. I hope, at this stage -- again, I can do this now fairly quickly. I start by summarising our submissions on the meaning effect that the rules in principle changes it was intended should be made.

LADY JUSTICE GLOSTER: Lord Justice Briggs wants the actual provision.

MR DICKER: It's 174.

LADY JUSTICE GLOSTER: The judge set it out correctly, did he?

MR DICKER: Yes. So the changes in the wording. The first point. One change that was obviously made was that the 86 Act introduced common regime for bankruptcy in corporate insolvency. Previously, they had been different.

Secondly, it also introduced an express statutory provision dealing with post insolvency interest. That's another change. Not from bankruptcy where such a provision did exist, but from liquidation where it didn't.

The third point, the statutory provision expressly dealt with the priority of post insolvency interest in the statutory Waterfall, as you would expect. It provided it was payable after proved debts had been paid in full and before any surplus was used for any other purpose.

Now, that reflected the position in both bankruptcy and corporate insolvency prior to 1986. Although in relation to liquidation, it was a matter of judge-made law, because we didn't have a specific statutory provision.

The fourth point, creditors are entitled to interest for the period after the commencement of the administration for so long as their debts are outstanding. What that does is identify the period for which post-insolvency interest is paid and requires the calculation to take into account any dividends received during the course of the insolvency.

In other words, the period starts with the commencement of the administration, and you have to take into account the dividends which had been paid, the rule doesn't seem to have.

Fifth, as you know, creditors were entitled to post-insolvency interest on two alternative bases. We say, essentially combining previous bankruptcy and liquidation regimes.

Sixth, reference to the rate applicable to the debt apart from the administration was intended effectively to reflect, to preserve, the prior position in a liquidation. To codify it. In other words, to ensure that creditors were entitled to a full entitlement



before the surplus was paid for any other purpose.

The judge relied on the fact that we now have an express statutory rule which refers to the rate applicable to the debt apart from the administration. We say, a process essentially of reflecting in a statute the underlying entitlement to payment in full can't somehow cause Bower v Marris to disappear. If you were entitled to it, the fact that it's now been codified, reflected in the rules, can't change that.

Seventh point, the reference to the Judgments Act rate was intended to ensure that creditors received interest as if they had a judgment, which -- unless statutes expressly provides otherwise -- permits the applicable of the principal in Bower v Marris.

So, we say, if one has in mind a draftsman who is familiar with prior regime, familiar with section 132, familiar with the 1883 Act, familiar with the prior position in liquidation, there's nothing in the wording of rule 2.88(7) and (9) that one can see that enables one to conclude that he intended to disapply the principle.

Now, the final point I want to address is the relevance or irrelevance of appropriation. The judge dealt with this in his judgment, at paragraphs 144 to 150.



We have five points in relation to this. The first point is: the principle in Bower v Marris does not depend on the actual or implied intention of the relevant parties and rules of appropriation are irrelevant. That's what the Lord Chancellor expressly stated, as you've seen in Bower v Marris itself. The reference authorities 1, tab 6, it's page 355, at the bottom.

Instead, the rule is an equitable rule of fairness which concerns the taking of an account, for the purposes of calculating interest. It's a fund calculation rule. It's a way of calculating the amount of interest to be paid. Appropriation has nothing to do with the principle. Indeed, principle operates where there has been no appropriation because the payments have been made by operation of law.

In a sense, it's easy to hold that the rules of appropriation are irrelevant. If they were relevant-- the principle would operate in this way: essentially, it would say payments have been paid by process of law, therefore they haven't been appropriated, they've been paid generally on account.

The question then of what happens is for the creditor to decide. You would then have to ask each creditor: how have you appropriated the payments?



Wentworth's argument is it all depends on appropriation. So you have to look at and apply those rules, which logically would mean, as I say, you have to ask creditors: so how have you appropriated dividend payments that you received?

Because only then would you know how much interest to pay.

That was a suggestion which Wentworth actually made at one stage, not pursued now. The simple answer is: it's a general equitable rule and it applies regardless. It's a general equitable rule which operates because it's regarded as fair and just, and that's the long and the short of it.

