

<p>1 Wednesday, 18 February 2015</p> <p>2 (10.30 am)</p> <p>3 (Proceedings delayed)</p> <p>4 (10.40 am)</p> <p>5 MR JUSTICE DAVID RICHARDS: Mr Trower.</p> <p>6 Opening submissions by MR TROWER</p> <p>7 MR TROWER: May it please your Lordship. This is a trial of</p> <p>8 the joint administrators' application for directions in</p> <p>9 which we are dealing with tranche A of the three</p> <p>10 tranches which your Lordship directed at the last</p> <p>11 hearing.</p> <p>12 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>13 MR TROWER: My Lord, I hope you will forgive me if I don't</p> <p>14 go through the appearances. They are apparent in the</p> <p>15 skeleton arguments.</p> <p>16 MR JUSTICE DAVID RICHARDS: Indeed.</p> <p>17 MR TROWER: My Lord, can I raise just one small point of</p> <p>18 housekeeping, we do have a transcript so if we could</p> <p>19 have a short mid-morning and mid-afternoon break,</p> <p>20 I think the transcribers would appreciate that.</p> <p>21 MR JUSTICE DAVID RICHARDS: Yes certainly.</p> <p>22 MR TROWER: My Lord, the issues which are before your</p> <p>23 Lordship today are issues that go to three broad</p> <p>24 categories of question. The first category is issues on</p> <p>25 quantification of statutory interest, and those are</p> <p style="text-align: center;">Page 1</p>	<p>1 The third stage, tranche C, is issues 10 to 27 and</p> <p>2 those are essentially master agreement issues. They</p> <p>3 relate to cost of funding and issues relating to the</p> <p>4 construction of master agreements and foreign master</p> <p>5 agreements, foreign law master agreements.</p> <p>6 MR JUSTICE DAVID RICHARDS: Right.</p> <p>7 MR TROWER: The reason I mention those now is there is</p> <p>8 a question about -- as to whether some of the issues in</p> <p>9 relation to currency conversion which are before your</p> <p>10 Lordship today should actually now be put off to</p> <p>11 tranche C.</p> <p>12 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>13 MR TROWER: And we'll come on to that.</p> <p>14 MR JUSTICE DAVID RICHARDS: Yes, because as one got into</p> <p>15 issues in the 30s, I think, apart from 39, the written</p> <p>16 submissions, as it were, peter out a bit.</p> <p>17 MR TROWER: I think it's fair to say that there's a lack of</p> <p>18 enthusiasm.</p> <p>19 MR JUSTICE DAVID RICHARDS: I'm sure we'll all feel that</p> <p>20 way, but the point in a sense is that there is -- the</p> <p>21 point is made by number of parties that there isn't</p> <p>22 necessarily the information or evidence available at the</p> <p>23 moment and, but anyway we'll come to that.</p> <p>24 MR TROWER: We'll have to come to that at some stage.</p> <p>25 MR JUSTICE DAVID RICHARDS: Yes.</p> <p style="text-align: center;">Page 3</p>
<p>1 issues 1 to 8.</p> <p>2 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>3 MR TROWER: The second category is whether currency</p> <p>4 conversion claims exist in certain circumstances and the</p> <p>5 quantification of those claims. That broadly issues 28</p> <p>6 to 33.</p> <p>7 The third question is -- which is a freestanding</p> <p>8 point, is how to proceed where a single figure</p> <p>9 compromise has been reached on a series of claims by the</p> <p>10 same creditor, containing different interest rates and</p> <p>11 currencies, and there isn't actually on the face of the</p> <p>12 compromise any provision for how you approach it as</p> <p>13 between the various parts of the single claim.</p> <p>14 My Lord, just so your Lordship can put these in</p> <p>15 context, and I don't think we need to come back to them,</p> <p>16 save possibly in relation to an issue that we may have</p> <p>17 to think about a little bit later, the tranche B issues</p> <p>18 and the tranche C issues are as follows. The tranche B</p> <p>19 issues are concerned with post-administration contracts;</p> <p>20 in other words, agreement that were entered into by the</p> <p>21 company in administration with its creditors and the</p> <p>22 impacts that those contracts may have on the questions</p> <p>23 in relation to interest and foreign currency conversion.</p> <p>24 Those are issues 9, 34 to 36 and 38. That's the</p> <p>25 second stage of the trial.</p> <p style="text-align: center;">Page 2</p>	<p>1 MR TROWER: It's fair to say -- and I was going to make the</p> <p>2 point a little bit later, but I'll make it now -- it's</p> <p>3 blindingly obvious from the skeletons that parties are</p> <p>4 more concerned about the interest issues than they are</p> <p>5 about the other issues.</p> <p>6 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>7 MR TROWER: That's what the concentration is on.</p> <p>8 MR JUSTICE DAVID RICHARDS: I think issue 39 comes in with</p> <p>9 issues 1 to 8 really the company does.</p> <p>10 MR TROWER: It actually applies to both interest and foreign</p> <p>11 currency conversion.</p> <p>12 MR JUSTICE DAVID RICHARDS: I see.</p> <p>13 MR TROWER: But it's being dealt with -- and before</p> <p>14 I forget, does your Lordship have a copy of the trial</p> <p>15 timetable?</p> <p>16 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>17 MR TROWER: We suggest we deal with it together with issues</p> <p>18 2 and now 3 because it follows naturally on from some of</p> <p>19 the arguments on issue 2.</p> <p>20 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>21 MR TROWER: These issues arise in the context of an eventual</p> <p>22 surplus after payment of proved debts of between a low</p> <p>23 case on the latest progress report of 4.94 billion and</p> <p>24 a high case on the latest progress report of</p> <p>25 7.39 billion.</p> <p style="text-align: center;">Page 4</p>

<p>1 MR JUSTICE DAVID RICHARDS: Pounds sterling.  2 MR TROWER: In sterling.  3 Your Lordship gets latest progress report is in the  4 bundle. I'll just give it to your Lordship for the  5 moment. It's exhibited to Mr Lomas's eleventh witness  6 statement at volume 4, tab 2, and the relevant figures  7 are on page 9. They're as at the end of September.  8 MR JUSTICE DAVID RICHARDS: Right.  9 MR TROWER: So there will be another progress report fairly  10 soon but it's not out yet.  11 So that's the sort of range of figures we're talking  12 about. As your Lordship knows from the skeletons, the  13 Senior Creditor Group represented by Mr Dicker and York  14 represented by Mr Smith argue for result on each issue  15 which increases the distributions of statutory interest  16 to be made and increases the amount of any non-provable  17 claim; that is the broad thrust of what their positions  18 are. Whereas Wentworth, and Mr Zacaroli and Mr Allison,  19 argue for a result on each issue which increases the  20 prospects of recoveries available for the sub-debt and  21 ultimately the members.  22 Now, there's just one little wrinkle, in that  23 Wentworth, in particular, doesn't make arguments to that  24 end which it considers not to be arguable.  25 Your Lordship will have seen, for example, on one issue,</p> <p style="text-align: center;">Page 5</p>	<p>1 say, "This shouldn't be the agreed position"; so steps  2 have been taken to keep the website up-to-date every  3 time an agreed position has been reached so that people  4 can have an opportunity to come along and say to the  5 administrators, "Actually this argument shouldn't be  6 made". Actually nobody has said anything in light of  7 that. We will still take your Lordship through the  8 arguments just so your Lordship can see what they are,  9 because I will be asking for directions that the  10 administrators should proceed in accordance with the  11 agreed positions in any event.  12 MR JUSTICE DAVID RICHARDS: Yes.  13 MR TROWER: Against that background, shall we go -- the  14 easiest way of doing this may be simply to open the  15 application notice and I'll -- because that lists out  16 the issues.  17 MR JUSTICE DAVID RICHARDS: Yes.  18 MR TROWER: I'll go through the ones which are before your  19 Lordship. Issue 1 is the first one which actually has  20 become an agreed issue anyway, save for a small part.  21 This is whether on the true construction of 2.88(7) the  22 statutory interest is payable simple or compound, while  23 the rate applicable is the Judgments Act rate. So we're  24 talking about the Judgments Act rate context. And the  25 question is whether when you're looking at the rule</p> <p style="text-align: center;">Page 7</p>
<p>1 issue 3, in their position paper they advanced an  2 argument which they no longer advance in their skeleton.  3 There's one issue where for some other reason which the  4 administrators don't know, but it doesn't matter what  5 the reason is, they're not arguing, in what might be  6 thought to be that interest, which is why the  7 administrators have advanced an argument and that  8 relates to issue 8.  9 MR JUSTICE DAVID RICHARDS: Right.  10 MR TROWER: I am going to take your Lordship to the -- what  11 I thought I would do is just run through the issues  12 quite quickly to summarise what the parties' positions  13 are. It won't take me very long. Before I do that, can  14 I just say this, and we make this -- in paragraph 15 of  15 our skeleton argument we refer to this. There are  16 a number of issues which have become effectively agreed  17 positions, although what we have done is set out the  18 arguments for your Lordship and they can be found, and  19 we'll go there in due course, either in the position  20 paper or the skeleton, so your Lordship can see the way  21 they have developed.  22 The administrators were concerned, obviously, to  23 ensure that having become agreed positions in the  24 context of parties to this application any stakeholder  25 with an interest had an opportunity to come along and</p> <p style="text-align: center;">Page 6</p>	<p>1 2.88(7) the statutory interest is payable, simple or  2 compound.  3 I don't know whether your Lordship might find it  4 helpful, while we are going through the issues, to have  5 rule --  6 MR JUSTICE DAVID RICHARDS: It would be helpful. I meant to  7 bring my Red Book down.  8 MR TROWER: It's in the bundles as well. It's in 3 -- I'm  9 afraid I've been using the Red Book as well. It's in  10 3D, at tab 64. Mr Bayfield has thought your Lordship  11 might like a copy of the Red Book.  12 MR JUSTICE DAVID RICHARDS: Don't worry, I'll look at it  13 here. I appreciate it's a bit like the Bateman cartoon,  14 "The man who hasn't got his Red Book in present  15 company"! But I've got it here for the moment.  16 MR TROWER: I immediately see we have -- I think we have the  17 wrong one. Mr Bayfield's Red Book is the right version  18 because it's the version that was in force when the  19 company went to administration.  20 MR JUSTICE DAVID RICHARDS: Ah, yes, of course. Thank you.  21 That's a good point. It would be no use to me having  22 the current Red Book.  23 MR TROWER: We'll dig out a proper version.  24 MR JUSTICE DAVID RICHARDS: Yes, thank you very much.  25 MR TROWER: So if we look at -- if we do this exercise in</p> <p style="text-align: center;">Page 8</p>

<p>1 relation to the rules, we're looking at what the 2 Judgments Act rates means for the purposes of 2.88(7). 3 MR JUSTICE DAVID RICHARDS: Yes. 4 MR TROWER: Can it include compound interest or is it only 5 simple? All, agreed that the answer on the main issue 6 is simple, not compound, so this is one of the agreed 7 issues. 8 MR JUSTICE DAVID RICHARDS: Yes. 9 MR TROWER: Now, there is a deeply technical sub-issue 10 where -- which relates to the computing of the daily 11 rate and whether in computing the daily rate the 12 calculation should be made by reference to either a year 13 of 365 days or a year of 366 days, depending on whether 14 or not it's a leap year. On this point there's a short 15 point which we'll come to -- we certainly don't need to 16 deal with it now and we'll deal with it at a convenient 17 moment, subject to your Lordship. York says the rate 18 should always be quantified by reference to a year of 19 365 days. The administrators say that you look at 20 reality and if it's a leap year for the relevant period 21 of days, then you compute it by reference to a year of 22 366 days. 23 MR JUSTICE DAVID RICHARDS: Right. 24 MR TROWER: But we can come back to that because what I'm 25 going to suggest is there will be one or two</p> <p style="text-align: center;">Page 9</p>	<p>1 stand on that. 2 MR JUSTICE DAVID RICHARDS: Yes. 3 MR TROWER: There is -- we're now suggesting that 4 your Lordship then deals with issue 39 immediately 5 after. 6 MR JUSTICE DAVID RICHARDS: Yes. 7 MR TROWER: Issue 39 is this, and it's obviously towards the 8 back of the application notice on page 13: insofar as it 9 relates to statutory interest, is a creditor who is 10 entitled to statutory interest or indeed any 11 non-provable claim, but let's focus on statutory 12 interest for present purposes, entitled to compensation 13 for the time taken to discharge the claim and, if so, 14 does the compensation form part of statutory interest 15 and, if so, pursuant to the Judgments Act some claim in 16 damages, some form of cause of action in restitution or 17 in some other form? 18 Now, the SCG say that the answer to this is "yes" 19 and that the claim will be larger if they're wrong on 20 Bower v Marris because the consequence will be they will 21 have a bigger claim that falls in under issue 39. The 22 basis for saying that is that their existing rights are 23 not vindicated by the statutory scheme and that there is 24 a principle of payment of compensation in respect of 25 late distributions. That effectively what they say.</p> <p style="text-align: center;">Page 11</p>
<p>1 miscellaneous points like this which are probably better 2 picked up at the end. 3 My Lord, the second issue is one of the principal 4 issues which your Lordship is being asked to decide. 5 It's called in lots of places the Bower v Marris issue 6 but the question is: is statutory interest calculated on 7 the basis of allocating dividends first to the payment 8 of statutory interest and then principal, or first in 9 reduction of principal and then to payment of statutory 10 interest. 11 This makes quite a significant difference on the 12 figures. Your Lordship will find the figures identified 13 in Mr Lomas's eleventh witness statement at 14 paragraph 13. The overall difference is it's about 15 5.1 billion will be distributed by way of interest if 16 it's treated as applied principal first and about 17 6.4 billion if it's interest first. 18 Now, the SCG, the Senior Creditor Group, says that 19 once a surplus on payment proved debts arises, the 20 dividends previously paid are notionally treated as 21 being allocated to interest accrued as at the date of 22 the payment of the principal. That's their case. York 23 agrees. Wentworth say that there is no notional 24 re-allocation and the joint administrators agreed with 25 Wentworth on this point. So that's the way the parties</p> <p style="text-align: center;">Page 10</p>	<p>1 York agrees essentially on the basis there's a claim 2 for damages for late payment of money. 3 Wentworth disagrees and the joint administrators 4 disagree. 5 So that's basically how the parties stack up on 6 issue 39. 7 MR JUSTICE DAVID RICHARDS: Yes. 8 MR TROWER: Issue 3, which has come into this -- actually in 9 its substantive part an agreed issue -- is coming into 10 being considered as part of issues 2 and 39 in 11 circumstances I'll explain to your Lordship in just 12 a moment, but issue 3 is whether the rate applicable to 13 the debt, apart from the administration, and that's the 14 rate that one is referring to under paragraph 9 of rule 15 2.88 -- 16 MR JUSTICE DAVID RICHARDS: Yes -- 17 MR TROWER: -- refers only to a numerical percentage rate or 18 to a mode of calculating the rate at which interest 19 accrues, including compounding. 20 Now, the parties' position is that the Senior 21 Creditor Group has always contended that that rate 22 encompasses all factors relevant at the rate at which 23 interest accrues and therefore includes compounding. 24 York agrees but makes no submissions in its own right on 25 this point -- anyway at the stage of the initial</p> <p style="text-align: center;">Page 12</p>

<p>1 skeletons. Wentworth now accepts that that is the 2 position. They didn't at the time of their position 3 paper but they now accept that you compound -- that rate 4 includes the concept of compounding. 5 MR JUSTICE DAVID RICHARDS: Yes. 6 MR TROWER: We agree with the conclusion but we have 7 included in our skeleton a description as to why it is 8 that we have reached that conclusion and identified the 9 counter-arguments for your Lordship. 10 MR JUSTICE DAVID RICHARDS: Yes. Thank you. 11 MR TROWER: Now, in paragraph 31 there's a sub-issue that 12 arises in relation to issue 3 which arises in this way, 13 and it's identified in paragraph 1 of the joint 14 administrators' position paper. If the Senior Creditor 15 Group is wrong on Bower v Marris, so we're in the realm 16 of principal before interest and there's no notional 17 re-allocation, and if the rate applicable to the debt 18 apart from administration can include a compound rate -- 19 so everyone is right on issue 3 -- the sub-issue is 20 whether statutory interest continues to compound 21 following payment in full of the principal; if it 22 doesn't continue to compound following payment in full 23 of principal, whether the creditor has a non-provable 24 claim for interest that would have continued to compound 25 following payment in full of the principal.</p> <p style="text-align: center;">Page 13</p>	<p>1 reason why issue 3 is going to be looked at in the 2 context of issue 2. 3 MR JUSTICE DAVID RICHARDS: Yes, I see. 4 MR TROWER: Even though in substance it's agreed. 5 I just want to say this: for the avoidance of any 6 doubt we don't accept -- it won't surprise your Lordship 7 to hear -- that the fact that compounding is appropriate 8 when calculating the rate for the purposes of rule 9 2.88(9) has any effect on the rule in Bower v Marris. 10 They are two quite different questions. Compounding is 11 available as a matter of construction of rule 2.88(9) 12 because it is a factor which goes to the computation of 13 the rate that is permitted by rule 2.88 and properly 14 falls within the words. The rule in Bower v Marris is 15 not such a factor because it is inconsistent with the 16 true construction of rule 2.88. 17 I just wanted to make that point because there does 18 seem to be a bit of a misapprehension as to what is 19 actually the administrators said about why it was that 20 they were accepting what the answer was in relation to 21 issue 3. 22 Issue 4. This is: is the rate applicable to the 23 debt apart from the administration apt to include 24 a foreign rate of judgment interest? Again, we're still 25 looking at 2.88(9), the rate applicable to the debt,</p> <p style="text-align: center;">Page 15</p>
<p>1 MR JUSTICE DAVID RICHARDS: Yes. 2 MR TROWER: But that may not be the answer. 3 Now, the Senior Creditor Group's position on that 4 issue is that if it is wrong on Bower v Marris, 5 statutory interest does continue to compound following 6 payment in full. York doesn't make any substantive 7 submissions on the point and Wentworth disagrees. 8 Now, we don't take a position on this point in the 9 light of the fact that it appears to be being fully 10 argued. I'll come back to just one point I want to make 11 in relation to issue 3 that arises out of York's reply 12 skeleton, but the impact of the sub-issue, this 13 particular sub-issue, is quite significant. It's dealt 14 with by Mr Lomas in paragraph 17 of his witness 15 statement. The overall effect of interest continuing to 16 compound is about 450 million. 17 Now, in their reply skeleton York assert that what 18 they characterise as Wentworth's and the joint 19 administrators' concession on issue 3 is inconsistent 20 with their position on Bower v Marris. So they have 21 made that point in their reply skeleton. So in effect 22 they're saying there's an inconsistency between the 23 position that's taken on Bower v Marris and the position 24 which is taken on issue 3, namely that interest -- the 25 interest rate can include compounding. That's the</p> <p style="text-align: center;">Page 14</p>	<p>1 apart from the administration, is that apposite to 2 include a foreign rate of judgment interest? Now, the 3 Senior Creditor Group contends that it is apt to include 4 a foreign judgment rate and they contend that it is apt 5 to include it whether or not a foreign judgment has been 6 obtained before the administration. 7 York agrees with that. 8 Now, Wentworth takes the opposite position in 9 circumstances in which the creditor was entitled to sue 10 in a foreign jurisdiction but did not have a judgment at 11 the time of the administration. So the ground of 12 dispute between the parties is whether the rate 13 applicable to the debt apart from the administration is 14 capable of covering what would be a foreign judgment 15 rate of interest in circumstances in which a creditor 16 had an entitlement to sue for a foreign judgment but did 17 not in fact do so and couldn't do so because of the 18 administration. 19 MR JUSTICE DAVID RICHARDS: What about a contractual rate? 20 MR TROWER: A contractual right to sue -- 21 MR JUSTICE DAVID RICHARDS: A contractual rate of interest. 22 MR TROWER: The contractual rate of interest will -- well, 23 what, if there's a contractual entitlement to sue for 24 a foreign judgment? 25 MR JUSTICE DAVID RICHARDS: No. Sorry, perhaps I am reading</p> <p style="text-align: center;">Page 16</p>

<p>1 this too widely, but -- so the issue in issue 4 is  2 stated to be whether the rate applicable to the debt,  3 apart from the administration, is apt to include  4 a foreign judgment rate of interest or other statutory  5 interest rate?  6 MR TROWER: Yes.  7 MR JUSTICE DAVID RICHARDS: My question is: what about -- so  8 you have a debt in US dollars with a contractual  9 interest rate.  10 MR TROWER: Yes.  11 MR JUSTICE DAVID RICHARDS: Is that encompassed in this  12 question?  13 MR TROWER: No, it's not.  14 MR JUSTICE DAVID RICHARDS: Is it encompassed anywhere?  15 MR TROWER: It's relevant to this question --  16 MR JUSTICE DAVID RICHARDS: Yes, it is.  17 MR TROWER: -- in the sense that where you have a debt in  18 a foreign currency in that way it may well be that  19 there's an entitlement to sue for recovery of it in  20 a foreign jurisdiction.  21 MR JUSTICE DAVID RICHARDS: Well, sorry, I am just --  22 looking at 9, the point I think I'm on is this: the  23 interest rate, which is payable as statutory interest,  24 is the greater of the judgment rate under English law or  25 "the rate applicable to the debt apart from the</p> <p style="text-align: center;">Page 17</p>	<p>1 a foreign currency, is it right -- does the rule  2 envisage that that interest rate should be applied to  3 a sterling debt? Because obviously the proved debt is  4 a sterling debt.  5 MR TROWER: Yes.  6 MR JUSTICE DAVID RICHARDS: Now, that's what I -- I mean,  7 there is an apples and pears problem about applying  8 a rate of interest applicable to a debt in a foreign  9 currency to a debt in a different currency because  10 interest rates necessarily are linked to the currency in  11 question.  12 MR TROWER: Yes.  13 MR JUSTICE DAVID RICHARDS: So if I can take a slightly, no  14 doubt, extreme example but not one which is impossible  15 to imagine. Assume you have the Ruritanian piso and the  16 Ruritanian piso is regarded in the markets as being an  17 incredibly dodgy currency, likely to devalue as against  18 major currencies. That would then reflect itself, one  19 would imagine, in a high interest rate. And the point  20 of the high interest rate is to compensate against the  21 risk seen as real of a devaluation of that currency.  22 So let us suppose the Ruritanian piso one-year LIBOR  23 is 25 per cent; not impossible. You then convert your  24 Ruritanian piso debt into sterling as at the date of  25 administration, giving you a debt of £1 million. It</p> <p style="text-align: center;">Page 19</p>
<p>1 administration".  2 MR TROWER: Yes.  3 MR JUSTICE DAVID RICHARDS: So those words everyone agrees  4 those latter words, includes a contractual rate of  5 interest if it's greater than the judgment rate.  6 MR TROWER: Indeed yes.  7 MR JUSTICE DAVID RICHARDS: But they're quite general words  8 so it could include, it is said, a foreign judgment  9 rate.  10 MR TROWER: Yes.  11 MR JUSTICE DAVID RICHARDS: The question I'm asking is --  12 and I appreciate issue 4 is looking at foreign judgments  13 but what about contractual rates of interest?  14 MR TROWER: There isn't an issue before your Lordship on  15 that.  16 MR JUSTICE DAVID RICHARDS: Everyone agrees --  17 MR TROWER: Everyone agrees that if there's a contractual  18 entitlement to a rate which is greater than 8 per cent.  19 MR JUSTICE DAVID RICHARDS: All right. This is the one  20 area, and it is the only area, I think, where I think  21 I might want some more assistance.  22 MR TROWER: Yes.  23 MR JUSTICE DAVID RICHARDS: The reason for it is this: if  24 you have an interest rate of, let's say, 15 per cent, be  25 it a foreign judgment rate or a contractual rate, on</p> <p style="text-align: center;">Page 18</p>	<p>1 then takes five years for the administration to reach  2 the point of making, let's say, a single distribution.  3 Assume the Ruritanian piso LIBOR rate remains the same;  4 does that creditor get 25 interest -- interest at  5 25 per cent on the sterling debt? You're nodding,  6 Mr Trower.  7 MR TROWER: I'm not nodding in the sense --  8 MR JUSTICE DAVID RICHARDS: I have put out the problem.  9 I don't want to -- it's just an issue that I think needs  10 to be thought about.  11 MR TROWER: Yes. I'm nodding in the sense of understanding  12 the point.  13 MR JUSTICE DAVID RICHARDS: You understand the point. I'm  14 not expecting any response from anyone at the moment,  15 but I am -- it's a matter on which I shall require some  16 assistance in the course of this hearing.  17 MR TROWER: Yes.  18 MR JUSTICE DAVID RICHARDS: Let me put it that way; when you  19 get to it is another matter, and I appreciate it is not  20 something you have addressed.  21 MR TROWER: I am grateful for that indication.  22 MR JUSTICE DAVID RICHARDS: Yes.  23 MR TROWER: So just to summarise in relation to the actual  24 issue in relation to 4, the territory where there's  25 dispute between the parties is whether -- is the</p> <p style="text-align: center;">Page 20</p>

<p>1 circumstance in which a foreign judgment could have been 2 sought but was not obtained.</p> <p>3 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>4 MR TROWER: The only point I just want to add to this is in 5 our position paper, at page 14, we did identify that in 6 the event that the answer is that put forward by the 7 Senior Creditor Group and York, the joint administrators 8 would like guidance on the question of the factors which 9 satisfy the test. This is in: is the mere ability to 10 sue enough and when should it be assumed that the 11 foreign judgment was obtained?</p> <p>12 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>13 MR TROWER: Because they (inaudible).</p> <p>14 There is just for your Lordship's note some evidence 15 that gives a bit of colour to this point -- to this 16 issue which is contained in Mr Lomas's eleventh witness 17 statement, at paragraphs 22 to 25.</p> <p>18 MR JUSTICE DAVID RICHARDS: Right.</p> <p>19 MR TROWER: It just explains what the major jurisdictions 20 we're talking about are and what is the judgment 21 interest position in those jurisdictions.</p> <p>22 The next issue is issue 5. The issue here is 23 whether the comparison exercise, which is done for the 24 purposes of -- done under rule 2.88(9), requires 25 a comparison of the total amount of interest payable or</p> <p style="text-align: center;">Page 21</p>	<p>1 disaggregation in accordance with the agreement and what 2 the difference is for creditors if there were to be 3 aggregation, but he doesn't -- unlike the main issue 5, 4 he doesn't say that there are problems; he just sets out 5 what the consequences are.</p> <p>6 The next series of issues which I thought might be 7 more helpful to take together is issues 6 to 8.</p> <p>8 MR JUSTICE DAVID RICHARDS: Right.</p> <p>9 MR TROWER: These are all concerned with the concept of when 10 interest is payable from.</p> <p>11 MR JUSTICE DAVID RICHARDS: Oh, yes.</p> <p>12 MR TROWER: Issue 6 is dealing only with interest applicable 13 to the debt, apart from the administration.</p> <p>14 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>15 MR TROWER: For the purposes of making the rule 2.88(9) 16 comparison, i.e. comparing which is the greater, and the 17 question there is: is the rate taken from the 18 administration date, from the due date for the debt or 19 from some other date?</p> <p>20 Question 7 is: is statutory interest payable on the 21 contingent debt payable from the date of the 22 administration, the date the debt ceased to be 23 contingent, or some other date, having regard to whether 24 the debt was contingent at the time of the final 25 dividend or at the time of payment of statutory</p> <p style="text-align: center;">Page 23</p>
<p>1 only numerical rates. SCG say that it's the total 2 amount. York agree. Wentworth agree that where this 3 issues arises as a result of compounding it should be 4 the total amount. Our understanding is this issue is 5 essentially therefore agreed between the parties.</p> <p>6 There is some evidence which is set out in 7 Mr Lomas's eleventh witness statement, at paragraphs 27 8 and 28, the practical problems that arise if the answer 9 is not as everybody has agreed.</p> <p>10 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>11 MR TROWER: There's then a sub-issue in relation to issue 5 12 which is dealt with in paragraph 40 of the position 13 paper. It's this: when comparing the Judgments Act rate 14 with the rate applicable, apart from the administration, 15 is the proved debt to be considered as a single debt or 16 do you just aggregate it into its component parts? 17 Which is a question which is relevant where part of the 18 debt bears contractual interest and part doesn't.</p> <p>19 The parties actually have all reached the same 20 position on this sub-issue as well, which is that 21 disaggregation is the correct approach.</p> <p>22 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>23 MR TROWER: Again, in Mr Lomas's eleventh witness statement 24 paragraph 29 and following, he explains some of the 25 practical consequences that flow if there is</p> <p style="text-align: center;">Page 22</p>	<p>1 interest?</p> <p>2 Question 8 raises exactly the same question in 3 relation to future debts.</p> <p>4 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>5 MR TROWER: Now, the Senior Creditor Group's position in 6 this group of issues is that in all cases interest is 7 payable from the date of administration, whether the 8 debt is present, future or contingent. That's their 9 broad thrust and York agree.</p> <p>10 Wentworth says that in relation to contingent debts, 11 interest is payable from the date on which the debt 12 actually arises. That's what they say, but they have 13 a different position in relation to future debts.</p> <p>14 The joint administrators say that the start date is 15 the date at which the debt falls due in relation to both 16 contingent debts and future debts, so we agree with 17 Wentworth on contingent debts but we stand alone on 18 future debts. We also say that where the applicable 19 interest is payable at the rate applicable to the debt, 20 apart from the administration, so in the easy case the 21 contract base, as opposed to the Judgments Act rate, it 22 must be also be the case that the interest has become 23 payable.</p> <p>24 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>25 MR TROWER: Now, the Senior Creditor Group also raise the</p> <p style="text-align: center;">Page 24</p>

<p>1 issue in their reply skeleton of differences in the 2 approach to when a liability is contingent for the 3 purposes of the outstanding test. So what they 4 illustrate in their reply skeleton is a range of 5 different circumstances in which a liability might or 6 might not be regarded as being contingent. I think 7 rather than getting into any great discussion of that 8 now, because it's not the time, I just want to make 9 clear what the administrators' position is. The 10 administrators' position is that a debt is outstanding 11 for the purposes of rule 2.88 from the moment at which 12 the creditor had a complete cause of action for its 13 recovery. That's what we say the question is, although 14 there is the extra point about where the applicable 15 interest is payable at the rate applicable to the debt, 16 apart from the administration. It must also be the case 17 that the interest has become payable.</p> <p>18 The practical impact on issue 7 is dealt with in 19 Mr Lomas's witness statement at paragraphs 34 to 40. So 20 he explains what the position is. The total impact in 21 respect of contingent claims is that an extra half 22 a billion, 0.5 billion, will be payable if contingent 23 claim interest dates back to the date of administration 24 and all claims are paid in full by September 2016.</p> <p>25 So that is what I was going to say about issues 6</p> <p style="text-align: center;">Page 25</p>	<p>1 currency conversion claims as separate and they support 2 Senior Creditor Group on issue 28. On this issue the 3 administrators are in the same position as the Senior 4 Creditor Group so we're on the Senior Creditor Group's 5 side of the argument on this one.</p> <p>6 Again, there is evidence -- Mr Lomas, paragraphs 51 7 to 55 -- which deals with the practical impact of this 8 particular issue and there's a range between 0.4 billion 9 and 0.9 billion.</p> <p>10 The next issue is issue 29. This is: does 11 a creditor have a currency conversion claim where he 12 receives statutory interest at the Judgments Act rate on 13 a sterling admitted claim which is less than the amount 14 that he would have got if the Judgments Act rate had 15 been applied to the underlying foreign currency claim?</p> <p>16 Now, the SCG says that the currency conversion claim 17 exists in its own circumstances but only if the creditor 18 is entitled to interest in a foreign currency at the 19 Judgments Act rate, absent the administration. It's 20 a very sort of limited context.</p> <p>21 York agrees. Broadly speaking, the joint 22 administrators agree as well.</p> <p>23 Wentworth say that absent the coincidence of an 24 entitlement to the Judgments Act rate there is no 25 currency conversion claim. So they're on the other side</p> <p style="text-align: center;">Page 27</p>
<p>1 to 8.</p> <p>2 We then move on -- as I said at the beginning 3 my Lord, your Lordship is likely to be troubled with 4 those issues, more than any of the others.</p> <p>5 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>6 MR TROWER: We then move on to the essential currency 7 conversion claim ones and just to go through them fairly 8 quickly as to what the position is.</p> <p>9 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>10 MR TROWER: Issue 28 is the first one: should the 11 calculation of a currency conversion claim take into 12 account the statutory interest paid? That's the 13 question. The Senior Creditor Group says "no". 14 Wentworth says "yes". York has a slightly more 15 elaborate position in relation to this issue. All I'm 16 going to do is invite your Lordship just to look at 17 paragraph -- to note paragraph 208 of York's skeleton 18 argument which describes it as having a primary case and 19 a secondary case. Its primary case is essentially that 20 interest is brought into account for the purposes of 21 calculating a currency conversion claim based on the 22 assumption that they're correct on issue 4, i.e. that 23 a foreign judgment rate is available, even if the 24 judgment isn't obtained.</p> <p>25 If they're wrong on issue 4, they treat interest and</p> <p style="text-align: center;">Page 26</p>	<p>1 of the argument on that one.</p> <p>2 Issue 30: does a creditor have a currency conversion 3 claim where he receives statutory interest at the rate 4 applicable, apart from the administration, on a sterling 5 admitted claim which is less than the amount he would 6 have got if that rate had been applied to the underlying 7 currency conversion claim?</p> <p>8 So this is now all are agreed on this, that the 9 answer to this question is "yes".</p> <p>10 Issues 31 and 32 are issues which go to the question 11 of whether currency conversion claims can arise under 12 particular contracts. The joint administrators have 13 always taken a completely neutral position on these 14 issues, but there is a debate at the moment which is not 15 yet resolved between the Senior Creditor Group and 16 Wentworth as to whether either issues 31 or issue 32 can 17 be resolved on this application and, if so, when. The 18 Senior Creditor Group say that issue 31 can't be 19 considered without further evidence and shouldn't be 20 dealt with at all. But if it is to be dealt with, it 21 should be dealt with now, that's their latest position.</p> <p>22 Wentworth say that issue 31 doesn't require further 23 evidence, can be resolved as a question of construction, 24 but that the agreements are governed my New York law and 25 therefore should be dealt with as part of tranche C.</p> <p style="text-align: center;">Page 28</p>

<p>1 That's where we're now moving to on Wentworth's 2 position. 3 MR JUSTICE DAVID RICHARDS: I see. 4 MR TROWER: Both parties, as I understand it, both parties, 5 are agreed that issue 32 can't be resolved on this 6 application. 7 MR JUSTICE DAVID RICHARDS: Right. 8 MR TROWER: Now, it may be that the parties' position in 9 relation to issue 31 and 32 have become slightly more 10 refined by the time we get to them, which won't be until 11 the beginning of next week, at the earliest. 12 MR JUSTICE DAVID RICHARDS: Right. 13 MR TROWER: But that's where we are on those at the moment. 14 Issue 33 -- we only have two more to go, issue 33 15 and issue 37 -- this a question of whether a currency 16 conversion claim can be established where there has been 17 a transfer of the provable debt. We summarise the 18 parties' position in our skeleton at page 80. As we 19 understand it, either this issue should -- the position 20 is that either the issue should go altogether as it's 21 too fact-specific and insufficient evidence has been 22 produced, or it should go into tranche B, so we're 23 still -- it may be that the matter will crystallise 24 a little bit further by after the weekend, but we'll 25 have to come back to that, I think, at the appropriate</p> <p style="text-align: center;">Page 29</p>	<p>1 We agree with the Senior Creditor Group on this. 2 It's not quite clear to me exactly where Wentworth 3 have got to on this. I think -- I had initially thought 4 that they were taking a different approach and they say 5 that the claim must be divided into the underlying 6 claims. But we're not quite sure where they are on this 7 and it may be that we can get a little bit more clarity 8 before we get to this, which will be presumably at the 9 end of the hearing, as it's the last issue. 10 MR JUSTICE DAVID RICHARDS: Yes. 11 MR TROWER: York takes no issue on this. 12 Now, there is evidence in Mr Lomas's eleventh 13 witness statement, again paragraph 66 to paragraph 75, 14 which gives your Lordship an explanation as to the 15 circumstances in which this all came to pass. 16 So, my Lord, that was a fairly quick gallop through 17 the issues to show what the parties' position is in 18 relation to each of them. 19 MR JUSTICE DAVID RICHARDS: Thank you very much. 20 MR TROWER: Against that background we have set out the 21 skeleton -- a skeleton of the timetable. 22 MR JUSTICE DAVID RICHARDS: Yes. 23 MR TROWER: We haven't tried to be too prescriptive about 24 exactly how much each party's -- the time each party is 25 going to take, but we have agreed the total time and we</p> <p style="text-align: center;">Page 31</p>
<p>1 moment. 2 MR JUSTICE DAVID RICHARDS: Yes. 3 MR TROWER: Issue 37 is a completely freestanding issue. It 4 is the issue which arises where different claims with 5 different currencies or different rates of interest have 6 been compromised without indicating how much of the 7 compromised sum is attributable to each claim. 8 Now, this situation arises where an agreed claim is 9 lower than the total claim asserted by the creditor. 10 The Senior Creditor Group says their position, which is 11 a helpful place to start, is that if it's possible to 12 identify a consensus on the point, then that must 13 prevail. And that's obviously right; if you can 14 identify an agreement, that ought to prevail. If it's 15 not possible to identify a consensus, what should 16 prevail is the basis on which the joint administrators 17 did in fact admit the claim. That's what should be 18 the -- where it's not possible to reach that conclusion, 19 there should be a pro rata approach. 20 MR JUSTICE DAVID RICHARDS: Yes. 21 MR TROWER: We broadly speaking agree with the joint 22 administrators on this. 23 MR JUSTICE DAVID RICHARDS: With the senior creditors. 24 MR TROWER: Sorry, we are the joint administrators: we agreed 25 with ourselves all the time, of course!</p> <p style="text-align: center;">Page 30</p>	<p>1 have -- which ought really to be allocated to each issue 2 and the order in which the submissions are going to be 3 made which is what we have in the timetable at the 4 moment. 5 MR JUSTICE DAVID RICHARDS: Yes. 6 MR TROWER: That's intended to reflect where the parties are 7 amongst other things on the various issues. 8 It may well be that some of the issues which, even 9 at the time this timetable was produced, looked as if 10 they were going to require a little bit of time are not 11 going to require very much time at all. That may enable 12 there to be a little bit of slippage in relation to the 13 two principal blocks, which are 2, 3 and 39, and 6 to 8. 14 Not that I'm encouraging, nor I'm sure your Lordship 15 will be encouraging, more to be said than is necessary. 16 MR JUSTICE DAVID RICHARDS: No. 17 MR TROWER: Right. 18 Mr Bayfield has just handed up to me a note and I'll 19 tell your Lordship before I forget. The correct version 20 of rule 2.88, which is the one that is applicable, is in 21 volume 3D at tab 63. 22 MR JUSTICE DAVID RICHARDS: Thank you. 23 MR TROWER: It's the third rule that's included there. 24 MR JUSTICE DAVID RICHARDS: Yes. Thank you very much. 25 MR TROWER: That's the one, as your Lordship has seen,</p> <p style="text-align: center;">Page 32</p>