LADY JUSTICE GLOSTER: It couldn't be said against you, could it, that the rule provides, in effect, a statutory appropriation? It's a principle rather than an interest.

MR DICKER: That is indeed what the judge held.

LADY JUSTICE GLOSTER: I mean, in essence.

MR DICKER: What's interesting is: if you go back to every single case that has ever considered this point before his, says, "Well, no, actually, that's not in fact how you analyse it". The dividends were paid to ensure pari passu distribution but they were paid by operation of law. So you treat them, effectively, as having paid

generally on account. The question then is: you have a surplus, how do you approach things now?

We say in that situation you are not in any way subverting the effect of the statute in applying Bower v Marris. What the statute does is effectively say: look, if there is a shortfall everyone has to receive 100 pence in the pound on their approved debts and they have. The question now --

LORD JUSTICE PATTEN: Why isn't that a rule? I mean, what's the magic in talking about rules by analogy, rules of appropriation? Because that's a form of appropriation, it's just a different rule, that's all.

MR DICKER: Yes, and we agree with that.

I think, as I understand the argument, the argument is that if you go back to the cases, when you read Bower v Marris and later cases, and they describe what's happening, they often describe the calculation as involving a notional reallocation of dividends, interest due. It's the word my learned friend focuses on. He says, "It only works if at the date of the dividend there was in fact interest which was due, and there isn't under the statute rules because it comes in for the first time when there's a surplus".

We say, the short reason for that is you have to read the comments in context. Those cases were all



talking about cases where the creditor did have an underlying right to interest. So if you want to describe what's going on, it would be perfectly natural to say, "I'm appropriating it to interest which was due at that stage". It doesn't necessarily mean it's a necessary requirement for the principle to operate. We say it isn't. Whittingstall v Grover is one indication where they couldn't find a debt which was due, find interest which was due. Attorney General of Canada v Confederation Trust is another example. So there's no magic in interest having been due at the relevant date. The most one can say is, "That is a fair description of how the principle operates in a case where, whether by contract or statute, interest was due as at that date".

It's also important, we say, to bear in mind that even in a contractual situation, the operation of the principle involves what might be called something of a fiction. The payments are treated as having been made in respect of accrued interest, although they were in fact paid in respect of principle.

Now, if that's right, the only question is really the extent of the fiction or the deeming. If the principle entitles you to say, "You have made a payment in respect of a proved debt, that is in respect



principal, nevertheless we can notionally treat it as having been applied first in relation to interest". Why is that deeming permissible that a further deeming or fiction of saying, "And if necessary we'll treat the interest as having been due at the relevant date", why is the former permissible and the latter not? Again, we say: no reason.

So, in our respectful submission, the judge was wrong in the conclusion he reached on issue 2. And in the consequential declaration, at 3. Correct answer is: interest is to be calculated in accordance with principle in Bower v Marris, treating dividends which have been paid as having been applied, first, in the payment of interest and, second, to principal.

That's all subject to your Lordships that I was proposing to say on Bower v Marris.

LADY JUSTICE GLOSTER: Thank you.

MR DICKER: I reassure you, although I have now only dealt with one out of the total of 17 issues in this appeal, I am, I think, pretty much where I expected to be at this the point.

LADY JUSTICE GLOSTER: You are up to speed, are you?

MR DICKER: Yes, so it will follow that some of the others are rather shorter.

Can I turn next to deal with connected issue which



concerns compound interest. It's the next one on the list of issues. It's declaration 8 and issue 3. You can see, from the list of issues, the declaration the judge made was:

"Where statutory interest is payable at a rate applicable to the debt apart from the administration and such rate is a compounding rate accrued statutory interest does not continue to compound following the payment in full of the principal amount through dividends."

It has echos of the issue which, at one point, troubled Mr Justice Mervyn Davis in Lines Brothers 2, although it's arising in a different context. The context is compound interest.

The judge -- again, for your note -- dealt with this in his judgment, paragraphs 19 to 26. Perhaps if you turn that up. It's in part of core bundle 1, tab 2. 23 is 19 to 26. The sub-issue we are concerned with is in paragraph 26. Just to explain the context, issue 3 concerned the reference to the rate applicable to the debt apart from the administration. In particular, the reference to the word "rate". The main issue raised by issue 3 was: did the word "rate" refer just to the numerical percentage rate or also to the mode of calculating the rate at which interest accrued on

a debt.
LADY JUSTICE GLOSTER: What, rest and things?
MR DICKER: Yes, or compound interest or anything else which could be encompassed in the word "rate". So Wentworth initially argued: the reference to rate was simply to the numerical percentage rate.
The judge held that wasn't right, and he gave -- and in fairness to Wentworth, by this stage they abandon this stance, so it was common ground that the judge agreed. He said, in 20:
"The parties are agreed the rate applicable to the debt apart from the administration in 2.88(9) refers not only to a numerical percentage rate of interest but, also, to the mode of calculating the rate which interest accrues on a debt, including the compounding of interest."
He set out his reasons.
Just picking up one of those reasons, because it will be relevant to the sub-issue, the third reason he gave, in paragraph 24, was that:
"As counsel for the administrators put it in their skeleton argument, the country approach results in a creditor receiving a sum by way of interest that is neither one thing nor the other. It's neither the judgment rate nor the full contractual entitlement, but



is rather an unprincipled middle ground with no foundation in logic or law."
So, in other words, if you say someone can have interest at 10 per cent but deny him his contractual right to compound interest, then you are not ending up with the full contractual entitlement, you are ending up with an unprincipled middle ground with no foundation in logic or law. The sub-issue is dealt with in 26. This is issue that is relevant on this appeal. 26:
"The administrators raised a sub-issue on which the parties are not agreed. On the basis the rate applicable to the debt apart from the administration includes a compound rate and assuming the answer to issue 2 is that statutory interest is calculated on the basis of allocating dividends first to the production of principle, [in other words I'm wrong on Bower v Marris] does accrued statutory interest continuing to compound following the payment in full of the principal amount through dividends. If not, does the creditor have a non-provable claim in respect interest that would have continued to compound on a contractual basis following payment in full of the principal amount."
So this is essentially assuming rate applicable to the debt, apart from the administration, includes a right to compound interest. The question is: over



what period are you entitled to compound interest? Does the right to compound interest essentially stop, and does the amount of your interest become frozen when proved debts have been repaid in full? Or if the full amount hasn't been paid by that date, which it won't have done, will interest continue to compound thereafter?
The judge held the answer was the former, not the latter. So this was another situation in which he said the way in which the rules operate essentially mean that creditors don't get their full entitlement.
Outside of administration, compound interest would obviously continue to accrue until the whole principal and interest had been paid. Not so, the judge said, under the rules.
The reason he gave, summarised at the end of 26, he says:
"I consider [some seven lines up] interest does not compound following the payment in full of the principal amount, because under the terms of rule 2.8 itself, interest, whether simple or compound, is payable only for the period that the proved debt, or part of it, is outstanding."
LADY JUSTICE GLOSTER: So that's very similar reasoning to what he said in relation to the previous issue.



MR DICKER: Yes. Essentially, you have to work out what's happened so far, and what's happened so far is dividends have been made which are paid, proved debts in full. His rules provide for compound interest at the rate applicable. It is essentially only for the period whilst the proved debt was outstanding.
LORD JUSTICE PATTEN: Is this Re Lines without Bower v Marris?
MR DICKER: It's a variant on Re Lines. It has written echoes of -- but obviously in the context of compound interest, rather than Bower v Marris.
LORD JUSTICE PATTEN: Yes. But does that matter that it's compound interest? If Bower v Marris doesn't apply, so you are looking at a requirement under the rules that you apply the dividends, firstly to the payment of the principal, as the judge found, then what difference does it matter whether it's simple or compound interest? I mean obviously it matters in amount, but what's the difference in principle?
MR DICKER: There's not. The same, I think, issue of construction arises essentially in both.
LORD JUSTICE PATTEN: Yes.
MR DICKER: Obviously the context is slightly different, and the points one can make on construction are slightly different. The answer the judge came up with does

produce a rather odd result. I mean if one goes back to the point he makes in paragraph 24, "unprincipled middle ground", the consequence of his judgment is that there is essentially, we would submit, an unprincipled middle ground that his judgment has achieved. He says the phrase "the rate applicable to the debt" includes a right to compound interest. But the way he applies it doesn't actually give you the compound interest that that right would otherwise entitle you to. Because --

LORD JUSTICE PATTEN: Go on.