<p>1 version enforced 1 April 2005 to 5 April 2010.</p> <p>2 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>3 MR TROWER: So, my Lord, that was all I was proposing --</p> <p>4 pretty much all I was proposing to say by way of</p> <p>5 opening, unless there's anything I can help</p> <p>6 your Lordship with?</p> <p>7 MR JUSTICE DAVID RICHARDS: No, thank you very much,</p> <p>8 Mr Trower. That's fine.</p> <p>9 So Mr Dicker.</p> <p>10 Opening submissions by MR DICKER</p> <p>11 MR DICKER: My Lord, the first group of questions as</p> <p>12 your Lordship knows, are 2, 3 and 39 and I was going to</p> <p>13 start with a few points by way of introduction,</p> <p>14 essentially to introduce the big themes.</p> <p>15 As your Lordship knows, question 2 asks how one</p> <p>16 calculates the amount of interest payable to creditors</p> <p>17 out of the surplus under rule 2.88. Again, as</p> <p>18 your Lordship knows, in our submission the answer can be</p> <p>19 shortly stated; we say that the calculation is performed</p> <p>20 by notionally treating prior dividends as having been</p> <p>21 allocated first to the payment of accrued interest at</p> <p>22 the dates of payment of the relevant dividends and then</p> <p>23 the reduction of principal; in other words, in</p> <p>24 accordance with what has been referred to as the rule in</p> <p>25 Bower v Marris. My Lord, we say this the way in which</p> <p style="text-align: center;">Page 33</p>	<p>1 excluding the rule. Indeed, arguments to the contrary</p> <p>2 were repeatedly raised and repeatedly rejected prior to</p> <p>3 1986. It was raised and rejected when the issue was</p> <p>4 first considered in bankruptcy in Bower v Marris itself,</p> <p>5 and was raised and rejected in 1869 and 1870 in the</p> <p>6 course of four well-known cases relating to the Humber</p> <p>7 Ironworks Company and the Joint Stock Discount Company</p> <p>8 As your Lordship will see, exactly the same argument</p> <p>9 eliciting exactly the same response has also been raised</p> <p>10 and dealt with in every other Commonwealth jurisdiction</p> <p>11 we have been able to identify.</p> <p>12 Those authorities consistently hold that when one</p> <p>13 comes to calculate the amount of interest to be paid out</p> <p>14 of the surplus, you treat the prior dividends as having</p> <p>15 notionally been applied first in respect of interest and</p> <p>16 then principal. In other words, what has been done is</p> <p>17 a calculation. You're not rewriting history. You're</p> <p>18 not saying that prior dividends were in fact paid in</p> <p>19 respect of interest and nor are you now seeking to apply</p> <p>20 the surplus towards principal. Obviously we'll develop</p> <p>21 those point in due course, but the point of substance is</p> <p>22 that the rule in Bower v Marris provides a calculation</p> <p>23 methodology which proceeds on a notional allocation of</p> <p>24 prior dividends to interest.</p> <p>25 We say that approach is equally applicable to the</p> <p style="text-align: center;">Page 35</p>
<p>1 the relevant provisions of the statutory scheme have</p> <p>2 been construed and held to operate since, certainly in</p> <p>3 relation to bankruptcy, 1824, and companies winding up,</p> <p>4 since 1869.</p> <p>5 The reasons why the courts have adopted this</p> <p>6 approach, we say, are obvious. It ensures that</p> <p>7 principal on which interest continues to run is treated</p> <p>8 as having been paid last and this way ensures that the</p> <p>9 creditors aren't prejudiced by delay in the payment of</p> <p>10 either dividends or eventually of the surplus and are</p> <p>11 entitled to received the amount of interest they would</p> <p>12 have been able to receive had the debtor not become</p> <p>13 subject to insolvency proceedings.</p> <p>14 Now, one might at this stage ask how this approach</p> <p>15 fits within the basic nature of the statutory scheme, in</p> <p>16 particular given that the statute proceeds on the basis</p> <p>17 that proved debts have already been paid in full, how</p> <p>18 can you calculate interest on the basis that they have</p> <p>19 not? My Lord, again, your Lordship will have seen this</p> <p>20 argument isn't a new one. Statutory regime has always</p> <p>21 required proved debts to be paid in full before any</p> <p>22 question of distributing the surplus can arise. This</p> <p>23 simply reflects the basic ranking that proved debts have</p> <p>24 priority over non-provable debts and distributions to</p> <p>25 shareholders. That fact has never been regarded as</p> <p style="text-align: center;">Page 34</p>	<p>1 calculation required by rule 2.88.</p> <p>2 The rule reflects what has been described in the</p> <p>3 cases as the "ordinary approach" or the "common justice</p> <p>4 approach". The references to the ordinary approach</p> <p>5 reflect the fact that outside of insolvency, absent</p> <p>6 a specific contractual or other requirement, a creditor</p> <p>7 can obviously ensure that any payments are applied first</p> <p>8 to interest and then to principal. The reference to it</p> <p>9 as reflecting common justice reflects the fact that, in</p> <p>10 an insolvency, the courts consider it would be wrong to</p> <p>11 allow the debtor to reduce its liability to interest by</p> <p>12 discharging principal first; in other words, to profit</p> <p>13 from the fact of insolvency.</p> <p>14 The way in which this is dealt with in the authority</p> <p>15 is by drawing a distinction between a company which is</p> <p>16 insolvent and the position in the event of a surplus.</p> <p>17 Your Lordship is obviously very familiar with the</p> <p>18 process of collective enforcement in relation to an</p> <p>19 insolvent company. If a debtor wants to receive</p> <p>20 anything, he effectively has to participate in that</p> <p>21 process and the moratorium prevents him from doing</p> <p>22 anything else. The basic process is of course that the</p> <p>23 assets of the debtor are realised and distributed</p> <p>24 pari passu in respect of proved debts; in other words,</p> <p>25 principal and interest to the date of commencement and</p> <p style="text-align: center;">Page 36</p>

<p>1 nothing beyond. It therefore necessarily follows, and 2 has always followed, that the amount of the proved debt 3 has to be paid in full before any question of 4 distributing the surplus arises.</p> <p>5 Now, there is no dispute obviously about any of 6 that. The critical issue is what happens in the event 7 the company turns out to be solvent? It's not a common 8 occurrence. No doubt it happened in this case, partly 9 as a result of the hard work done by the administrators 10 and their professional advisors. There aren't that many 11 authorities dealing with the situation, but those there 12 are consistently hold that the process of collective 13 enforcement was intended to ensure that the asset were 14 distributed pari passu in respect of proved debts. It 15 was not intended to prejudice creditors or to benefit 16 the debtor in the event of a surplus. In other words, 17 it's a matter as between creditors to ensure equal 18 treatment of creditors in respect of an insolvent 19 debtor.</p> <p>20 The authorities hold that in the event of a surplus 21 prior dividends in respect of proved debts treated as 22 having been paid, as they were by operation of law, not 23 as having involved a final appropriation; in other 24 words, they're treated as having been general payments 25 on account.</p> <p style="text-align: center;">Page 37</p>	<p>1 law, it's old law, inapplicable to the new regime. 2 Now, their position in their position papers was 3 that everything changed in 1986. In our reply position 4 paper we responded by saying that's rather odd because 5 if you look at the statutory provisions in relation to 6 bankruptcy prior to 1986, they are very similar to those 7 in the 1986 Act, running all the way back to 1824.</p> <p>8 My Lord, that seems to have prompted a change in 9 approach on the part of the administrators. The 10 administrators' contention is that you have to 11 distinguish between bankruptcy and a company winding up. 12 Bankruptcy, the rule in <i>Bower v Marris</i> was apparently 13 abolished, repealed -- whatever expression one wants to 14 use -- by the 1883 Act, so it ceased to operate in 15 bankruptcy from 1883 onwards. In relation to companies 16 winding up, they say the rule continued to operate until 17 1986. It was abolished by the 1986 Act in the context 18 of companies winding up.</p> <p>19 So one has this distinction between bankruptcy and 20 companies winding up.</p> <p>21 <i>Wentworth</i> in their reply skeleton argument appear to 22 take the same position. Paragraph 63, they say the 23 logic is that it was abolished in 1883 in bankruptcy, 24 1986 in companies winding up. What they say is that at 25 each the relevant date there was a fundamental change in</p> <p style="text-align: center;">Page 39</p>
<p>1 The cases say, given that those payments in 2 a surplus have been treated as having been general 3 payments on account, interest is calculated in the 4 ordinary way. In other words, the payments are treated 5 as having been applied in respect of notional interest 6 first and then principal.</p> <p>7 Now, the rule in <i>Bower v Marris</i> might be said to be 8 judge-made law, in the sense that it involves the courts 9 authoritatively determining the effect of the relevant 10 provisions of the statutory scheme. But, as 11 your Lordship knows, there is nothing unusual in that. 12 The same equally can be said, for example, about the 13 rule against double proof, various aspect of insolvency 14 set-off, the hindsight principle, the fact it's 15 retroactive, et cetera.</p> <p>16 My Lord, that's the Senior Creditor Group's position 17 in a nutshell.</p> <p>18 What about <i>Wentworth's</i> and the administrators' 19 positions? My Lord, as your Lordship will see, their 20 positions changed in a number of respects between their 21 position papers, their skeleton arguments and now 22 <i>Wentworth's</i> reply skeleton argument. One key point 23 concerns the position prior to 1986. <i>Wentworth</i> and the 24 administrators both accept the rule in <i>Bower v Marris</i> 25 applied prior to 1986. They say it's no longer good</p> <p style="text-align: center;">Page 38</p>	<p>1 the nature of the statutory provisions governing the 2 treatment of the surplus. My Lord, we'll obviously need 3 to have a look at the statutes and the history in due 4 course, but it's important to understand, we say, the 5 nature of the fundamental change that is said to have 6 taken place. Both <i>Wentworth</i> and the administrators 7 accept before this alleged change the effect of the 8 statutory scheme was that all creditors' non-provable 9 claims had to be satisfied in full, including in respect 10 of interest, before any distributions could be made to 11 shareholders. They accept that one aspect of that was 12 the rule in <i>Bower v Marris</i>; in other words, payments 13 being notionally attributed to interest before 14 principal.</p> <p>15 One can see that if your Lordship just turns up 16 <i>Wentworth's</i> skeleton argument, paragraph 50. My Lord, 17 just 49 and 50. 49:</p> <p>18 "... the so-called 'principal' or 'rule' is no more 19 than an application of the general rule applicable 20 between solvent parties that enables the creditor, 21 entitled to receive both principal and interest, to 22 appropriate payments made to it in discharge of interest 23 before principal.</p> <p>24 "Second, the application of that principle to the 25 calculation of interest payable from an insolvency</p> <p style="text-align: center;">Page 40</p>

<p>1 surplus depends upon the fact that the relevant 2 legislation preserved the underlying right of a creditor 3 with an interest-bearing debt to be paid in full, 4 suspending payment of interest as at the date of 5 commencement of the insolvency proceedings as a rule of 6 convenience only, such that on the emergence of 7 a surplus there was a remission to the creditors' 8 contractual (or other pre-existing) right to receive 9 interest as if there had been no insolvency." 10 So that, they say, is effectively the position in 11 bankruptcy prior to 1883 and in relation to companies 12 winding up prior to 1986. Before those two dates, 13 creditors were entitled to payment of their claims in 14 full and that's reflected in the statement that 15 creditors are remitted to their contractual rights; in 16 other words, are entitled to have those rights satisfied 17 in full. 18 Now, what is said is that everything changed such 19 that from 1883 and 1986 respectively onwards, the 20 provisions dealing with interest contained a complete 21 and exhaustive code. To use Wentworth's words, those 22 provisions occupied the field. 23 Your Lordship will see the consequence of that if 24 your Lordship goes on in Wentworth's skeleton argument 25 to paragraph 123. Picking it up three lines down:</p> <p style="text-align: center;">Page 41</p>	<p>1 I take it, essential to it? I mean, it will be for 2 Mr Zacaroli to explain, but one can see that it's not 3 essential to say there's no remission to contractual 4 rights for the purposes of non-provable claims in order 5 to sustain the argument that Bower v Marris does not 6 apply to rule 2.88? 7 MR DICKER: Your Lordship is absolutely right theoretically. 8 It is of course possible to have two different types of 9 argument, the first one of which says just looking at 10 the rules as a matter of construction, that is 11 inconsistent with Bower v Marris. 12 MR JUSTICE DAVID RICHARDS: Yes. 13 MR DICKER: The second is effectively to say the rules are 14 a complete and exhaustive code, and not merely do you 15 not get interest calculated in accordance with 16 Bower v Marris under rule 2.88, you never get it because 17 it's inconsistent with the complete code. 18 MR JUSTICE DAVID RICHARDS: Yes. 19 MR DICKER: My Lord, there are elements of both arguments in 20 certainly the position papers where Wentworth appears to 21 have come out in its skeleton argument, certainly its 22 reply skeleton argument, to essentially say, "It's 23 a complete code; that's how you have to construe it". 24 Having construed it -- and they construe it in a way 25 that excludes Bower v Marris, and there's no option of</p> <p style="text-align: center;">Page 43</p>
<p>1 "It is Wentworth's position, as explained in the 2 sections of the skeleton argument that deal with issues 3 2 and 39, that rule 2.88 provides a statutory 4 entitlement to post-administration interest which 5 substantively alters creditors' rights in respect of 6 interest accruing after the date of administration and 7 there is thus no scope for remitting creditors to 8 contractual rights in the event that the statutory 9 regime gives them less in respect of interest accruing 10 post-administration than they would have recovered had 11 there been no insolvency." 12 So from the relevant date, whatever it was, we have 13 a new, complete and exhaustive code that operated 14 effectively to limit creditors to whatever the rules 15 provided by way of interest and to discharge such other 16 claims as they might otherwise have had. 17 One consequence of that, it is said, is that from 18 the relevant date interest now has to be calculated in 19 the opposite way from that in which it was previously 20 calculated; in other words, it's now necessary to 21 calculate interest on the basis that prior payments are 22 applied in respect of principal and you have to 23 calculate interest on that basis. 24 MR JUSTICE DAVID RICHARDS: The submission made here 25 although it supports their position on issue 2, is not,</p> <p style="text-align: center;">Page 42</p>	<p>1 having it back in. 2 Obviously from their perspective, if it comes back 3 in as a non-provable claim, then so far as the 4 subordinated creditors and the shareholders are 5 concerned, there may not be that much difference for 6 them. 7 MR JUSTICE DAVID RICHARDS: Yes. 8 MR DICKER: My Lord, the administrators' position as we 9 understand is to broadly similar effect. 10 So far as this argument is concerned, in other words 11 the complete and exhaustive code argument is concerned, 12 we say that the arguments made are similar to argument 13 which your Lordship heard in relation to Waterfall 1 and 14 rejected in the context of non-provable claims relating 15 to claims denominated in foreign currencies. 16 We also say it's contrary to principle and 17 authority. The extent of the argument now being made -- 18 can I just show your Lordship one paragraph from 19 Wentworth's reply skeleton. If your Lordship goes to 20 its reply skeleton, paragraph 3. 21 MR JUSTICE DAVID RICHARDS: Yes. 22 MR DICKER: My Lord, in paragraph 3 they say -- I should 23 probably start with 2: 24 "Many of the 'fundamental principles' which underpin 25 much of the SCG's argument ... are incorrect or</p> <p style="text-align: center;">Page 44</p>

<p>1 overstated." 2 3: 3 "It is, for example, not a fundamental principle 4 that all of the liabilities of the company that existed 5 prior to insolvency must be satisfied in full before any 6 assets are distributed to shareholders. The correct 7 principle is that all of the liabilities which are 8 required to be satisfied by the statutory scheme ... are 9 satisfied in full before anything is paid to those lower 10 down the priority waterfall, e.g. holders of 11 subordinated debt or equity." 12 My Lord, we say it is of course true that the 13 statute provides how the assets of the debtor are to be 14 dealt with and the courts must do what the statute says, 15 but we also say it has always been a basic aspect of the 16 statutory scheme that creditors' underlying claims are 17 not affected by the process of collective enforcement 18 and are entitled to be satisfied in full before any 19 distributions are made to members. That fundamental 20 aspect of the scheme needs to be taken into account when 21 construing rule 2.88. 22 MR JUSTICE DAVID RICHARDS: Mr Dicker, I wonder whether that 23 might be a convenient moment for the shorthand-writers? 24 MR DICKER: It would be very convenient. 25 MR JUSTICE DAVID RICHARDS: I'll rise for five minutes.</p> <p style="text-align: center;">Page 45</p>	<p>1 discussions leading up to the 1986 Act to suggest that 2 legislative might have wanted to repealed rule in 3 relation to companies winding up. 4 Their position, as we understand it, is simply this 5 is what the rules require and they both say in terms 6 that considerations of policy are irrelevant. 7 My Lord, just showing your Lordship that, if 8 your Lordship just goes to the administrators' skeleton 9 argument, paragraph 79. 10 MR JUSTICE DAVID RICHARDS: Yes. 11 MR DICKER: Paragraph 79, the administrators say: 12 "... considerations of policy (to which the SCG 13 appeals) have no role in the court's task of construing 14 the statute: the only relevant policy is the policy that 15 is to be ascertained from the meaning of the words the 16 legislature has actually chosen to use ..." 17 We say you cannot construe the Act without having 18 regard to fundamental features of it held by the cases 19 to have existed essentially since the regime first came 20 into existence. 21 My Lord, so far as Wentworth is concerned, 22 paragraph 60 of their reply, if your Lordship has that. 23 They say: 24 "The SCG and York both contend ... no policy reason 25 that creditors should not be able to appropriate the</p> <p style="text-align: center;">Page 47</p>
<p>1 (11.50 am) 2 (Short break) 3 (11.55 am) 4 MR JUSTICE DAVID RICHARDS: Mr Dicker. 5 MR DICKER: My Lord, we say it would be very surprising 6 indeed if the legislature intended such a fundamental 7 change as represented by the 'occupy the field' 8 argument, even more surprising if it had chosen to make 9 that change otherwise than expressly and unequivocally. 10 My Lord, that, we say, echoes a point your Lordship 11 made in the Waterfall 1 judgment at 154 where your 12 Lordship said: 13 "It might be thought surprising if the substitution 14 under the insolvency legislation of statutory interest 15 that non-provable contractual interest reduced the 16 liability of members." 17 My Lord, we say there's nothing in the wording of 18 the legislation which indicates such a change, nor do 19 Wentworth or the administrators seek to explain why the 20 legislature might have wanted to achieve this result. 21 They have been unable to find any authority which 22 contains any criticism of the previous regime. Indeed 23 as your Lordship will see, the authorities repeatedly 24 refer to the rule as being required as a matter of 25 fairness and justice, nor is there anything in the</p> <p style="text-align: center;">Page 46</p>	<p>1 dividends paid in the administration in respect of their 2 proved debt towards interest first and then to 3 principal. As explained above, this misses the point as 4 rule 2.88(7) contains a complete statement of the extent 5 to which statutory interest is payable on proved debts 6 from an insolvency surplus." 7 In other words, "This is simply what the statute 8 says. Don't spend too much time asking why". 9 My Lord, Wentworth's position appears to be even 10 more extreme in one sense because the contention appears 11 to be that the repeal of the rule was probably not 12 consciously intended. The reason I say that is because 13 they make the point in paragraph 84 of their skeleton, 14 that there is no evidence that the drafters of the court 15 report for the 1986 legislation had Bower v Marris in 16 mind at all. 17 My Lord, presumably they would also say that 18 distinguished members of their committee were also 19 ignorant of the Humber Ironworks, given that that case 20 expressly applied Bower v Marris, as your Lordship will 21 see, in 1869. 22 My Lord there's one further point in relation to the 23 argument that the statutory provisions contain 24 a complete and exhaustive code and that's this: it's 25 inconsistent with Wentworth's and the administrators'</p> <p style="text-align: center;">Page 48</p>