MR DICKER: -- you continue to get compound interest for a period, but only until you've repaid the principal -- for whatever reason it's frozen. Outside of insolvency, as I say, you would be entitled to say: I've got interest outstanding, which has not yet been paid, on which I would be entitled to compound interest, the judge says not under the rules.

LORD JUSTICE PATTEN: But I mean it is being paid as statutory interest, yes? It's compound, because that's the appropriate rate to apply to statutory interest? It's the same debate, yes?

MR DICKER: It's very similar, yes.

LORD JUSTICE BRIGGS: But his argument hangs everything on one aspect of his construction, doesn't it; namely that 2.88(7) only gives you something when there is some part



of the principal outstanding. So if a non-Bower v Marris accounting led to a conclusion there was no principle outstanding, but quite a big slug(?) of interest, you wouldn't fail to get compound interest because of any other defect to the formula, save for it just not being a period when there is any right to statutory interest.

MR DICKER: And it does lead to this oddity: the judge says interest does not compound following the payment in full of the principle amount:

"... because under the terms of rule 2.88(7) interest whether simple or compound is payable only for the period proved ..."

So imagine the situation, according to the judge, dividend payments are made and they pay off proved debts principal in full. There's an amount of interest outstanding which stops running. Now assume that you haven't paid proved debts in full, there's £1 of principal still outstanding. On the judge's approach, at that stage still owed £1 of principal, so the shutters haven't come down. In addition to the £1 of principal you are entitled -- you haven't yet been paid -- compound interest up to that date, and compound interest will then continue to run on the £1 plus the accrued interest unless and until it is paid.



So one has this bizarre situation which, according to the judge, that will say are you entitled to compound interest. It does not work in the way compound interest normally work, in the sense that it stops running not when principal and interest is repaid, it stops running just when principal is repaid. But for some reason if you leave £1 outstanding it's continuing to compound.

Again, with the greatest respect to the learned judge he has treated this as essentially a consequence of his construction of the wording of 2.88(9). He hasn't sought to address issues like this. He doesn't appear to have considered why the legislature might have wanted to give you half of the rights you were entitled to by way of compound interest, or why the legislature would have wanted compound interest to continue to run, provided £1 of principal was still outstanding but not if that final pound is --

LADY JUSTICE GLOSTER: Could you give us -- I'm not saying now -- but tomorrow, just one page of some worked examples on this. Because that would I think illustrate the point, certainly for me. Because the differences could be quite extreme, couldn't they?

MR DICKER: They can be. And given the amount of money and the amount of time involved in this case, the sums in relation to almost all of these issues are huge. I mean



there's one issue in relation to leap year, you take, whether it's 365 days or whatever, which, I think, at one stage the judge asked, "Do I really need to decide this? Is there much involved?" and was told, I think it's tens of millions, turn on the one day.

LORD JUSTICE BRIGGS: I'm not sure my Lady is asking for a worked example which was raised months ago. (Inaudible) just a simple one.

MR DICKER: We will try to.

LADY JUSTICE GLOSTER: And if there are different situations, depending on when precisely you are paid in the history, that would just illustrate it for me.

MR DICKER: I'm sure we could do that.

LADY JUSTICE GLOSTER: Nothing too complicated.

LORD JUSTICE PATTEN: I'm not absolutely clear what you are contending for as being the correct application of the rule in relation to a case where compound interest is in full(?). I mean, this is all on the hypothesis you are wrong about the first issue we've just dealt with. So that the judge's construction of 2.88(7), so far as Bower v Marris at least is concerned is correct, principal first.

MR DICKER: I think this issue is still relevant even if I'm right on Bower v Marris, because compound interest would give you additional sums as well. I think, although no

doubt those more mathematically inclined behind me will tell me if I'm wrong, but I think the other way round may matter less; in other words, if someone is entitled to compound interest, it may be he doesn't need Bower v Marris. If someone gets Bower v Marris they still have an additional benefit if he's entitled to compound interest --

LADY JUSTICE GLOSTER: It seems to me the judge is deciding it on both scenarios in paragraph 26, that he's right and that he's wrong. So I would be interested to have one example on the hypothesis that he was right, and one on the hypothesis that he was wrong, explaining why this point still matters to you.