<p>1 own position on this application. My Lord, it's 2 inconsistent with their position in relation to 3 question 30. Can I just remand your Lordship? Question 4 30, if your Lordship has it, asks whether there exists 5 a non-provable claim against LBIE where the total amount 6 of interest received by a creditor, applying a rate 7 applicable to the debt apart from the administration on 8 a sterling admitted claim, when converted into the 9 relevant foreign currency on the date of payment, is 10 less than the amount of interest which would accrue 11 applying the rate applicable to the debt apart from the 12 administration to the original foreign currency claim. 13 So question 30 is concerned with a creditor whose 14 claim is denominated in a foreign currency and who has 15 a contractual right to interest. 16 Rule 2.88(7) requires interest to be paid on proved 17 debts which have been converted into sterling as at the 18 date of administration. One of the features of 2.88(7) 19 is it's payable in respect of the sterling proved debts. 20 So assume that sterling has depreciated and the 21 result is that the payments made out under 2.88(7), 22 being calculated by reference to the sterling equivalent 23 as at the date of administration, are less than the sums 24 that the creditor would have been entitled to receive by 25 way of interest on his foreign currency claim. The</p> <p style="text-align: center;">Page 49</p>	<p>1 MR JUSTICE DAVID RICHARDS: I see, yes. Right. 2 MR DICKER: My Lord there's then the second issue 3 your Lordship referred to earlier. The mere fact that 4 there's not a complete and exhaustive code doesn't 5 necessarily determine what 2.88(7) and (9) mean. One 6 still has the question of whether or not Bower v Marris 7 is consistent with the terms of 2.88(7) and (9). 8 MR JUSTICE DAVID RICHARDS: Yes. 9 MR DICKER: That raises the question, well, what is it about 10 the rule -- about rule 2.88(7) and (9) that's 11 inconsistent with the rule in Bower v Marris? 12 The argument that Wentworth originally advanced was 13 that the effect of the regime was that dividends were 14 appropriated when they were made to the payment of 15 provable debts. So you have paid a dividend that was 16 appropriated in respect of a provable debt, i.e. 17 principal, therefore they said it necessarily followed 18 that when you calculate interest you have to calculate 19 interest on the basis it's the principal that has been 20 paid, rather than interest. 21 My Lord, your Lordship will see that in their reply 22 position paper if your Lordship goes to file 1, tab 9, 23 in the same file as the application, paragraph 13. 24 MR JUSTICE DAVID RICHARDS: Yes. 25 MR DICKER: Paragraph 13, Wentworth says:</p> <p style="text-align: center;">Page 51</p>
<p>1 question then arises: does the creditor have 2 a non-provable claim for the difference? 3 MR JUSTICE DAVID RICHARDS: Yes. 4 MR DICKER: The answer by all parties to your Lordship to 5 that question is "yes"; in other words, Wentworth and 6 the administrators accept that a creditor can get more 7 than the interest which rule 2.88 gives him because at 8 least in one situation where the interest he gets isn't 9 sufficient to discharge interest that he's entitled to 10 on his foreign-denominated claim he has a non-provable 11 currency conversion claim in respect of the shortfall. 12 My Lord, we say it follows, therefore, even on the 13 administrators' and Wentworth's own case, 2.88(7) is not 14 a complete and exhaustive code. 15 MR JUSTICE DAVID RICHARDS: I suppose the administrators say 16 that it's a complete code for the payment of statutory 17 interest, leaving aside questions of non-provable claims 18 which are themselves not the subject of provision in the 19 Act or rules? 20 MR DICKER: Well, my Lord, certainly Wentworth go further 21 than that. 22 MR JUSTICE DAVID RICHARDS: As you have shown me. 23 MR DICKER: And our understanding is that the 24 administrators' position is the same as Wentworth's on 25 this.</p> <p style="text-align: center;">Page 50</p>	<p>1 "At paragraph 18(2) of its position paper, York 2 suggests that neither the Act nor the 1986 rules provide 3 for the appropriation of dividend payments to principal, 4 (i.e. the proved debt) in advance of interest accruing 5 post-administration. This is wrong. Since rule 2.88(7) 6 applies only when all provable debts have been paid, it 7 necessarily follows that dividends are appropriated -- 8 when they are made -- to the payment of provable debts, 9 (i.e. principal and pre-administration interest)." 10 So at the stage of Wentworth's reply position paper, 11 the argument was essentially the process of collective 12 enforcement involves the payment of dividends in respect 13 of principal and it therefore necessarily follows that 14 interest has to be calculated on that basis because the 15 principal has been discharged. 16 My Lord, again, we pointed out in our reply position 17 paper that precisely that argument, as your Lordship 18 will see, was raised in numerous of the earlier 19 authorities and Wentworth's position accordingly 20 changed. 21 If your Lordship goes to Wentworth's reply skeleton, 22 you'll see what we understand to be the latest position. 23 Wentworth's reply skeleton is paragraph 25 and the 24 important one is sub-paragraph (3). 25 MR JUSTICE DAVID RICHARDS: Yes.</p> <p style="text-align: center;">Page 52</p>

<p>1 MR DICKER: 25, they say:  2 "In summary, once the principle actually applied in  3 Bower v Marris is understood, it is clear that:  4 "(1) The principle has no relevance to the  5 construction of rule 2.88(7), which involves the  6 question at what rate, for what period, on what  7 principal sum, is interest to be paid from the  8 insolvency surplus in administration;  9 "(2) The requirement that the creditor has  10 a contractual or other pre-existing right to interest in  11 order for the principle to operate at all, is clearly  12 fundamental ...  13 "(3) The SCG is mistaken in asserting that  14 Wentworth's argument is one that was rejected in  15 Bower v Marris. The argument rejected in Bower v Marris  16 was that the payments of dividends did constitute an  17 appropriation towards principal. Wentworth's case does  18 not depend on showing there has been any particular  19 appropriation."  20 So the first argument was it's been appropriated to  21 principal. That's what they said in their reply  22 position paper. The latest appears to be: actually  23 that's not right; they don't have to show that dividends  24 were in fact paid and discharged to principal, it's  25 a question of calculation under the rules.</p> <p style="text-align: center;">Page 53</p>	<p>1 The second is Wentworth's latest case, which is, even  2 assuming that's not the case, assuming that  3 Bower v Marris was correctly decided so far as it's  4 said, the payments are by process of operation of law,  5 they are treated as general payments on account, they  6 didn't in fact discharge principal. Even accepting  7 that's right, Wentworth's case is when one comes to  8 constitute rules, nevertheless, the terms of the rules  9 make it plain that the calculation that's now required  10 is different from that which was previously performed.  11 My Lord, obviously, as Mr Trower, my learned friend,  12 has already indicated to your Lordship, the consequences  13 of who is right on this argument are considerable.  14 On a very general level, if Bower v Marris does not  15 apply, the creditors will be prejudiced, in the sense  16 that the amount of interest that they would have  17 received had the debtor not become insolvent will not be  18 satisfied in full by the payments made pursuant to the  19 statutory scheme. It also means that they will be  20 prejudiced, obviously, by delay in the payment of  21 principal or eventual surplus.  22 My Lord, the other side of the coin is of course  23 that shareholders will benefit. The amount the  24 creditors would otherwise have been entitled to receive  25 if the calculation had been done by treating payments as</p> <p style="text-align: center;">Page 55</p>
<p>1 My Lord, we do respectfully say this is not just  2 a forensic point, although it's certainly that.  3 Wentworth needs to establish the legislature clearly  4 intended to create a complete and exhaustive code on  5 their first argument or, alternatively, intended to  6 abolish the effect of the rule on their second. We say  7 indications such as this strongly suggest that they  8 cannot say this is something the legislature did clearly  9 intend.  10 My Lord, we're less clear about the administrators'  11 position on this particular issue, but if your Lordship  12 goes to the administrators' skeleton, the paragraph 107,  13 sub-paragraph (2), picking it up at paragraph 107,  14 sub-paragraph (2), five lines down, they say:  15 "When dividends are applied to pay the debts proved  16 the principal is discharged in part. Contractual  17 interest will no longer continue to accrue on the part  18 of the debt that has been paid. There is no contractual  19 right to interest on principal that has been  20 discharged."  21 So, as we understand it, we have to meet two  22 different arguments at this stage. The first is an  23 argument that when dividends were paid they did in fact  24 discharge principal and therefore interest must be  25 calculated on the basis that the principal was paid.</p> <p style="text-align: center;">Page 54</p>	<p>1 applied first in respect of interest, that amount would  2 be distributed in said to shareholders, and shareholders  3 would also benefit from any interest earned on the  4 surplus before it is eventually distributed. We say, in  5 short, that can't be right. That essentially is  6 a litmus test for the administrators' and Wentworth's  7 submissions. If that is the outcome and that is the  8 outcome which they accept follows from their positions,  9 then we say that does not reflect the effect of the  10 statute.  11 My Lord, a few brief words in relation to the  12 relevance of question 3 in this context. Question 3 is  13 concerned with the meaning of the phrase "the rate  14 applicable to the debt, apart from the administration".  15 We say this provision is intended to ensure creditors  16 receive the full amount of interest which they would  17 otherwise have been entitled to receive had the company  18 not gone into administration.  19 My Lord, as my learned friend Mr Trower indicated,  20 there are certainly passages in the administrators'  21 skeleton which make exactly the same point. Can I just  22 show your Lordship three paragraphs.  23 The first is paragraph 124 of the administrators'  24 skeleton, where they say:  25 "Consequently the 'rate applicable to the date apart</p> <p style="text-align: center;">Page 56</p>

<p>1 from the administration' in rule 2.88(9) is the whole 2 amount of post-administration interest, taking into 3 account every factor that determines the total amount of 4 money that is payable by way of interest, including the 5 numerical percentage and the way in which that numerical 6 percentage is to be applied (i.e simple or compound). 7 The payment of statutory interest at that rate mirrors 8 the superior underlying contractual rights or other 9 rights of those creditors who are the recipients of 10 statutory interest calculated on that basis." 11 My Lord, 115, if your Lordship turns back two pages, 12 they say: 13 "As a matter of construction, the word 'rate' is apt 14 to include every factor that determines the total amount 15 of money that is payable by way of interest for 16 a particular period of time, including the numerical 17 percentage and the way in which that numerical 18 percentage is to be applied ..." 19 My Lord, one of the factors determines the total 20 amount of interest that a creditor can receive is 21 obviously whether or not he's entitled to say or to 22 proceed on the basis that the payments he receives go 23 first to interest or first to principal. The third 24 paragraph, if your Lordship goes back to paragraph 65, 25 deals with this point: The administrators say in 65:</p> <p style="text-align: center;">Page 57</p>	<p>1 a phrase of words which, according to the 2 administrators' own skeleton, naturally encompasses the 3 rule in <i>Bower v Marris</i>. 4 My Lord, Wentworth's position is rather different. 5 Wentworth's original position on question 3 and the 6 reason why it was included was that, according to 7 Wentworth, "rate" meant simply the numerical percentage 8 Now, one can see if they had been able to make that good 9 they might have been able to argue, "Well, rate simply 10 means 10 per cent, 12 per cent, whatever, that's all it 11 means, therefore there's no room for rule in 12 <i>Bower v Marris</i> in the phrase", and that would have 13 supported their overall case. 14 Now, my Lord, I think the day before we were due to 15 exchange skeleton arguments Wentworth wrote indicating 16 that they were abandoning that argument, accepting it 17 was effectively unarguable, and the administrators agree 18 the administrators don't view the argument as arguable 19 either. 20 Wentworth's latest position is, "Okay, it's not just 21 limited to the numerical percentage, it also includes 22 compounding, but what it certainly doesn't include is 23 the rule in <i>Bower v Marris</i>". Now, that's an assertion 24 they make. It's not developed or explained but it 25 appears that for some reason the only factor which</p> <p style="text-align: center;">Page 59</p>
<p>1 "In short, in circumstances where creditors were 2 remitted to their contractual rights in the event of a 3 surplus in the liquidation, and in the absence of any 4 legislative provision requiring a different result, the 5 ordinary default rule, which would have applied in the 6 absence of a winding-up, would be applicable to govern 7 the calculation of creditors' entitlements. Creditors 8 were remitted to the package of rights that would have 9 applied in the absence of any liquidation, including the 10 default rule." 11 Now, this is obviously dealing with the position 12 before they say "everything changed". But in 65 they 13 are effectively saying one of the package of rights 14 which rule 2.88 now mirrors, one of the package of 15 rights is the default rule; in other words, the rule in 16 <i>Bower v Marris</i>. 17 My Lord, put another way, we say these passages in 18 the administrators' skeleton indicate no difficulty in 19 construing the phrase "the rate applicable to the debt, 20 apart from the administration" as effectively including, 21 as one factor, the rule in <i>Bower v Marris</i>. That's 22 precisely what the administrators say those words mean 23 Put another way, your Lordship may think it 24 surprising if the legislature had intended to repeal the 25 rule in <i>Bower v Marris</i> but had chosen to do so by using</p> <p style="text-align: center;">Page 58</p>	<p>1 appears not to have made its way into rule 2.88(9), 2 according to Wentworth, is the rule in <i>Bower v Marris</i>. 3 My Lord, there's very little I need to say by way of 4 introduction so far as question 39 is concerned. The 5 question logically arises after one has determined what 6 the relevant rules mean, as my learned friend Mr Trower 7 said, not merely questions 2 and 3 but other rules as 8 well. 9 My Lord, just so your Lordship knows, our two main 10 themes in relation to question 9 are, firstly, to the 11 extent that creditors' rights have not been satisfied in 12 full, once the rules have been construed, they have 13 a non-provable claim for the shortfall, and are entitled 14 to have that shortfall satisfied in full before any 15 distributions are made to shareholders. Now, if those 16 rights effectively include a right to compensation by 17 way of interest or otherwise, the amount they get 18 pursuant to rule 2.88 is less than the amount to which 19 they're otherwise entitled. We say that's 20 a non-provable claim like any other, just as 21 your Lordship in <i>Waterfall 1</i> held, where there was the 22 lacuna on the rules the shortfall ranked as 23 a non-provable claim. 24 My Lord, that, however, only deals with a situation 25 in which a creditor has some underlying entitlement to</p> <p style="text-align: center;">Page 60</p>

<p>1 compensation. One also needs to deal with the fact that 2 2.88(9) says that creditors are also entitled to 3 interest at the Judgments Act rate, whether or not their 4 debt otherwise carried interest.</p> <p>5 Our submission in relation to that is on the 6 construction of the rules, creditors' entitlement is 7 treated as payable from the date of the final dividend 8 on proved debts, treated as payable in the sense that it 9 constitutes a debt of LBIE's which has crystallised at 10 that stage.</p> <p>11 We're not alleging, just so everyone is perfectly 12 clear, that the administrators are in any way in breach 13 for having failed to distribute the surplus, but we say 14 that's a separate question, just as it is in relation to 15 an insolvent company. One can have a situation in which 16 it's perfectly plain whether a company is insolvent; it 17 owes a debt; it can owe a debt without the liquidators 18 or administrators being in breach for having failed to 19 pay dividends in respect of that debt because the 20 process of collective execution requires steps to be 21 taken.</p> <p>22 So we say -- and I'll deal with this obviously in 23 more detail in due course -- when one construes the 24 entitlement under 2.88(9) it effectively constitutes 25 a contingent right of creditors of a debt of LBIE's</p> <p style="text-align: center;">Page 61</p>	<p>1 in the light of the statutory history and also the 2 overarching principles governing statutory scheme. 3 My Lord, there is a reference -- I won't take 4 your Lordship to it -- that York have in their skeleton 5 to the decision of the House of Lords in Mills v HSBC, 6 paragraph 1, Lord Walker. Just so your Lordship has the 7 reference, it's bundle 1E/156A.</p> <p>8 MR JUSTICE DAVID RICHARDS: Right.</p> <p>9 MR DICKER: Now, we say one needs to start therefore by 10 looking at the position prior to the introduction of the 11 1986 Act and we have three basic propositions which, we 12 say, one derives from the previous regime.</p> <p>13 The first is that the features of the 1986 Act and 14 rules that Wentworth and the administrators rely upon 15 were equally features of the statutory regime before 16 1986.</p> <p>17 Secondly, in substance, the arguments of 18 construction that they now make based on those features 19 were made in respect of the previous regime and 20 authoritatively rejected.</p> <p>21 Thirdly, rejected because the courts construed the 22 statutory scheme as providing a mode of calculation for 23 interest which proceeded on the basis that dividends 24 were treated in the event of a surplus as having been 25 general payments on account and therefore to be applied</p> <p style="text-align: center;">Page 63</p>
<p>1 which crystallises when the final dividend on proved 2 debts has been paid. If that's right, then we say it 3 straightforwardly follows that if there's a delay in 4 payment, creditors are entitled to compensation for that 5 delay, in particular on the basis of Semptra Metals.</p> <p>6 My Lord that, I hope, was a helpful identification 7 of the main themes.</p> <p>8 MR JUSTICE DAVID RICHARDS: Thank you.</p> <p>9 MR DICKER: What I now propose to do is take your Lordship 10 through some of the detail. My Lord, I am conscious 11 that we have dealt with this fairly fully in our written 12 material.</p> <p>13 MR JUSTICE DAVID RICHARDS: Yes, but I have read, obviously 14 the arguments, but I've not gone into the underlying 15 authorities and --</p> <p>16 MR DICKER: My Lord, I was going to say I'm also conscious 17 that in the usual way your Lordship has not had very 18 long.</p> <p>19 MR JUSTICE DAVID RICHARDS: No. So don't -- it's helpful, 20 of course, to have all your arguments, but they don't 21 take the place of the oral exposition of the points.</p> <p>22 MR DICKER: My Lord, can I then turn to question 2. The 23 answer obviously depends on the construction effect of 24 the rules. I've made the point that question need to be 25 answered in the context of the Act and rules as a whole,</p> <p style="text-align: center;">Page 62</p>	<p>1 first in respect of interest, notional interest, and 2 then principal.</p> <p>3 My Lord, the regimes are different as between 4 bankruptcy, on the one hand, and company winding up, on 5 the other, and I need to deal with them separately. So 6 starting with bankruptcy for 1986 and beginning at the 7 beginning. The rule in Bower v Marris can be traced 8 back to the decision of Lord Hardwicke in the case of 9 Bromley v Goodere. Before turning it up, just so 10 your Lordship knows the statutory position at the 11 relevant time, we summarise it in our skeleton at 12 paragraphs 50 to 55.</p> <p>13 The statutes are in the bundles. I don't think we 14 need to turn them up.</p> <p>15 Your Lordship should note that at this stage there 16 was no express provision dealing with creditors' rights 17 to interest in the event of a surplus.</p> <p>18 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>19 MR DICKER: That said, the basic features of the regime were 20 already fully familiar ones and included concepts of 21 collective process of enforcement, pari passu 22 distribution of the bankruptcy estate in respect of 23 debts, a cut-off date for debts at the commencement of 24 the bankruptcy, a surplus right of creditors to payment 25 of any debts not satisfied by dividends out of any</p> <p style="text-align: center;">Page 64</p>



<p>1 surplus and the entitlement of the bankrupt to any 2 residue.</p> <p>3 The position in bankruptcy obviously did change in 4 a significant way in 1705. Bankruptcy in 1705 5 introduced the concept of discharge of the bankrupt and 6 that's one of the issues which Lord Hardwicke had to 7 consider in Bromley v Goodere.</p> <p>8 My Lord, can I ask your Lordship to take up 9 bundle 1A, tab 5.</p> <p>10 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>11 MR DICKER: I don't think your Lordship needs to go through 12 the detail of the facts. The short point is 13 your Lordship will see, from line 1, the debtor became 14 bankrupt in December 1711. Three lines further, 15 interest was allowed by the Commissioners only to 16 31 December 1711; in other words, at cut-off date of the 17 date of commission. Plaintiff's debtors paid various 18 sums, the result being, two lines further on, all the 19 creditors received 20 shillings and a pound and, when 20 the last was made, it appeared that Mr Gibson, one of 21 the assignees, had monies still in his hands. The 22 creditors sought an order that they were entitled to 23 interest.</p> <p>24 The judgment of the Lord Chancellor begins at the 25 bottom of that page. There are some preliminary</p> <p style="text-align: center;">Page 65</p>	<p>1 delaying their creditors and it would be an 2 extraordinary thing if the delay of payment should 3 prevent the creditors from having interest out of an 4 estate able to pay it and interest in all cases is given 5 for delay of payment."</p> <p>6 Then he says: 7 "I will consider this case first upon the old Acts 8 previous to the 4th and 5th of Queen Ann [that's the 9 1705 Act that introduced concept of discharge] and then 10 upon that statute."</p> <p>11 Your Lordship will see the first one he deals with, 12 13 Eliz. cap. 7. That's the 1571 Act. Again, 13 your Lordship doesn't need to turn it up. What's worth 14 noting is right at the bottom of 50, he says: 15 "The next direction in the Act is what the 16 Commissioners should do in regard to the debts. They 17 are directed to pay to every of the creditors a portion 18 rate like according to the quantity of his or their 19 debts."</p> <p>20 So that's the pari passu rule.</p> <p>21 Then he says: 22 "And the question is what debts are here meant? 23 I am of the opinion it means debts due at the time of 24 the bankruptcy or when the commission issued which is 25 the same [that's the introduction through case law of</p> <p style="text-align: center;">Page 67</p>
<p>1 discussions in relation to contribution monies which 2 creditors had to pay to get the commission, but over the 3 page, page 50, the first full paragraph, he says: 4 "That is agreed. The principal question therefore 5 is as to the demand of interest and I think that ought 6 to be paid likewise. It came before me originally upon 7 petition and even then my first apprehension was that it 8 would bear no great doubt, but as it was insisted there 9 was no just foundation for the demand and that if 10 I determined it that way my determination would have 11 been subject to no appeal, I chose to have it come 12 before me by way of bill."</p> <p>13 He then says he will take notice of certain 14 objections made not in relation to the merits. Your 15 Lordship can ignore those.</p> <p>16 Then going to four paragraphs from the end of that 17 page, he says: 18 "Having laid these things out of the case, I come 19 now to the main question whether creditors for debts 20 carrying interest by contract are entitled to have 21 subsequent interest and I think they are."</p> <p>22 He makes the general point: 23 "All the bankrupts are considered in some degree as 24 offenders. They are called so in the old Act and all 25 the Acts made are made to prevent their defeating and</p> <p style="text-align: center;">Page 66</p>	<p>1 the cut-off date]. To prevent disputes about the time 2 when he becomes a bankrupt, the Commissioners always 3 find in general that he was a bankrupt at the time of 4 commission issue but this construction must be confined 5 to cases where there is a deficiency, for it is then 6 only the creditors are to have a portion rate alike."</p> <p>7 In other words, already drawing the distinction 8 between the position in the event the debtor is 9 insolvent and in the event there's a surplus.</p> <p>10 Then he says: 11 "The Act goes on to take notice of the surplus which 12 it directs to be paid ...(reading to the words)... as he 13 should and might have done before the making of this 14 Act."</p> <p>15 Obviously this is before the concept of discharge.</p> <p>16 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>17 MR DICKER: In the next paragraph, he says: 18 "This shows the surplus to be paid over to the 19 bankrupt is only the surplus after the payment of the 20 whole debts ...(reading to the words)... when it might 21 have been recovered from him again by the creditors."</p> <p>22 My Lord, there's then reference to two further 23 statutes, 1603 and 1623. I think the only point to note 24 is, in the very next paragraph, he says: 25 "Thus, it stands upon the 13th of Eliz. The next is</p> <p style="text-align: center;">Page 68</p>

<p>1 the statute of Jac. 1 cap. 15, that has not much in it, 2 but the expression of full satisfaction in the clause 3 which gives the bankrupt the surplus and is penned in 4 these words." 5 So emphasising the concept of full satisfaction. 6 Then dropping to the paragraph which has the 7 number 79 in front of it: 8 "But then it is said the practice has been for the 9 Commissioners to ascertain the debts by computing 10 interest only to the time of issuing the commission and 11 that, being the contemporanea expositio, is to be relied 12 upon." 13 He then says: 14 "There is no direction in the Act for that purpose. 15 It is been used only as a best method of settling the 16 proportion among the creditors. They might have a rate 17 like satisfaction and it is founded upon the equitable 18 power given them upon the Act." 19 Again, distinguishing the effect of the process of 20 collective enforcement as between creditors, on the one 21 hand, and as between creditors and the debtor, on the 22 other. 23 Then towards the end of the page, at the bottom, he 24 says: 25 "I come now to consider it upon the 4th and 5th of</p> <p style="text-align: center;">Page 69</p>	<p>1 "But it is objected there will be a difficulty in 2 forming this decree. By this way creditors upon simple 3 contract may have a better satisfaction than creditors 4 by specialty. The specialty creditors cannot have more 5 than their penalties while creditors by notes carrying 6 interest will have their whole interest but no objection 7 arises on that account because it is a frequent case in 8 the disposition of trust assets." 9 In other words, creditors who are entitled to 10 continuing interest will then benefit over and above 11 those who aren't and, indeed, who don't have any right 12 to interest at all. 13 Then he deals with the position in relation to 14 set-off and what he essentially says, at the end, is: 15 "It is absurd to say they should stop interest on 16 a creditor's debt at the time of issuing the 17 commission" -- 18 MR JUSTICE DAVID RICHARDS: Sorry, where is that? 19 MR DICKER: I am sorry, just at the end of the next 20 paragraph: 21 "It is absurd to say they should stop interest on 22 the creditor's debt at the time of issuing the 23 commission and carry on interest on the bankrupt's 24 demand." 25 MR JUSTICE DAVID RICHARDS: Yes.</p> <p style="text-align: center;">Page 71</p>
<p>1 Ann cap. 17 ..." 2 That's the statute that introduced the concept of 3 discharge. His conclusion is that that doesn't affect 4 the position. 5 Your Lordship will see, over the page, the first 6 full paragraph: 7 "Consider therefore the effect of the discharge. 8 The certificate is not to operate as a discharge of the 9 fund before vested in the assignees but extend 10 ...(reading to the words)... of the bankrupt or his 11 future effects." 12 Then three points, as it were, on merits. If 13 your Lordship goes down to about halfway, there's 14 a paragraph beginning, "And suppose that ..." 15 MR JUSTICE DAVID RICHARDS: Yes. 16 MR DICKER: He says: 17 "And suppose that from the difficulty of getting in 18 the bankrupt's estate by his estate carrying interest 19 there should be a surplus, it would be absurd to say the 20 creditors should not have interest likewise." 21 In other words, if the bankrupt is himself earning 22 interest, why shouldn't the creditors be entitled to 23 interest? 24 Then a point we'll come back to because it's dealt 25 with in subsequent legislation, he says:</p> <p style="text-align: center;">Page 70</p>	<p>1 MR DICKER: Then: 2 "I mention this to show that an equitable rule ought 3 to be followed in giving interest in these cases." 4 He then says: 5 "Upon the whole therefore I declare ..." 6 The relevant part of his order, your Lordship will 7 see, is at page 53. It's the first full paragraph. He 8 says: 9 "The Master to take account of what has been paid to 10 such creditors by way of dividends and what has been so 11 paid ...(reading to the words)... and afterwards in 12 sinking the principal." 13 In other words, creditors are entitled to full 14 satisfaction -- that's the words at the end of the 15 paragraph immediately above -- and you achieve that by 16 taking an account of what has been paid and applying it 17 in the first place to keep down the interest and 18 afterwards in sinking the principal. My Lord, that 19 obviously is what became known as the rule in 20 Bower v Marris. 21 MR JUSTICE DAVID RICHARDS: Yes. 22 MR DICKER: My Lord, two cases shortly after or after 23 Bromley v Goodere. The first is ex parte Mills which is 24 at tab 9. 25 MR JUSTICE DAVID RICHARDS: Yes.</p> <p style="text-align: center;">Page 72</p>

<p>1 MR DICKER: I say "shortly after", we're now in 1793. The 2 summary in the first two lines: 3 "In a case of a surplus coming to a bankrupt, 4 creditors have a right to interest where there is 5 a contract for it appearing either on the face of the 6 security or by evidence." 7 Obviously there's no provision yet for interest on 8 debts that don't otherwise carry interest. 9 MR JUSTICE DAVID RICHARDS: Yes. 10 MR DICKER: Two passages. The first from the 11 Lord Chancellor's observations during argument. 642, 12 three paragraphs from the end -- 13 MR JUSTICE DAVID RICHARDS: Do we know who the 14 Lord Chancellor was here? 15 MR DICKER: I did. Lord Loughborough, I think. 16 MR JUSTICE DAVID RICHARDS: Thank you. 17 MR DICKER: It's argued for the petition: 18 "No Act has given authority [three paragraphs from 19 the end] to apply the property of the bankrupt to any 20 thing not a debt at the time of the bankruptcy. The 21 statutes direct surplus to be paid to the bankrupt and 22 by 1705 Act bankrupts are discharged from all debts due 23 and owing at the time they become bankrupts." 24 Lord Loughborough says: 25 "That supposes an insolvent estate where there is no</p> <p style="text-align: center;">Page 73</p>	<p>1 of the Bar and the Chancellor determined it upon full 2 consideration. I think it is perfectly well-founded. 3 Any other conclusion would have been erroneous. 4 I should think it would be removing landmarks to disturb 5 it at the distance of 50 years but if the point was new 6 my assent goes to the reasoning, as well as the 7 authority." 8 Then dropping five lines, in the middle, he says: 9 "When the statute made the certificate a bar, it 10 required very express words to declare the creditors to 11 be totally precluded ...(reading to the words)... the 12 surplus, after full satisfaction, belongs to the 13 bankrupt. Until that in natural justice the creditors 14 have a right to retain it against any claim the bankrupt 15 can set up." 16 Then dropping to the last two lines, he says: 17 "As the argument in Bromley v Child was so much 18 laboured, I dare say no other case could be found but 19 cases have often occurred since that ...(reading to the 20 words)... nothing would be fixed or certain in the law 21 and practice of this court and the exposition of the 22 statute law." 23 My Lord, a very short additional reference, if 24 your Lordship just goes back to tab 8. There's a report 25 of a judgment in a case called ex parte Champion.</p> <p style="text-align: center;">Page 75</p>
<p>1 surplus. The bankrupt is ...(reading to the words)... 2 the clause with regard to the surplus he must have it 3 after full satisfaction. The debt is antecedent to the 4 bankruptcy and continues until payment." 5 Then his judgment, 643, in the third paragraph, it's 6 recorded shortly that the argument in support of the 7 order was stopped by the court. The Lord Chancellor 8 says: 9 "It was with surprise that I heard the case of 10 Bromley v Child question [my Lord, that, I think, is 11 a typo by the editors. It's intended to be 12 Bromley v Goodere]. It has now been above 50 years 13 confirmed by every judge" -- 14 MR JUSTICE DAVID RICHARDS: That may be a reference to 15 Sir Caesar Child who was no doubt a party. 16 MR DICKER: My Lord, he then continues by saying: 17 "It has now been above 50 years confirmed by every 18 judge who has sat in this court. I have never heard 19 a criticism upon it, except an observation which is 20 obvious enough that ...(reading to the words)... in one 21 case is stopped by the penalty and the other goes on to 22 actual payment." 23 Dropping two lines, he says, in the middle: 24 "That determination was by no means a rash 25 determination. The case was argued with all the ability</p> <p style="text-align: center;">Page 74</p>	<p>1 MR JUSTICE DAVID RICHARDS: Yes. 2 MR DICKER: At the bottom of page 630, the Solicitor General 3 against the petition says: 4 "The order already obtained is the same as was made 5 by Lord Hardwicke in the case of Sir Stephen Evans 6 [Bromley v Goodere]." 7 The editor has inserted: 8 "The terms of the order made in this matter now 9 serve as a precedent and are invariably followed." 10 Does your Lordship have -- because there are two 11 reports of this. I hope you have a report beginning at 12 page 629. 13 MR JUSTICE DAVID RICHARDS: Yes, I have. That's the one 14 I have here and I'm looking at. 15 MR DICKER: And the passage at the bottom of 630? 16 MR JUSTICE DAVID RICHARDS: Yes. Absolutely. Yes, I see. 17 MR DICKER: The statutory position changed in 1824 and 1825. 18 MR JUSTICE DAVID RICHARDS: Sorry, this is -- yes. Thank 19 you. 20 MR DICKER: As a result of the enactment of the 1824 21 Bankruptcy Act which was promptly re-enacted in the form 22 of the 1825 Act. 23 My Lord, can I show your Lordship the terms of the 24 relevant section. If your Lordship goes in the bundles 25 to bundle 3A, which is the first of the statutory</p> <p style="text-align: center;">Page 76</p>

<p>1 materials. My Lord, the 1824 Act is at tab 9. The 1825                  2 Act is at tab 10. If your Lordship goes to tab 10, with                  3 one immaterial exception, they are in the same terms.                  4 The relevant section is 132 which your Lordship will see                  5 halfway down the second page.                  6 MR JUSTICE DAVID RICHARDS: So it's page ...?                  7 MR DICKER: Page 85, 132.                  8 MR JUSTICE DAVID RICHARDS: So this is tab 10?                  9 MR DICKER: My Lord, 3A, tab 10.                  10 MR JUSTICE DAVID RICHARDS: There are some page numbers to                  11 left, sometimes top right.                  12 MR DICKER: Ah.                  13 MR JUSTICE DAVID RICHARDS: So, anyway, it's ...?                  14 MR DICKER: It's 132.                  15 MR JUSTICE DAVID RICHARDS: So it's the last page, "And be                  16 it enacted that the assignees ..."                  17 MR DICKER: Yes. It says:                  18 "And be it enacted that the assignees shall, on                  19 request made to them by the bankrupt, declare to him how                  20 they have disposed of his real and personal estate and                  21 pay the surplus, if any ...(reading to the words)... who                  22 have proved under the commission shall have been paid                  23 shall be entitled to recover the remainder of the debts                  24 due to him."                  25 So that's the entitlement of the bankrupt to the</p> <p style="text-align: center;">Page 77</p>	<p>1 a contractual right to interest. My Lord, the words                  2 "reference to or by law payable thereon", York point out                  3 in their written materials, appear to have reflected the                  4 fact that an creditor brought an action at law on an                  5 instrument payable on demand, he was entitled to                  6 interest at 5 per cent, whether or not the contract                  7 provided for interest.                  8 Then the fourth point, after that, all creditors who                  9 had proved or entitled to interest on their debts from                  10 the date of the commission at 4 per cent per annum.                  11 MR JUSTICE DAVID RICHARDS: Yes.                  12 MR DICKER: That is obviously remedying the unfairness which                  13 Lord Hardwicke had identified in Bromley v Goodere.                  14 Some creditors being entitled to continuing interest,                  15 others not, and we say it is the direct ancestor of the                  16 reference to the Judgments Act rate in rule 2.88(9).                  17 My Lord, the next authority, going back to                  18 bundle 1A, is Bower v Marris itself which is at tab 17                  19 of bundle 1A.                  20 MR JUSTICE DAVID RICHARDS: Mr Dicker, let's broach this a                  21 2 o'clock so we don't have to break off halfway                  22 through it.                  23 (12.55 pm)                  24 (Luncheon Adjournment)                  25 (2.00 pm)</p> <p style="text-align: center;">Page 79</p>
<p>1 surplus.                  2 Then it says:                  3 "But the assignees shall not pay such surplus until                  4 all creditors who have proved under the commission shall                  5 have received interest upon their debts to be calculated                  6 and paid at the rate and in the order following                  7 ...(reading to the words)... all other creditors who                  8 have proved under the commission shall receive interest                  9 on their debts from the date of the commission rate at                  10 £4 per centum ..."                  11 Four points in relation to the terms of section 123.                  12 Firstly, the assignees were under a duty to distribute                  13 the surplus to the bankrupt on request by him and that                  14 duty obviously only arose after all proved debts had                  15 been paid in full; in other words, after all principal                  16 and interest at the date of commencement had been paid.                  17 Secondly, the assignees were not entitled to                  18 distribute the surplus until they had first paid                  19 creditors' interest on their debts. In other words,                  20 part of their duty to distribute surplus to the bankrupt                  21 required them first to comply with their duty to pay                  22 interest to the creditors.                  23 The third is interest first had to be paid on their                  24 debts at the rate of interest reserved or by law payable                  25 thereon. The reference to "reserved" obviously covered</p> <p style="text-align: center;">Page 78</p>	<p>1 MR JUSTICE DAVID RICHARDS: Mr Dicker.                  2 MR DICKER: My Lord, Bower v Marris at tab 17.                  3 MR JUSTICE DAVID RICHARDS: Yes.                  4 MR DICKER: My Lord, obviously by this stage the 1825 Act                  5 had been enacted.                  6 MR JUSTICE DAVID RICHARDS: Yes.                  7 MR DICKER: So the essential question ultimately was: did                  8 that make a difference and, in particular, did it make                  9 a difference as to the way in which interest was                  10 calculated? In other words, was the order made by                  11 Lord Hardwicke still the right order to make?                  12 My Lord, I think your Lordship should first look at                  13 page 352, just picking up the way the matter developed.                  14 Halfway down 652, the sentence beginning:                  15 "In the year 1840 the Master made a separate                  16 report~..."                  17 MR JUSTICE DAVID RICHARDS: Yes.                  18 MR DICKER: If your Lordship has that?                  19 MR JUSTICE DAVID RICHARDS: Yes.                  20 MR DICKER: "... from the claimant, Jonathan Dent, under the                  21 decree by which ...(reading to the words)... from time                  22 to time remained due", and the assignees objected. They                  23 had insisted, the next paragraph, line 3:                  24 "In substance that inasmuch as the debt in respect                  25 of which dividends were declared in bankruptcy was the</p> <p style="text-align: center;">Page 80</p>

<p>1 amount of principal and interest due at the date of the 2 commission, the receipt of each dividend by the creditor 3 operated as an extinguishment of such principal and 4 interest respectively to the extent of the portion the 5 dividend which was attributable to each, and 6 consequently that in computing what was due upon the 7 bond on the estate of Joseph Marris, the Master ought to 8 confine himself on a calculation of interest on the 9 principal from time to time remaining." 10 Essentially exactly the same as the argument made by 11 the administrators and, until recently, by Wentworth as 12 well. So the argument that debt is the amount of 13 principal and interest due at the date of commission -- 14 MR JUSTICE DAVID RICHARDS: Yes. 15 MR DICKER: -- and the dividend extinguished that. 16 MR JUSTICE DAVID RICHARDS: Yes. 17 MR DICKER: The Master in the next paragraph, on 353, 18 overruled those objections and the defendants: 19 "... the assignees presented a petition ...(reading 20 to the words)... thereon at the date of commission." 21 Then going to the judgment of the Lord Chancellor, 22 he refers at the bottom of 354 to the creditor claiming 23 payment of what he's not received -- this is last two 24 lines: 25 "... from the estate of the bankrupt and insists</p> <p style="text-align: center;">Page 81</p>	<p>1 Lord Chancellor makes is that as this mode of payment is 2 regulated by Acts of Parliament, the doctrine for 3 appropriation, which is founded upon the intention 4 express or implied of the debtor or creditor, cannot 5 have any place in the consideration of the present 6 question. The estate of the obligor under 7 administration is liable, and he then continues to 8 explain the effect of the estate. 9 So, in other words, what he's doing here is not 10 simply applying the doctrine of appropriation. He's 11 saying this is a question of construction of the 12 statutory scheme. One can see that, dropping six lines 13 down on 356, the sentence at the end of the line: 14 "If therefore he is bound, because these payments 15 are made under a bankruptcy, to apply them towards 16 a part of the principal which bears interest and thereby 17 to leave interest due, which does not bear interest, he 18 is a loser by the bankruptcy." 19 So, as I say, what the judge is doing here is 20 effectively construing the effect of the scheme. He's 21 saying, "If the assignee is right, the creditor is 22 a loser". 23 He goes on to say: 24 "Although the whole of the principal ...(reading to 25 the words)... in the same proportion."</p> <p style="text-align: center;">Page 83</p>
<p>1 that the amount ...(reading to the words)... payments on 2 account, there would have been no question between the 3 parties." 4 So that's position outside of insolvency. 5 Then he says: 6 "But it is said on behalf of the obligor's estate 7 that payment ...(reading to the words)... principal 8 money although sums were due for interest at the time." 9 My Lord, as your Lordship knows, the way in which 10 the issue arose in Bower v Marris was essentially 11 between obligee and co-obligor who was effectively 12 saying, "Well, as between obligee and obligor, this what 13 happened and I can take the benefit". 14 MR JUSTICE DAVID RICHARDS: Yes. 15 MR DICKER: The judgment continues: 16 "The question, so far as it is a question of 17 principal, turns upon the accuracy of this view of the 18 case." 19 Again, the argument is repeated: 20 "The proposition rests upon this, the payments 21 consisted of dividends ...(reading to the words)... such 22 principal money as the dividends consisted of was on 23 each payment discharged." 24 Now, then essentially the reasons why this is -- 25 this argument was wrong. The first point the</p> <p style="text-align: center;">Page 82</p>	<p>1 Then six lines further on, in the middle of the 2 line: 3 "This would be to give to this mode of payment in 4 bankruptcy the effect of depriving the obligee of part 5 of his debt and of relieving the obligor from the 6 liability to which he had, by his bond, subjected 7 himself. That would be manifestly most unreasonable and 8 unjust and is attempted to be supported only by the 9 supposed appropriation of the dividends to the payment 10 of so much of the principal but in fact there is no such 11 appropriation." 12 So at this point he's answering the argument that 13 the statute requires assets to be applied and 14 distribution of accrued debts, and therefore the 15 principal has been paid and therefore you can't now 16 essentially perform the calculation in some other way. 17 His explanation as to why there is no such 18 appropriation is in the following paragraph -- the 19 following part. He says: 20 "The interest stops at the date of commission and 21 though the ...(reading to the words)... payments are 22 made out of his estate to the obligee." 23 So in short the effect of the collective process of 24 execution is something that is a matter for the 25 convenience of the debtor's creditors. It doesn't</p> <p style="text-align: center;">Page 84</p>