MR DICKER: Yes. I'm sure we can produce that in time for tomorrow.

On the construction point, I've made the point in relation to (inaudible) and doesn't make sense. From a construction point of view, we say that the judge is right in terms of the wording of the rule, it says you receive interest in respect of your debts for the period they are outstanding. When you apply those words in the context of compound interest, you need to take into account the logic of compound interest, which is essentially that interest is effectively treated as it's capitalised, it's treated as if it was part of the



principal. It doesn't make sense in that context to say: you've been paid everything so your debt is no longer outstanding, therefore no further interest should run. If you do say that then you are necessarily negating the right to compound interest which you have essentially just said is reflected in the rules.

LORD JUSTICE PATTEN: But I mean, those debts in the relevant rules I think we all accept are the debts that you are able to prove for. So they're not going to include this claim for interest.

MR DICKER: Well, the debt which is proved for will not include post-insolvency interest, that's right.

LORD JUSTICE PATTEN: Exactly.

MR DICKER: If you say that the creditor is nevertheless entitled to compound interest on that debt, then when you get to the stage of distributing the surplus you look at what has happened since the date of administration. You have principal -- let's assume no accrued interest up to the date of administration -- principal proved. From that date, apart from the administration, compound interest accruing on the principal.

LORD JUSTICE PATTEN: Yes.

MR DICKER: Is that interest effectively being treated as capitalised? When you try and determine for the



purposes of this rule for what period the debt is outstanding, during which they ought to be entitled to compound interest, we say the answer is easy, because given the nature of compound interest the debt effectively only ceases to be outstanding when both principal and interest has been paid. The contrary conclusion, as we say, doesn't make any sense. There is no sense in the legislature saying: we'll give you this right but for a period only which does not reflect the underlying right. And certainly no sense in the legislature saying: you can continue to have compound interest mounting up on the interest which has so far accrued provided only liquidator keeps back £1 of principal and ensures that he doesn't pay all debts in full.

LORD JUSTICE PATTEN: Speaking myself I'm not sure this isn't just another example, if you like, of why you say the principle in Bower v Marris ought to apply in this situation. I mean, once you are working on the hypothesis it doesn't apply and the judge has that point right, I think as a matter of construction of the rule it becomes much more difficult for the reasons my Lord has indicated to run this argument.

MR DICKER: There a separate argument of construction which I've made. Can I put it this way: I accept that if we



are right on Bower v Marris then this obviously becomes a lot easier. I don't accept if we're wrong on Bower v Marris this issue necessarily goes as well.

And as I say, issue 3 is important for those creditors with the right to compound interest because Bower v Marris even if it does apply doesn't give them as much as compound interest would.

LADY JUSTICE GLOSTER: Right. So that's section J of your skeleton.

MR DICKER: Yes. There's a further question the judge refers to right at the end of 26, is the one I want to turn to next, where he says in the last sentence, second half:

"This sub-issue does not therefore arise. In any event, for the reasons given in relation to issue 2A I will hold that a creditor will not have a non-provable claim of the type identified."

So the next pair of issues are issue 2A, which involves declarations 5 and 6. Dealing with each of these in turn, starting with declaration 5, one looks at that on the list of issues:

"If and to an extent the statutory interest paid for a creditor on his proved debt under 2.88(7) is less than the amount of interest to which that creditor would otherwise have been entitled in respect of that debt,

the creditor does not have a non-provable claim for the difference."

So the issue arises in this way: we say that rule 2.88 is intended to reflect creditors' full entitlement, whether in respect of Bower v Marris, whether in respect of compound interest or otherwise. But assume we are wrong about one or all of those aspects, the question is whether or not the shortfall in the interest which a creditor is owed constitutes a non-provable claim payable after interest under 2.88, but before any distribution is made to the subordinated debt or the shareholders, potentially along with every other non-provable claim.

LADY JUSTICE GLOSTER: You say this arises even if you have lost down the line previously?

MR DICKER: Yes. The issue only arises if I'm --

LADY JUSTICE GLOSTER: I can see that.

MR DICKER: If I have lost then we say we have a non-provable claim to the balance --

LADY JUSTICE GLOSTER: Even though the judge has said the statutory scheme foreclose you -- or precludes you.

MR DICKER: Our submission, and the reason why we say we have such a claim, is because the judge was wrong to hold that 2.88 was a an exclusive code. There are two issues in a sense: what does 2.88 mean? The judge could



have been right in relation to that. The other question is: is it an exclusive code? And the judge could have been wrong on that question.

LADY JUSTICE GLOSTER: And if it's not an exclusive code even if he's right on Bower v Marris you have this non-provable claim.

MR DICKER: Correct. It does make a difference in the sense at this stage of the argument it only matters to a creditor with something that would rank as a non-provable claim. So if he has a contractual right to interest, he's not paid in full under 2.88, he may have a non-provable claim. If he has an underlying statutory right to interest not paid in full, again he may have a non-provable claim.

But the one group who this stage of the argument does not assist are creditors who have no underlying rights to interest. His only right to interest is under 2.88(9); namely, at the Judgment Act rate, whether or not they have a claim to interest.

LORD JUSTICE PATTEN: So this a reversion to your contractual rights, essentially, at the tail end of the distribution process.

MR DICKER: Yes. This operates actually very like the regime that used to operate in liquidation prior to 1986 where the court held if you don't get paid in full



through the process of proof, you reverted to your contractual rights, you are then paid in full. The only difference is you now have, in addition to payment of proved debts, you have an express provision dealing with post-insolvency interest, which comes out first before you get to non-provable claims.

LORD JUSTICE BRIGGS: Is it common ground that if you have one it's on the same step of the Waterfall as the currency conversion claim, for example?

MR DICKER: I don't know whether it's common ground. It's certainly our submission that it is. We're not suggesting that there is any ranking of non-provable claims. I mean there obviously was in section 132, but you would need, I think, to have an express statutory provision for that to occur. Otherwise, it's simply something that hasn't been paid through the process of proof and --

LORD JUSTICE BRIGGS: In general principle would (inaudible words).

MR DICKER: Yes.

LADY JUSTICE GLOSTER: So this is issues 2A, declarations 5 and 4, looking at your list of issues.

MR DICKER: Yes.

LADY JUSTICE GLOSTER: I'm not sure I understand the difference -- because it's 4.15 -- between declaration 5



and declaration 4.

MR DICKER: I've outlined five, which is essentially a claim by a creditor with an underlying right to interest to a non-provable claim of the first. The second is to try and deal with the position of a creditor who doesn't have an underlying claim to interest, who's only entitled to interest at the Judgment Act rate under 2.88(9). And the question is if the office-holder essentially takes ten years or so to pay that amount of interest provided for in the rules, is there any other way essentially of getting interest on that sum? I can deal with the second declaration 4 very shortly.

LORD JUSTICE PATTEN: So he has to get it out of the statutory provisions or nothing else, because he has no residual contractual right he can rely on.

MR DICKER: Correct. So it's a way of trying to build on to the right which 2.88(9) gives him, and says there are circumstances in which on the construction of 2.88(9) he is entitled to actually interest on interest.

LORD JUSTICE PATTEN: On interest.

MR DICKER: It's a short point and I can deal with it shortly.

LORD JUSTICE PATTEN: And the judge dealt with it quite shortly.

LADY JUSTICE GLOSTER: Yes. I think we meet deal with that

tomorrow morning. Because this court rises at 4.15.
MR DICKER: Sorry, I had understood we were sitting till 4.30.
LADY JUSTICE GLOSTER: We will not be sitting until 4.30. Thank you very much. Not before 10.30. There is no single judge application. There is simply a hand-down of the judgment. So everybody should be prepared to start at 10.30 although you have been listed not before 10.30.
MR DICKER: We will need to find 15 minutes of my submissions to excise before tomorrow but I am sure I can do that.
LADY JUSTICE GLOSTER: Thank you very much.
(4.15 pm)
(The hearing was adjourned until the following day at 10.30 am)