<p>1 affect the underlying obligations of the bankrupt.  2 Then continue at 357, line 5:  3 "Given that, why should such payments have  4 a different ...(reading to the words)... suffer on the  5 bankrupt's estate to benefit by the bankruptcy?"  6 In other words, the basic approach of the Act is of  7 course creditors' claims are satisfied in full and the  8 debtor doesn't get anything unless and until that has  9 happened.  10 Now, that's all a discussion about the statutory  11 scheme. He then goes on to refer to the section now  12 enacted in the 1825 Act. He says:  13 "By the 132nd second section the bankrupt is not to  14 receive the surplus ...(reading to the words)... must  15 have intended to place him in as favourable  16 a situation."  17 My Lord, your Lordship should note section 132, as  18 your Lordship knows, has two interest provisions.  19 MR JUSTICE DAVID RICHARDS: Yes.  20 MR DICKER: One of which is interest to which creditors are  21 otherwise entitled, and also the interest at the  22 prescribed rate. There's no distinction by  23 Lord Cottenham in this passage between those two rights.  24 Indeed, to the contrary, in line 2 of that paragraph, he  25 says:</p> <p style="text-align: center;">Page 85</p>	<p>1 Then 360, the last paragraph:  2 "On the opinion that upon principle and authority  3 ...(reading to the words)... must be reversed and the  4 petition accepting to the report dismissed ...",  5 et cetera.  6 My Lord, so that's Bower v Marris. Your Lordship  7 can see how firmly established the rule was at least at  8 this stage and established following the introduction of  9 section 132 of the 1825 Act.  10 My Lord, I will come back to aspects of the  11 subsequent legislative history later, but your Lordship  12 should note that section 132 was re-enacted in  13 substantially the same terms as section 197 of the  14 Bankrupt Law Consolidation Act 1849.  15 Can I show your Lordship that quickly. It's in  16 bundle 3A, tab 15.  17 MR JUSTICE DAVID RICHARDS: Yes.  18 MR DICKER: My Lord, the section is over the page, 605, and  19 it's the last full section, CXC VII.  20 My Lord, your Lordship I think the only thing to  21 note is that in lines 3 and 4 the reference is to:  22 "If there is a surplus, the court may order such  23 surplus to be paid to the bankrupt."  24 That's the only change between this provision and  25 section 132. 132 operated on a request by the bankrupt.</p> <p style="text-align: center;">Page 87</p>
<p>1 "The bankrupt is not to received surplus until all  2 the creditors have received their interest on their  3 debt."  4 Then, over the page, having dealt with it as  5 a matter of principle, he turns to the authorities at  6 258. He says:  7 "If there had been no decision upon this subject,  8 I should ...(reading to the words)... without the aid  9 which the statute now affords."  10 Can I just emphasise those words.  11 Essentially the conclusion which Lord Hardwicke  12 reached in Bromley v Goodere, obviously he did in the  13 absence of any express statutory provision.  14 Lord Cottenham appears to have regarded the 1825 Act as  15 essentially helping and making it clear that that is the  16 position.  17 Then references to ex parte Morris, ex parte Mills,  18 which I took your Lordship to --  19 MR JUSTICE DAVID RICHARDS: Yes.  20 MR DICKER: -- and various other cases.  21 Then only two further short paragraphs. Firstly,  22 359, the first full paragraph in the middle:  23 "It is true that in certain cases the dividend has  24 been considered ...(reading to the words)... work in  25 justice and defeat the contract between the parties."</p> <p style="text-align: center;">Page 86</p>	<p>1 This section operates effectively by order of the court.  2 MR JUSTICE DAVID RICHARDS: Just show me those words again.  3 sorry?  4 MR DICKER: Sorry, it's in line -- at the end of 3:  5 "The court may order such surplus ..."  6 MR JUSTICE DAVID RICHARDS: Yes, I see.  7 MR DICKER: That's the only change.  8 MR JUSTICE DAVID RICHARDS: Yes, yes.  9 MR DICKER: So we say one should proceed on the basis that  10 Parliament was content to reenact section 132 in  11 section 197, without, save for that exception, material  12 amendment and was therefore happy with the rule in  13 Bower v Marris.  14 MR JUSTICE DAVID RICHARDS: Yes.  15 MR DICKER: My Lord, there are a very large number of  16 bankruptcy cases that I could show your Lordship too but  17 I think that's all I need to --  18 MR JUSTICE DAVID RICHARDS: Very well.  19 MR DICKER: -- at least for present purposes.  20 What I was therefore now going to do was turn to  21 companies winding up before 1986 to show your Lordship  22 the cases which establish the rule applies in that  23 context.  24 My Lord, can I start again with the statutory  25 position. We summarise it in our skeleton,</p> <p style="text-align: center;">Page 88</p>

<p>1 paragraphs 89 to 91. In short, the relevant legislation 2 which we're concerned with is the Companies Act 1862 and 3 1867. They're in the bundle. I don't think I need to 4 show your Lordship them. The legislation is now, as 5 your Lordship knows, in reasonably familiar form, the 6 1862 Act having introduced the concept of limited 7 liability. 8 Now, section 170 of the 1862 Act applied the rules 9 of Chancery as applicable in winding-up proceedings. 10 Those rules were contained in an order in Chancery, 11 dated 11 November 1862. Your Lordship has those in 12 bundle 3A, tab 18. 13 MR JUSTICE DAVID RICHARDS: Yes. 14 MR DICKER: My Lord, the first extract behind tab 18 is from 15 the 1862 Act and the last page of that, four pages in, 16 contains section 170. 17 MR JUSTICE DAVID RICHARDS: Yes. 18 MR DICKER: I don't think I need to show your Lordship the 19 detail. The rules are then -- an extract from the rules 20 is then included. The relevant rule at the time, at 21 least for the 1862 Act, as purportedly included, is 22 rule 26. If your Lordship could just look at that. 23 MR JUSTICE DAVID RICHARDS: Yes. 24 MR DICKER: "Interest on such debts and claims as shall be 25 allowed shall be computed as to such of them as carry</p> <p style="text-align: center;">Page 89</p>	<p>1 Now, the position was considered in four cases which 2 your Lordship is no doubt familiar with involving the 3 liquidations of Humber Ironworks Company and the Joint 4 Stock Discount Company. My Lord, in all four cases it 5 was argued that the statutory regime required dividends 6 to be appropriated in respect of principal and therefore 7 interest needed to be calculated on that basis. 8 MR JUSTICE DAVID RICHARDS: Can I just clarify one point? 9 MR DICKER: Yes. 10 MR JUSTICE DAVID RICHARDS: In rule 26 it provided that 11 those creditors whose debts did not carry interest 12 should be paid at the rate of 4 per cent per annum out 13 of any assets which remain after satisfying the costs of 14 the winding-up of the debts and the claims, et cetera, 15 so all that had gone, was ultra vires. 16 MR DICKER: Yes. 17 MR JUSTICE DAVID RICHARDS: So was there provision for the 18 fund out of which the intra vires interest was payable; 19 in other words, was that interest postponed to the 20 proved claims or debts or did it rank together with 21 them? 22 MR DICKER: I think the answer to that is no, it simply 23 followed from the structure of the statutory scheme. In 24 other words, once you have a cut-off date and 25 post-insolvency interest is not provable and you have an</p> <p style="text-align: center;">Page 91</p>
<p>1 interest after the rate they respectively carry." 2 Then this also: 3 "Any creditor whose debt or claim so allowed does 4 not carry interest shall be entitled to interest after 5 the rate of 4 per cent per annum from the date of the 6 order to wind-up the company out of any assets which may 7 remain after satisfying the costs of the winding-up 8 debts and claims established and the interest of such 9 debts and claims as by law carry interest." 10 MR JUSTICE DAVID RICHARDS: Yes, I see. 11 MR DICKER: My Lord now on its face rule 26 is in broadly 12 similar terms to section 132. 13 MR JUSTICE DAVID RICHARDS: Yes. 14 MR DICKER: There was, however, a problem which is part of 15 rule 26 was held by the authorities ultra vires, and 16 that's the second part. 17 MR JUSTICE DAVID RICHARDS: Yes. 18 MR DICKER: Just for your Lordship's reference, and we don't 19 need to turn them up because there's reference to them 20 later, the cases which so held are Re Hadfield's Patent 21 Cask Company, which is 1A, at tab 22, and 22 Re Herefordshire Banking Company, 1A, at tab 24. 23 My Lord, so all that existed at this stage was, in 24 effect, the first two and a half lines of rule 26; that 25 was the only statutory provision.</p> <p style="text-align: center;">Page 90</p>	<p>1 obligation to distribute the assets pari passu amongst 2 proved debts, it necessarily follows that you can only 3 pay post-insolvency interest out of any surplus before 4 (inaudible). 5 MR JUSTICE DAVID RICHARDS: I see. 6 MR DICKER: My Lord, the way we have analysed the position 7 is at this stage essentially one can regard the position 8 as not dissimilar from that which confronted 9 Lord Hardwicke in Bromley v Goodere itself; in other 10 words, we don't at this stage have a statutory code, 11 we're still at the stage of the judges effectively, and 12 that your Lordship will see from the authorities I was 13 just about to turn to. 14 MR JUSTICE DAVID RICHARDS: Okay, right. 15 MR DICKER: The first is Re Humber Ironworks &amp; Shipbuilding 16 Company number 1 which is 1A, at tab 27. 17 MR JUSTICE DAVID RICHARDS: Yes. 18 MR DICKER: My Lord, it may well be that your Lordship is 19 very familiar with this. 20 MR JUSTICE DAVID RICHARDS: The thing is you look at these 21 cases for different purposes so I'm happy to treat it as 22 if I've never looked at it before. 23 MR DICKER: My Lord, I was going to make precisely that 24 point. The case is very well-known, although one 25 confesses when one reads it it's generally for the</p> <p style="text-align: center;">Page 92</p>

<p>1 insolvent point, rather than the surplus.  2 MR JUSTICE DAVID RICHARDS: Quite, quite.  3 MR DICKER: My Lord, just starting with the short headnote:  4 "In the case of an insolvent company which is being  5 wound ...(reading to the words)... and interest at the  6 winding up."  7 So that's the cut-off date applies equally in  8 companies winding up:  9 "It is only in the event of there being a surplus  10 that they ...(reading to the words)... and then in  11 reduction of principal."  12 My Lord, the two judgments start at page 644, just  13 before looking at Lord Justice Selwyn's judgment,  14 your Lordship should note in the middle of the page  15 Sir Baggallay QC's submission that:  16 "Computation of interest shall be carried on and  17 that dividends shall be applied first in payment of  18 interest and then in reducing the principal. This is  19 the rule in Chancery and ought to be followed here ..."  20 Then a reference to section 170.  21 Then below Mr Southgate makes the point that  22 I mentioned to your Lordship that the 26th rule as to  23 interest on simple contract debts was held to be ultra  24 vires.  25 MR JUSTICE DAVID RICHARDS: Yes.</p> <p style="text-align: center;">Page 93</p>	<p>1 estate is insolvent and, as your Lordship observed, this  2 is the passage that one usually reads the case for.  3 MR JUSTICE DAVID RICHARDS: Yes.  4 MR DICKER: I think the only parts that I need to draw  5 your Lordship's attention to are, firstly, in the middle  6 of the page, there's a sentence beginning, "Justice,  7 I think, requires ..."  8 MR JUSTICE DAVID RICHARDS: Yes.  9 MR DICKER: "Justice, I think, requires that course of  10 proceedings shall be followed ...(reading to the  11 words)... in payment of the debts as they existed at the  12 date of the winding up."  13 My Lord, obviously that is explaining why there is  14 a cut-off date in relation to an insolvent company, but  15 I'll come back to the reference that no person should be  16 prejudiced by accidental delay in the context of surplus  17 later.  18 Then, at the bottom, he says that he's already  19 guarded himself from being supposed to say the court  20 takes upon itself to alter the rights of the creditors  21 to any further extent or to deprive them of the right  22 they have to interest at the full rate of 20 per cent if  23 and when there is a surplus to pay it.  24 Then, I think, the tree must lie as it falls. It  25 must be ascertained what are the debts as they exist at</p> <p style="text-align: center;">Page 95</p>
<p>1 MR DICKER: My Lord, then Lord Justice Selwyn's judgment  2 just emphasising the following points. First of all,  3 645, beginning three lines down:  4 "It is surprising that after the number of years  5 during which ...(reading to the words)... from what  6 appears to us to be the justice of the case."  7 The issue in the case was effectively two-fold. The  8 first is: is there a cut-off date for post-insolvency  9 interest in an insolvency; and, secondly, what happens  10 in the event that there's a surplus?  11 Then 645, halfway down:  12 "In the present case we have to consider what are  13 the positions of the creditors of the company when, as  14 here, there are some creditors who have a right to  15 interest and others having debts not bearing interest.  16 In the first place it appears to me that we must  17 consider the case under the two aspects; first where  18 there is and next where there is not a surplus."  19 Then he deals in the surplus passage with the  20 position in the event of a surplus. He says:  21 "I apprehend in whatever manner the payments may  22 have been made ...(reading to the words)... that  23 disposes of the question where there is a surplus as to  24 which there is no doubt or difficulty."  25 My Lord, he then deals with the position where the</p> <p style="text-align: center;">Page 94</p>	<p>1 the date of the winding-up. All dividends in the case  2 of an insolvent company must be declared in respect of  3 the debt so ascertained.  4 So that's going back to the situation where the  5 debtor is insolvent.  6 Then he says:  7 "... understood that we are laying down this rule as  8 applicable to all cases under the recent Act where  9 creditors' actions are stayed."  10 My Lord, Lord Justice Giffard, on 647, he starts by  11 dealing with the cut-off date; in other words, the  12 insolvent situation, and he says, four lines down:  13 "The only argument really adduced in favour of  14 computing interest subsequent ...(reading to the  15 words)... which has been adopted as to dead men's  16 estates than in favour of it."  17 So, in other words, you can't apply the position in  18 the event of a solvent estate to an insolvent situation.  19 MR JUSTICE DAVID RICHARDS: Yes.  20 MR DICKER: Then he deals generally with the position in  21 bankruptcy. He says:  22 "As to the rule which my learnt brother has laid  23 down, it is the rule in bankruptcy. The rule was, as  24 has been said, judge-made law but it was made after  25 great consideration and no doubt because it works with</p> <p style="text-align: center;">Page 96</p>



<p>1 equality and fairness between the parties."  2 Then specifically the insolvent situation, he says:  3 "If we are to consider convenience, it is quite  4 clear that where an estate is insolvent convenience is  5 in favour of stopping all the computations at the date  6 of winding-up."  7 MR JUSTICE DAVID RICHARDS: Yes.  8 MR DICKER: "For these reasons, I am of the opinion that  9 dividends ought to be paid on the debts as they stand at  10 the date of the winding-up, for when the estate is  11 insolvent this rule distributes the assets in the  12 fairest way."  13 Then when the estate is solvent, he says:  14 "It works with equal fairness because as soon as it  15 is ascertained there is a surplus...(reading to the  16 words)... under his contract and on the other hand  17 a creditor who is not stipulated for interest does not  18 get it."  19 One need to bear in mind no provision for interest  20 on debts that don't otherwise carry interest at this  21 stage.  22 MR JUSTICE DAVID RICHARDS: Yes.  23 MR DICKER: Then he adds at the end this:  24 "I may add another reason, that I do not see with  25 what justice interest can be computed in favour of</p> <p style="text-align: center;">Page 97</p>	<p>1 until all interest accrued since the commencement of the  2 winding-up had been paid, the interest being  3 post-insolvency interest.  4 Your Lordship will see that on page 86, just picking  5 up the facts about eight lines down. It says:  6 "The Warrant Finance Company proved for the amount  7 due on the bills against both estates [and then they  8 received dividends, dropping three lines] ... making  9 together 20 shillings in the pound. They claimed to  10 continue to prove against the joint stock discount  11 company to the full amount of 13,000 until the interest  12 which had accrued since the commencement of the winding  13 up was also satisfied."  14 Over the page, 87, your Lordship can see the  15 argument by Mr Jessel QC. His argument was:  16 "The Warrant Finance Company's case is in point.  17 This order cannot be reversed without overruling that  18 case. The dividends paid to the appellants were  19 appropriated to the payment of the principal and could  20 not be applied by them to the payment of interest."  21 So the appropriation argument.  22 Lord Justice Gifford's response is at the bottom of  23 87, picking it up six lines down on 88:  24 "The only ground on which the argument to the  25 contrary could be put is that taken by Mr Jessel, namely</p> <p style="text-align: center;">Page 99</p>
<p>1 creditors whose debts carry interest while creditors  2 whose debts do not carry interest are stayed from  3 recovering judgment and so obtaining a right to  4 interest."  5 MR JUSTICE DAVID RICHARDS: Yes.  6 MR DICKER: My Lord, obviously that last comment is made in  7 relation to an insolvent company but applies equally in  8 the context of a solvent company. There is no justice  9 in either situation in one being entitled to interest  10 but not the other. So if you have an insolvent company,  11 no one gets post-insolvency interest. If you have  12 a solvent company, similarly the position should be  13 equal. That was the position in bankruptcy not yet  14 incorporating insolvency.  15 MR JUSTICE DAVID RICHARDS: Yes.  16 MR DICKER: My Lord, that's the first of the authorities.  17 The second your Lordship will find in the next tab  18 and it's the first of the Joint Stock Discount Company  19 cases, otherwise known as Warrant Finance Companies  20 case.  21 MR JUSTICE DAVID RICHARDS: Yes.  22 MR DICKER: My Lord, this concerned a creditor who had  23 a right of proof for the same debt against two companies  24 in liquidation. It had already received 20 shillings in  25 the pound, claimed to be entitled to continue to prove</p> <p style="text-align: center;">Page 98</p>	<p>1 that there has been an appropriation of the dividends to  2 the payment of principal, but that is a mistake. The  3 rule which has been made has no such effect. It is  4 a rule adopted because it is found a just and convenient  5 rule for the administration and realisation of assets  6 under the particular bankruptcy or the particular  7 winding-up. It is not meant at all to interfere with  8 the rights of the creditor if he can get payment from  9 other sources to combine and retain all that he can  10 obtain from all those sources until he has paid not only  11 his principal but all his interest and so the debt is  12 entirely satisfied."  13 So in a slightly different situation, namely proof  14 against two insolvent estates. The same argument,  15 essentially, "You have received dividends, they were  16 paid in respect of principal and therefore your interest  17 needs to be calculated on that basis".  18 MR JUSTICE DAVID RICHARDS: Just give me one moment  19 (Pause)  20 MR DICKER: My Lord, the next case is Humber Ironworks  21 number 2 which is at the next tab, tab 29.  22 MR JUSTICE DAVID RICHARDS: Yes.  23 MR DICKER: The issue here was slightly different. It was  24 whether a creditor who held security was entitled to  25 receive dividends in the liquidation to the full amount</p> <p style="text-align: center;">Page 100</p>

<p>1 of principal and, at the same time, realise his security 2 until the full amount of interest had been satisfied. 3 MR JUSTICE DAVID RICHARDS: Yes. 4 MR DICKER: So it's no longer a claim against two estates, 5 it's a claim against one, plus reliance on security. 6 The decision your Lordship will see in the held 7 at 88: 8 "The rule that a creditor of a company which is 9 being wound up is not entitled to dividends towards 10 payment of interest accrued since the commencement of 11 the winding-up does not prevent a creditor who holds 12 a security from receiving dividends to the full amount 13 of the principal and at the same time realising his 14 security until the full amount of principal and interest 15 has been satisfied." 16 My Lord, again, picking it up with the argument, 17 page 91, your Lordship will just see a reference in 18 Mr Baggallay QC's submissions at the bottom of that page 19 to Bower v Marris. 20 MR JUSTICE DAVID RICHARDS: Yes. 21 MR DICKER: Then: 22 "The present case is similar to re Joint Stock 23 Discount Company ...(reading to the words)... appear he 24 has a security given by the principal." 25 Mr Southgate re-runs the appropriation argument.</p> <p style="text-align: center;">Page 101</p>	<p>1 Your Lordship has that at tab 31. 2 My Lord, this is effectively the next stage in the 3 dispute. The previous decision had held that the 4 creditor was entitled to receive dividends from both 5 estates until his claim had been satisfied in full. 6 What happened in this case was that the liquidator 7 admitted the creditor therefore for a further sum but 8 calculated the amount he was due on the basis that 9 dividends had been appropriated to principal, thereby 10 reducing the creditor's claim to interest. 11 Your Lordship will see that in a moment from the facts. 12 But just noting the "Held" at the top: 13 "The secured creditor cannot be deprived of his 14 security until he has been paid in full ...(reading to 15 the words)... which were in liquidation and receive 16 dividends from both estates." 17 Then: 18 "The liquidator of company A applied for an order 19 for delivery up of the bills ...(reading to the 20 words)... payment of interest and then as to surplus in 21 reduction of the principal." 22 Your Lordship will see the detail over the page, 23 page 12. The first full paragraph: 24 "The balance of £79, which the liquidator of the 25 Joint Stock Discount Company now admitted to be due to</p> <p style="text-align: center;">Page 103</p>
<p>1 Your Lordship will see that in the last three lines 2 of his submissions: 3 "Payments made to the appellants have been 4 appropriated to reduction of the principal. At all 5 events, they have never been treated by them as paid on 6 account of interest." 7 Lord Justice Giffard, halfway down that page, 8 picking it up about ten lines down, says: 9 "I think the question is concluded by the case of In 10 Re Joint Stock Discount Company ...(reading to the 11 words)... the creditor may have and does not amount to 12 an appropriation in any shape or form." 13 Then he deals with the result in that case: 14 "The result is that, as in many cases, the creditor 15 has a claim on two or more estates ...(reading to the 16 words)... upon for a series of years and must now be 17 taken to be the law." 18 Then the last four lines of that paragraph: 19 "Although the proof in terms is in respect of 20 principal, that does not amount to any appropriation or 21 preclude the party who approved from appropriating the 22 sum received for the payment of interest so long as 23 interest is due." 24 My Lord, the final authority in this group of four 25 is the second Joint Stock Discount Company case.</p> <p style="text-align: center;">Page 102</p>	<p>1 the Warrant Finance Company [in other words, as a result 2 of the last judgment] was arrived at in this way: the 3 dividends paid previously to November 1867 were all 4 treated as applied in reduction of principal debts." 5 Then eight lines from the end of that paragraph: 6 "The Warrant Finance Company contended this balance 7 was calculated altogether on an erroneous principle and 8 that the dividends of the Joint Stock Discount Company, 9 like those of the contract corporation, ought to be 10 treated as applied in payment of interest and then as to 11 the surplus only in reduction of principal and they 12 claimed payment of a much larger balance before giving 13 up the bills." 14 Then at the bottom of 12, your Lordship will see 15 Mr Jessel having another go at the appropriation 16 argument. He says: 17 "We admit all sums received from the contract 18 corporation are as between us and the holders of the 19 bills to be treated as applied in the first place as 20 payment of interest, then in reduction of principal, but 21 we say that sums paid by us are applicable only to 22 payment of principal and cannot be treated as applied in 23 any other way." 24 Mr Baggallay, probably becoming a little weary by 25 now, responds at page 13, four lines into his argument</p> <p style="text-align: center;">Page 104</p>

<p>1 he's recorded as saying: 2 "But in the Warrant Finance Company's case the 3 Lord Justice says that is simply a convenient rule for 4 the administration of the assets and the winding-up ... 5 not meant to interfere with the rights of creditors." 6 Then eight lines or so from the end of the argument, 7 at the end of the line, he says: 8 "That is an appropriation simply for the convenience 9 of the court, not such as to deprive the creditor of his 10 right to appropriate payment in any way he thinks most 11 beneficial according to the principle laid down in 12 Bower v Marris." 13 Mr Jessel in reply, page 14, tries to distinguish 14 Bower v Marris on the basis it only concerned 15 effectively the co-obligor: 16 "In Bower v Marris there was no question of 17 appropriation of payment ...(reading to the words)... 18 and the bankrupt obligor which is the point in this 19 case." 20 My Lord, obviously not a correct explanation of 21 Bower v Marris. Lord Rommily deals with it very 22 shortly. He says: 23 "I am very clear as to the principle on which this 24 case is to be decided. I treat the case as if there 25 were no winding-up at all and these sums that been paid</p> <p style="text-align: center;">Page 105</p>	<p>1 introduced for the first time an express regime insofar 2 as companies winding up was concerned dealing with 3 post-insolvency interest. 4 MR JUSTICE DAVID RICHARDS: Yes. 5 MR DICKER: Obviously such a regime had existed in 6 bankruptcy since 1824. 7 My Lord, carrying on the history. There was then 8 a new Act in bankruptcy, the Bankruptcy Act 1883. 9 I need to show your Lordship that, given the submissions 10 which are now being made by the administrators in 11 relation to it. Your Lordship will have it in 3A, 12 tab 27. 13 MR JUSTICE DAVID RICHARDS: Yes. 14 MR DICKER: My Lord, there are two relevant sections. The 15 first, section 40. 40, sub-section 1 provides: 16 "In the distribution of the property of a bankrupt 17 shall be paid in priority to all other debts." 18 Then there's various preferential debts. 19 Your Lordship isn't concerned with that. 20 4, sub-section 4: 21 "Subject to the provisions of this Act, all debts 22 proved in the bankruptcy shall be paid pari passu." 23 MR JUSTICE DAVID RICHARDS: Yes. 24 MR DICKER: So that's now enshrining that. 25 Section 40, sub-section 5:</p> <p style="text-align: center;">Page 107</p>
<p>1 simply on account." 2 The last paragraph: 3 "Therefore of the opinion the Joint Stock Discount 4 Company cannot be entitled to the benefit of any remedy 5 they may have on these bills against the contract 6 corporation until the Warrant Finance Company has 7 received principal, interest and costs in full." 8 MR JUSTICE DAVID RICHARDS: Yes. 9 MR DICKER: My Lord, so two propositions from those four 10 well-known cases. First of all, the process of 11 collective execution and the payment of dividends in 12 accordance with that process do not constitute an 13 appropriation so as to deprive creditors of the right 14 that they would otherwise have, when they have it, to 15 payment in full. 16 Secondly, an application of Bower v Marris, in other 17 words payment in full, means payment calculated on the 18 basis that those dividends were treated as having been 19 applied first to interest and, secondly, to principal. 20 My Lord, so far as subsequent legislation in 21 relation to companies winding up is concerned, the 22 legislation was amended on various occasions, obviously 23 prior to 1986. My Lord, there's no material amendment 24 in the sense of no amendment made that's relevant for 25 these purposes. It was the 1986 Act that effectively</p> <p style="text-align: center;">Page 106</p>	<p>1 "If there is any surplus after payment of the 2 forgoing debts, it shall be applied in payment of 3 interest from the date of the receiving order at the 4 rate of £4 per centum per annum on all debts proved in 5 the bankruptcy." 6 That provision effectively mirroring section 132 of 7 the 1825 Act providing for interest at 4 per cent. 8 MR JUSTICE DAVID RICHARDS: Right. 9 MR DICKER: Then section 65: 10 "The bankrupt shall be entitled to any surplus 11 remaining after payment in full ...(reading to the 12 words)... expenses of the proceeding under the 13 bankruptcy petition." 14 That is obviously preserving a creditor's right to 15 payment in full of his creditor's -- payment in full, 16 including any interest to which he's entitled as 17 a matter of contract or otherwise. 18 MR JUSTICE DAVID RICHARDS: Yes. 19 MR DICKER: Now, my Lord, on the administrators' argument, 20 as it's now advanced, these provisions are critical 21 because the administrators' submission is -- 22 MR JUSTICE DAVID RICHARDS: Sorry to interrupt you. When 23 you said that this was the same as section 132, section 24 40, sub-section 5, seems to be providing for a flat rate 25 of 4 per cent on all debts proved in the bankruptcy,</p> <p style="text-align: center;">Page 108</p>

<p>1 whereas section 132 had two limbs. First of all, you 2 had contractual post-bankruptcy interest and then you 3 had the 4 per cent for everyone else. 4 MR DICKER: You're absolutely right that the two have 5 effectively been split out. 6 MR JUSTICE DAVID RICHARDS: Right. 7 MR DICKER: The last part, in other words the 4 per cent, is 8 covered by section 40, sub-section 5, and the other part 9 is covered by the rubric in section 65 which is "the 10 bankrupt shall be entitled to any surplus remaining 11 after payment in full of his creditors with interest", 12 which obviously brings in as well the new provision or, 13 rather, not the new provision, the provision for payment 14 at 4 per cent as by this Act provided. 15 MR JUSTICE DAVID RICHARDS: So payment in full of his 16 creditors includes post-bankruptcy interest on those 17 debts which carried interest? 18 MR DICKER: Yes. 19 MR JUSTICE DAVID RICHARDS: I see. 20 MR DICKER: Your Lordship will remember the phrase "payment 21 in full" was a phrase that Lord Hardwicke picked up, 22 I think, from one of the early statutes. Can I just 23 remind your Lordship of that? It's in Bromley v Goodere 24 where he refers to the 1603 Act and he says: 25 "The next is the statute at the 1st of Jac. 1 cap.</p> <p style="text-align: center;">Page 109</p>	<p>1 intended to release his estate. 2 MR JUSTICE DAVID RICHARDS: I see Lord Hardwicke was saying 3 that if you have, let's say, a contractual right to 4 interest, then the creditor with that right is entitled 5 to payment of that sum before the estate is handed back 6 to the bankrupt? 7 MR DICKER: Absolutely. That comes -- 8 MR JUSTICE DAVID RICHARDS: That answers the question, 9 I think. 10 MR DICKER: You then have 1825 which -- 11 MR JUSTICE DAVID RICHARDS: Which spells that out. 12 MR DICKER: -- and adds a new provision which is the 13 4 per cent. 14 MR JUSTICE DAVID RICHARDS: Indeed. Then we get to 1883 and 15 they no longer spell out the bit of contractual 16 interest, which they did in 1825, but they preserve -- 17 and you say that comes in the phrase "payment in full of 18 his creditors". 19 MR DICKER: Yes. 20 MR JUSTICE DAVID RICHARDS: I see. Thank you. 21 MR DICKER: Just dividing up the language in a slightly 22 different way. 23 MR JUSTICE DAVID RICHARDS: Yes. 24 MR DICKER: Now, my Lord, what the administrators say is 25 that this provision is critical and the reason they say</p> <p style="text-align: center;">Page 111</p>
<p>1 15 ... not much in it but expression of full 2 satisfaction in the clause ..." 3 And he refers to that -- 4 MR JUSTICE DAVID RICHARDS: I may have misunderstood you, 5 but my understanding was the -- sorry, whichever Act 6 this was, the 1825 Act, was the first Act to make 7 provision for the payment of post-bankruptcy interest, 8 whether it was due under the contract or otherwise. 9 MR DICKER: Yes. 10 MR JUSTICE DAVID RICHARDS: So before then, is this right, 11 once a concept of discharge was introduced into the 12 legislation, the bankrupt got his property back but he 13 could still be sued for post-bankruptcy interest 14 presumably? Am I misunderstanding it? 15 MR DICKER: Before one starts with the period before 1825. 16 Before 1825 there was no provision in relation to 17 statutory interest -- no provision in relation to 18 post-insolvency interest as such. 19 MR JUSTICE DAVID RICHARDS: Absolutely. 20 MR DICKER: One effectively had to deduce it from the 21 inherent nature of the scheme, which is what 22 Lord Hardwicke did. He effectively said that the 23 creditors are entitled to satisfaction in full. 24 Discharge doesn't affect that because that's intended to 25 provide the bankrupt with a discharge. It's not</p> <p style="text-align: center;">Page 110</p>	<p>1 it's critical and the reason why they say it abolished 2 the rule in Bower v Marris was because, according to 3 them, before 1883 there was no "mandatory direction 4 requiring the surplus to be applied in payment of 5 interest". Before 1883 the relevant Acts merely 6 provided for payment of interest to be a pre-condition 7 to the payment of surplus to the bankrupt. 8 My Lord, after 1883 a major change had occurred 9 because there was, so the administrators say, for the 10 first time a mandatory directional that surplus shall be 11 applied in the payment of interest. 12 MR JUSTICE DAVID RICHARDS: Yes. 13 MR DICKER: My Lord, just for your Lordship's note, I think 14 that's most clearly expressed in paragraph 53 of the 15 administrators' skeleton argument. It may be worth just 16 turning that up. If your Lordship just glances at 53, 17 I think I have fairly summarised the point. (Pause) 18 MR JUSTICE DAVID RICHARDS: Yes. 19 MR DICKER: The effect of that, they say, is that given we 20 now have a mandatory direction for the payment of 21 interest, for some reason there's no room for the rule 22 in Bower v Marris. 23 My Lord, in our submission there is absolutely 24 nothing in the difference between the 1825 Act and the 25 1883 Act which indicates the legislature intended the</p> <p style="text-align: center;">Page 112</p>

<p>1 subsequent Act to have this significant effect.</p> <p>2 My Lord, we say the submission that there was no</p> <p>3 obligation on the trustees to apply the surplus in</p> <p>4 payment of interest under the earlier Acts is incorrect.</p> <p>5 There was -- plainly in substance they were under a duty</p> <p>6 to provide the surplus to the bankrupt. They were also</p> <p>7 not entitled to provide that surplus without, first,</p> <p>8 paying creditors' interest. There really is no</p> <p>9 difference in substance between the two, we say.</p> <p>10 My Lord, we also submit there's no reason for</p> <p>11 believing that such a change was intended. The</p> <p>12 administrators don't give any reason why the legislature</p> <p>13 wished to make this change; my Lord, on any basis it's</p> <p>14 surprising if the legislature wished to make it only</p> <p>15 shortly after the rule in <i>Bower v Marris</i> had been</p> <p>16 enthusiastically adopted for companies winding up. This</p> <p>17 is only some ten years or so after the four cases I've</p> <p>18 just shown your Lordship, and in the absence of any</p> <p>19 authority that suggests there was ever any criticism of</p> <p>20 the rule in <i>Bower v Marris</i>, the only criticism that has</p> <p>21 evidence been made is that it's unfair that it's only</p> <p>22 creditors with contractual rights to interest who should</p> <p>23 be paid interest, and that, as I said, was cured by</p> <p>24 section 132 of the 1825 Act.</p> <p>25 York, in their skeleton, refer to two textbooks in</p> <p style="text-align: center;">Page 113</p>	<p>1 Bankruptcy Act 1914. If your Lordship goes to tab 36</p> <p>2 there are extracts of that Act there.</p> <p>3 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>4 MR DICKER: My Lord, section -- the relevant sections, if</p> <p>5 your Lordship goes to section 33, 33.1 is the</p> <p>6 preferential claims that my Lord saw under the relevant</p> <p>7 section of the 1883 Act. Then going on to sub-section 7</p> <p>8 and sub-section 8, 7 and 8 again mirror the provisions</p> <p>9 of the 1883 Act.</p> <p>10 Section 66(1) is a new provision. It's referred to</p> <p>11 subsequently by the court committee and it caused an</p> <p>12 enormous account of grief to liquidators over the years.</p> <p>13 It's section 66.</p> <p>14 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>15 MR DICKER: 66(1):</p> <p>16 "Where a debt has been proved and the debt includes</p> <p>17 interest or any pecuniary consideration in lieu of</p> <p>18 interest, such interest or consideration shall, for the</p> <p>19 purposes of dividend, be calculated at a rate not</p> <p>20 exceeding 5 per cent per annum without prejudice to the</p> <p>21 right of a creditor to receive out of the estate any</p> <p>22 higher rate of interest to which he may be entitled</p> <p>23 after all the debts proved in the estate have been paid</p> <p>24 in full."</p> <p>25 MR JUSTICE DAVID RICHARDS: Yes.</p> <p style="text-align: center;">Page 115</p>
<p>1 1894 and 1904 which continue to refer to the rule in</p> <p>2 <i>Bower v Marris</i>. I'll leave Mr Smith to show your</p> <p>3 Lordship those.</p> <p>4 The other consequence of course is this, on the</p> <p>5 administrators' latest case, that we then logically had</p> <p>6 two different regimes running after 1883. In</p> <p>7 bankruptcy, for some reason, <i>Bower v Marris</i> did not</p> <p>8 apply. In companies winding up it did apply because it</p> <p>9 was held to have applied in the four cases I've just</p> <p>10 shown your Lordship. My learned friends are unable to</p> <p>11 point to any new statute containing any slight change in</p> <p>12 wording that would enable them to say that rule had gone</p> <p>13 as well.</p> <p>14 So one ends up with this odd position, in our</p> <p>15 submission, that you start off with <i>Bower v Marris</i> in</p> <p>16 bankruptcy. It gets introduced into companies winding</p> <p>17 up in 1869/1870 on the basis the bankruptcy rule is</p> <p>18 a good rule. According to my learned friends, it's</p> <p>19 abolished in bankruptcy ten years later in 1883, but</p> <p>20 continues in corporate insolvency all the way through to</p> <p>21 1986. My Lord, it is on any basis a curious state of</p> <p>22 affairs.</p> <p>23 My Lord, can I just finish the statutory history</p> <p>24 before looking at <i>Re Lines Brothers</i>. Obviously last</p> <p>25 Bankruptcy Act before the 1986 Act was the</p> <p style="text-align: center;">Page 114</p>	<p>1 MR DICKER: So, in other words, pre-commencement interest</p> <p>2 limited to 5 per cent.</p> <p>3 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>4 MR DICKER: In the event of a surplus, you can get all of</p> <p>5 the higher interest to which you're entitled.</p> <p>6 My Lord, in 66(2) there are various anti-avoidance</p> <p>7 provisions which were inserted to deal with various ways</p> <p>8 in which creditors sought to avoid this, one of which</p> <p>9 was effectively restating the account monthly, turning</p> <p>10 the accrued interest into principal, and a new loan in</p> <p>11 the higher amount on which interest was also due.</p> <p>12 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>13 MR DICKER: That's one of the things dealt with by 66(2).</p> <p>14 My Lord, the other provision, again, your Lordship</p> <p>15 has already seen, section 69 in the same terms as the</p> <p>16 1883 Act.</p> <p>17 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>18 MR DICKER: My Lord, just, if I may, before we break, if</p> <p>19 it's convenient to your Lordship, a reference to one</p> <p>20 authority.</p> <p>21 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>22 MR DICKER: It's the Vice Chancellor in <i>Re Rolls-Royce</i> which</p> <p>23 your Lordship will have at 1B, at tab 83. My Lord, the</p> <p>24 only reference, and it may be necessary to come back to</p> <p>25 the case later, but if your Lordship just looks at 1588,</p> <p style="text-align: center;">Page 116</p>

<p>1 letter D, there's a reference to section 317 of the 2 Companies Act. 3 Then at later F, the Vice Chancellor says: 4 "That section sends one to the Bankruptcy Act 1914." 5 There one finds these two provisions: section 33(8), 6 and that is the provision your Lordship has just seen 7 the 4 per cent; and section 69, which is the other 8 provision. 9 Then the Vice Chancellor said: 10 "The provision contained in section 33(8) reproduces 11 in substance a provision which has been in force since 12 the Bankruptcy Act 1849 at least." 13 MR JUSTICE DAVID RICHARDS: Yes. 14 MR DICKER: My Lord, I wonder if that might be a convenient 15 moment? 16 MR JUSTICE DAVID RICHARDS: Yes, certainly. I'll rise for 17 five minutes. 18 (3.13 pm) 19 (Short break) 20 (3.20 pm) 21 MR JUSTICE DAVID RICHARDS: Yes, Mr Dicker. 22 MR DICKER: Re Lines Brothers number 2. 1C, tab 95. 23 MR JUSTICE DAVID RICHARDS: 1C? 24 MR DICKER: 1C, tab 95. 25 My Lord, as your Lordship knows, this case concerns</p> <p style="text-align: center;">Page 117</p>	<p>1 competing approaches to the calculation of interest. 2 What both approaches shared was an assumption that 3 the rule in <i>Bower v Marris</i> applied; in other words, the 4 liquidators, when working out how much would be due if 5 you converted claim into sterling and paid interest on 6 that basis, calculated it by treating the prior 7 dividends as payments of interest before principal and, 8 again, the bank did the same in respect of their foreign 9 currency claim. 10 My Lord, so far as <i>Bower v Marris</i> is concerned, much 11 proceeded on the basis of common ground. There was one 12 issue which arose which Mr Justice Mervyn Davies raised 13 towards the end of his judgment, which your Lordship 14 will see in a moment. The argument was essentially that 15 isn't there a problem when we get to the stage of the 16 final dividend having been paid and proved debts, 17 i.e. principal having been paid in full. 18 Mr Justice Mervyn Davies said, "Well, what is there on 19 which interest can continue to accrue?" So he said he 20 was minded to stop the <i>Bower v Marris</i> calculation on the 21 date of final payment. There was argument at that 22 stage, in the sense that both sides came back and 23 submitted to him that he was wrong. He ended up 24 agreeing. 25 But, my Lord, just showing your Lordship firstly the</p> <p style="text-align: center;">Page 119</p>
<p>1 companies winding up. It applied the rule in 2 <i>Bower v Marris</i>. Everyone agrees that it was right to 3 apply the rule: the Senior Creditor Group on the basis 4 that the rule has always applied both in bankruptcy and 5 in companies winding up; the administrators and 6 Wentworth on the basis that although it disappeared in 7 bankruptcy in 1883, it didn't disappear in companies 8 winding up until 1986. So this is effectively an 9 accurate reflection of the state of law in 1984. 10 Your Lordship is familiar with the issue in 11 Lines Brothers number 1 -- 12 MR JUSTICE DAVID RICHARDS: Yes. 13 MR DICKER: -- where the court dealt with currency 14 conversion claims. 15 What then happened in Lines Brothers number 2 was 16 that the bank came back and wanted to argue that when 17 you deal with statutory interest -- when you deal with 18 interest, to which they were now restricted as a result 19 of the judgment in the Court of Appeal, you were 20 entitled to calculate the interest by reference to the 21 claims denominated in the foreign currency. The 22 liquidators' argument in response was, "No, when you get 23 interest, it's again on your proved debt by reference to 24 your claim converted into sterling on the date of the 25 commencement of the winding-up". So one had these two</p> <p style="text-align: center;">Page 118</p>	<p>1 relevant discussion in the record of the argument. It 2 starts at page 440. 3 MR JUSTICE DAVID RICHARDS: Yes. 4 MR DICKER: David Graham QC, Robin Potts QC and Martin Moore 5 for the liquidators. The question is whether the 6 post-liquidation interest on a foreign currency debt 7 should be calculated according to the rate of exchange 8 as on the liquidation date or some other date. It is 9 not a case where there is a surplus for return to 10 contributories but still a competition between 11 creditors; sterling creditors on the one hand and 12 foreign currency creditors on the other. 13 So the first issue is: what was the relevant date 14 that applied? 15 Mr Potts QC following, at page 441, letter B, deals 16 with how much is due between letter F and G. He said: 17 "It is common ground the position relative to 18 post-liquidation interest in winding-up is governed by 19 the <i>Humber Ironworks</i> case and <i>Bower v Marris</i>. Under the 20 rules laid down by those authorities, dividends are 21 notionally applied first in satisfaction of 22 post-liquidation interest accrued down to the date of 23 the relevant dividend and thereafter to capital. 24 Interest is then calculated on the notionally reduced 25 capital balance down to the next dividend", and so on.</p> <p style="text-align: center;">Page 120</p>

<p>1 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>2 MR DICKER: Then at 442, just above letter B, he says:</p> <p>3 "The Humber Ironworks calculation aims to show the</p> <p>4 amount which would remain due had there not been</p> <p>5 a winding up, not merely in respect of interest but also</p> <p>6 in respect of capital."</p> <p>7 Then the argument for the bank starts between E</p> <p>8 and F. Mr Stubs QC and Mary Arden, as she then was:</p> <p>9 "It is clear from Bower v Marris, the</p> <p>10 Humber Ironworks case and Line Brothers ...(reading to</p> <p>11 the words)... the respective contracts by which such</p> <p>12 debts were governed."</p> <p>13 They use that essentially to say, therefore, when</p> <p>14 you calculate interest, you have to do that by reference</p> <p>15 to the underlying foreign currency claim.</p> <p>16 Mr Potts, at 444D, says:</p> <p>17 "... common ground that the Bower v Marris approach,</p> <p>18 which requires dividends to be treated as ordinary</p> <p>19 payments on account going first to interest and then to</p> <p>20 principal, is the proper one."</p> <p>21 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>22 MR DICKER: My Lord, then that is recorded in the judgment</p> <p>23 of Mr Justice Mervyn Davies at 446, just below letter D;</p> <p>24 he says:</p> <p>25 "In these circumstances there remains for decision</p> <p style="text-align: center;">Page 121</p>	<p>1 raised. He deals with between E and G. He says:</p> <p>2 "In saying that Appendix A applies, I desire to add</p> <p>3 this caveat. Appendix A includes interest in the sum of</p> <p>4 173,000-odd for the period 20 June 1978 to 31 December</p> <p>5 1982. It would be brought up-to-date by adding to that</p> <p>6 figure interest for the period from 21 December 1982 to</p> <p>7 the date of payment; in other words, Appendix A proceeds</p> <p>8 on the footing that interest has continued to run since</p> <p>9 the payment of the final dividend on 20 June 1978. It</p> <p>10 is supposed, as I understand, that interest continues to</p> <p>11 run on the notionally unpaid capital thrown up by the</p> <p>12 Bower v Marris calculations. I am not satisfied that</p> <p>13 interest ought to be charged in respect of the period</p> <p>14 after 20 June 1978. I say that because all principal</p> <p>15 was in fact paid off on 20 June 1978 so that thereafter</p> <p>16 there was no principal owing that could carry interest.</p> <p>17 The capital sum of 589,000-odd is to my mind merely</p> <p>18 a notional figure not capable of supporting an interest</p> <p>19 claim."</p> <p>20 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>21 MR DICKER: My Lord that was effectively simply a variant of</p> <p>22 the appropriation fallacy, one limited to looking at the</p> <p>23 payment of the final dividend.</p> <p>24 The parties return for further submissions.</p> <p>25 Your Lordship will see that at 456 at letter F.</p> <p style="text-align: center;">Page 123</p>
<p>1 some question ...(reading to the words)... this sum</p> <p>2 appears in appendix A to this judgment. Appendix A is</p> <p>3 an agreed document."</p> <p>4 He then deals with the bank's submission that you</p> <p>5 ought to do it by reference to the foreign currency</p> <p>6 denominated sum. He rejects that at 451 G to H. He</p> <p>7 says, between G and H, second sentence:</p> <p>8 "I hold that such interest is claimable by reference</p> <p>9 to the exchange rate prevailing at the date of the</p> <p>10 winding up. My principal reason for this view is</p> <p>11 grounded on some words from Lord Wilberforce's speech in</p> <p>12 Miliangos."</p> <p>13 His conclusion is at 453, letter D. He says at</p> <p>14 letter D:</p> <p>15 "It follows that question 3(b) in the summons is</p> <p>16 answered in the sense of 3(b)(i), i.e. interest accrued</p> <p>17 after commencement" --</p> <p>18 MR JUSTICE DAVID RICHARDS: Sorry, where are you?</p> <p>19 MR DICKER: My Lord, I am sorry. 453 at letter D.</p> <p>20 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>21 MR DICKER: "... interest accrued after the commencement of</p> <p>22 the winding-up of Lines Brothers Limited ...(reading to</p> <p>23 the words)... as at the date of the winding-up.</p> <p>24 Appendix A applies."</p> <p>25 Then the issue which I mentioned which the judge</p> <p style="text-align: center;">Page 122</p>	<p>1 Mr Potts QC says:</p> <p>2 "The calculations of both sites have been effective</p> <p>3 in conformity ...(reading to the words)... accrued down</p> <p>4 to that date was deemed to remain outstanding."</p> <p>5 And, similarly, he then says in relation to</p> <p>6 Appendix B the position was the same.</p> <p>7 457, between A and B:</p> <p>8 "As to whether interest falls to be computed after</p> <p>9 the final dividend payment on the principal sum deemed</p> <p>10 under Bower v Marris to remain outstanding upon such</p> <p>11 final dividend being paid, the view of the liquidators</p> <p>12 and of the bank is that interest does continue to be</p> <p>13 computed on the principal deemed outstanding until</p> <p>14 further payments have been made satisfying in full that</p> <p>15 deemed outstanding amount of principal. The reason is</p> <p>16 the principal in Bower v Marris aims to bring out</p> <p>17 a payment to the creditor of precisely that sum he would</p> <p>18 have received had no liquidation taken place. By</p> <p>19 treating dividends paid as ordinary payments on account</p> <p>20 falling to be appropriated in the first instance and</p> <p>21 keeping down interest and thereafter capital. The</p> <p>22 Bower v Marris calculator stops at the date of the final</p> <p>23 dividend. The creditor does not get payment in full of</p> <p>24 his debt and contractual interest and is thus not</p> <p>25 committed to his contract in the full sense."</p> <p style="text-align: center;">Page 124</p>

<p>1 Then it is plain from the authorities that interest 2 continues to be calculated until the notional principal 3 balance is extinguished by actual payment. 4 Bromley v Goodere, Mills, Bower v Marris and 5 Humber Ironworks are referred to, together with various 6 other cases. 7 MR JUSTICE DAVID RICHARDS: I have read to the end of the 8 argument. 9 MR DICKER: I am grateful to your Lordship. 10 So, Mr Justice Mervyn Davies in the end satisfied 11 there wasn't a reason for stopping at the date of 12 payment of the final dividend and the calculation 13 continued. 14 MR JUSTICE DAVID RICHARDS: Yes. 15 MR DICKER: My Lord, we mention in our skeleton that the 16 rule is not merely a rule applicable in England but it 17 appears to have been adopted in every Commonwealth 18 jurisdiction that we can find which has considered the 19 issue, in particular it's been applied in Australia, 20 Canada, Scotland, Ireland, Hong Kong and the 21 United States. As far as we're aware, no common law 22 jurisdiction has rejected the rule and all of them have 23 considered it, as I have said, and adopted it. 24 My Lord, I was going to refer your Lordship to 25 a mere handful of those cases. One thing your Lordship</p> <p style="text-align: center;">Page 125</p>	<p>1 So that's the relevant date. 2 Then at 9 he refers to 438 causing provisions of the 3 Bankruptcy Act to apply. That Act providing that a debt 4 is not provable in bankruptcy insofar as the debt 5 consists of interest accruing in respect of the period 6 commencing on or after the date of the bankruptcy is 7 provable in the bankruptcy. 8 So that's the cut-off date. 9 Your Lordship will see a reference in 10, in the 10 quotation from the judgment in Tahore Holdings at the 11 end of the quotation a reference to Lord Justice Giffard 12 in Humber Ironworks. 13 Over the page in 16, a reference to WW Duncan. 14 Then this in paragraph 11: 15 "These observations apply equally to the present 16 case under the Companies (New South Wales) Code but with 17 one note of explanation or clarification. Implicit in 18 those observations is the assumption that an obligation 19 to pay interest will be contractual." 20 The earlier cases referring to remission to 21 contractual rights and expressions of that sort. He 22 says the same assumption appears in the judgment of 23 Mr Justice Windeyer in Spedley Securities. 24 "These references to contractual interest do not 25 mean that interest payable by virtue of some other</p> <p style="text-align: center;">Page 127</p>
<p>1 will note, I think, in going through those cases, is the 2 extent to which they have all referred to, relied upon 3 and effectively approved the English cases, 4 Bromley v Goodere, Bower v Marris, Re Humber Ironworks 5 There has been an extraordinary amount of 6 cross-fertilisation, if that's the right word. 7 My Lord, the first is a case from New South Wales. 8 It's in bundle 1D at tab 135. My Lord, the reason we 9 refer this authority to your Lordship is that it holds 10 that Bower v Marris applies not merely in relation to 11 a creditor with a contractual right to interest but also 12 to a creditor with a statutory right to interest, in 13 this case pursuant to a judgment. 14 My Lord, the judgment is by Mr Justice Barrett in 15 the Supreme Court of New South Wales. Picking it up at 16 paragraph 7, he deals with the provisions governing 17 debts and claims admissible to proof. He says: 18 "These are found in section 438 of the Companies 19 (New South Wales) Code." 20 438(1), debts admissible to proof. 438(2), 21 application of the Bankruptcy Act 1986. In 8 he refers 22 to 439(1): 23 "The amount of a debt of a company including a debt 24 that is for or includes interest is to be computed for 25 the purposes of the winding-up as at the relevant date."</p> <p style="text-align: center;">Page 126</p>	<p>1 legally binding obligation stands on some different 2 footing and is not comprehended by the principles 3 stated. It is just that the interest obligation before 4 the court in the particular cases was a contractual 5 obligation." 6 At 12 he says: 7 "The source of the obligation to pay interest in the 8 present case is section 95 of the Supreme Court Act 1970 9 New South Wales." 10 He concludes, in the last half of 13, by reference 11 to an affidavit of Mr Kershaw in the last five lines 12 saying that that: 13 "... also recognises and proceeds upon the 14 principles as regarding post-liquidation that I have 15 referred to above and consider to be correct. Those 16 principles should be applied in relation to all debts 17 upon which interest was continuing to accrue at the time 18 the winding-up order was made, regardless of the nature 19 or the source of the legal obligation to pay interest." 20 In other words, interest first, and interest first 21 whether one is talking about a contractual right to 22 interest or pursuant to a judgment. 23 My Lord, the second is at tab 137, 24 Gerah Imports v The Duke Group. 25 MR JUSTICE DAVID RICHARDS: Just give me one moment</p> <p style="text-align: center;">Page 128</p>



<p>1 (Pause)</p> <p>2 Yes, is this right, there was no provision in the</p> <p>3 Australian legislation for post-liquidation interest if</p> <p>4 there wasn't some independent legal right to it?</p> <p>5 MR DICKER: My Lord, precisely. I think your Lordship will</p> <p>6 see the position more clearly from the next case which</p> <p>7 contains a rather longer --</p> <p>8 MR JUSTICE DAVID RICHARDS: Thank you.</p> <p>9 MR DICKER: 137 is Gerah Imports v The Duke Group. It's</p> <p>10 a decision of the Court of Appeal in South Australia.</p> <p>11 Just looking at the held: The Duke Group was ordered to</p> <p>12 be wound up in 1989. All creditors were paid their</p> <p>13 proven debts in full with a substantial surplus</p> <p>14 remaining by January 2000. The liquidator called for</p> <p>15 proofs of debt in relation to post-liquidation interest.</p> <p>16 The case was stated to the full court as to whether such</p> <p>17 claims were barred by section 439(1) of the Companies</p> <p>18 (South Australia) Code 1981:</p> <p>19 "Held: Anderson, Mullighan and Nyland agreeing that</p> <p>20 such claims were not barred and could be dealt with by</p> <p>21 the liquidator because 439(1) of the Companies</p> <p>22 (South Australia) Code was never intended to alter the</p> <p>23 common law position."</p> <p>24 My Lord, at paragraph 5 the issues are identified.</p> <p>25 Firstly, does section 439(1) of the Companies</p> <p style="text-align: center;">Page 129</p>	<p>1 of the Companies Code which was the relevant ...(reading</p> <p>2 to the words)... provided a bar to creditors'</p> <p>3 entitlements to post-liquidation interest."</p> <p>4 So that's the issue.</p> <p>5 13 sets out 439.</p> <p>6 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>7 MR DICKER: The amount of a debt of a company, including</p> <p>8 a debt that is, for, or includes, interest, is to be</p> <p>9 computed for the purposes of a winding-up as at the</p> <p>10 relevant date.</p> <p>11 The answer to the question of whether that changed</p> <p>12 the position is dealt with beginning at paragraph 19:</p> <p>13 "There was a rule at common law which allowed for</p> <p>14 what has been called a second round of proofs where</p> <p>15 there was a surplus after payment of all debts and</p> <p>16 interest proved in the normal way as at the commencement</p> <p>17 of the winding-up."</p> <p>18 Then a reference to the judgment of</p> <p>19 Mr Justice Dixon, as he then was, in MacKenzie v Rees,</p> <p>20 being a convenient summary of the law.</p> <p>21 If your Lordship turns over to 21, just to note, at</p> <p>22 line 9, the reference to Bromley v Goodere, at line 17</p> <p>23 a reference to ex parte Mills. There's also a reference</p> <p>24 in paragraph 3 to a decision of Chief Justice McLelland</p> <p>25 in Midland Montagu Australia v Harkness, again in the</p> <p style="text-align: center;">Page 131</p>
<p>1 (South Australia) Code bar claims for post-liquidation</p> <p>2 interest by creditors who have a contractual or</p> <p>3 statutory right to interest at an agreed or specified</p> <p>4 rate for a period extending beyond the relevant date for</p> <p>5 the purposes of section 439(5)?</p> <p>6 2, if "no" to question 1, is the liquidator entitled</p> <p>7 to deal with claims for post-liquidation interest in</p> <p>8 accordance with the principles set out in paragraph 30</p> <p>9 and the affidavit of John Sheahan sworn 25 June 2003?</p> <p>10 My Lord, your Lordship should just note Wentworth</p> <p>11 says, in paragraph 53 of its skeleton, that this case</p> <p>12 didn't mention Bower v Marris. If your Lordship,</p> <p>13 however, looks at paragraph 6, it sets out paragraph 30</p> <p>14 of Mr Sheahan's affidavit. Mr Sheahan says:</p> <p>15 "As referred to above, I also received written</p> <p>16 advice from ...(reading to the words)... in summary, the</p> <p>17 advice was to the following effect ..."</p> <p>18 My Lord, it may be quickest if your Lordship were</p> <p>19 just to read 30.1 to 30.6. (Pause)</p> <p>20 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>21 MR DICKER: So Mr Karkar and, as a result, Mr Sheahan,</p> <p>22 appearing to be very familiar with the rule in</p> <p>23 Bower v Marris.</p> <p>24 Paragraph 8 says:</p> <p>25 "The argument concerned the interpretation of 439(1)</p> <p style="text-align: center;">Page 130</p>	<p>1 bundles but I won't show your Lordship it.</p> <p>2 Then at 24:</p> <p>3 "Counsel for TDGL emphasised the difference between</p> <p>4 a substantive rule of law and the rule of convenience</p> <p>5 described in the cases. As he pointed out, the history</p> <p>6 of the way a surplus was dealt with and the law which</p> <p>7 was applied in cases where there was a surplus was not</p> <p>8 a matter of dispute. It is only because of the</p> <p>9 enactment of section 439(1) that any dispute has arisen.</p> <p>10 Put simply, did the enactment of that section alter the</p> <p>11 common law position applied consistently over many</p> <p>12 years?"</p> <p>13 The answer to that, my Lord, will see in 38,</p> <p>14 certainly so far as the legislative materials</p> <p>15 interpreting the legislation are concerned, the court</p> <p>16 says:</p> <p>17 "In my view the second reading speeches tend very</p> <p>18 much to support the argument ...(reading to the</p> <p>19 words)... in the event of a surplus to recover</p> <p>20 post-liquidation interest."</p> <p>21 That ultimately is the conclusion that's reached in</p> <p>22 53 and 54:</p> <p>23 "In my view, therefore, the introduction of 439(1)</p> <p>24 never intended to alter the common law position</p> <p>25 ...(reading to the words)... than clearly pointing in</p> <p style="text-align: center;">Page 132</p>

<p>1 the opposite direction." 2 So you can recover interest. 3 And then the second issue dealt with more shortly. 4 If your Lordship looks at 56: 5 "In relation to the case stated I would therefore 6 answer as follows...", question 1, no, and then question 7 2, whether Mr Karkar's advice was correct and set out 8 the relevant approach, answer yes. 9 My Lord, the third and fourth cases are two 10 decisions from Canada. 11 The first, an early case of 1851 called 12 Re Langstaffe which is in bundle 1A, tab 19. 13 My Lord, again, the issue is: is interest payable in 14 the event of a surplus and, if it is, on what basis? 15 Again, trying to take this shortly, paragraph 4 from 16 the argument your Lordship will see a number of cases, 17 again including Bromley v Goodere, Bower v Marris and 18 other authorities, many of which are in the bundles. 19 Vice Chancellor Esten's judgment begins at paragraph 9. 20 Picking it up at paragraph 10, he starts with a point on 21 what one might call the merits. 22 He says: 23 "I would premise that reason and justice are all in 24 favour of the ...(reading to the words)... on debts 25 which he had thereby delayed the recovery."</p> <p style="text-align: center;">Page 133</p>	<p>1 He then deals with the position in Canada in 2 paragraph 11 with the Canadian Act having been passed in 3 1843. Five lines down he refers to section 132 of the 4 '85 Act imposing a further charge upon the estate. 5 Authorised the addition introduction of interest at rate 6 of 4 per cent. And says: 7 "It is not easy to account for our own legislature 8 having adopted this provision either in terms or in 9 substance but nothing can be more just than that 10 a bankrupt estate should pay interest on all debts of 11 every description whatsoever before the bankrupt himself 12 should be allowed to receive any part of it." 13 At the bottom of the page, he says: 14 "No doubt the whole of our Bankrupt Act was borrowed 15 from ...(reading to the words)... strictly consonant to 16 the dictates of natural justice and reason." 17 So Bower v Marris, it appears, known and established 18 in Canada in 1851. 19 MR JUSTICE DAVID RICHARDS: Yes. 20 MR DICKER: A more recent Canadian decision is a decision 21 called Attorney General of Canada v Confederation Trust 22 which is 1D/133. My Lord, this case is important for 23 two reasons. First of all, the court had to consider 24 whether the enactment of the express provision dealing 25 with post-insolvency interest abolished the previous</p> <p style="text-align: center;">Page 135</p>
<p>1 Then he says, well, that may be, but it's a question 2 of construction. He says: 3 "If the law is against such claim it must be 4 enforced whatever may ...(reading to the words)... new 5 and positive enactment must govern all questions arising 6 under it." 7 My Lord, then two lines further on, he says: 8 "... useful to attend to the bankrupt law in England 9 from the introduction of that system until the passing 10 of our own Act." 11 My Lord, he then deals for the rest of paragraph 10 12 with the position in England. I won't take your 13 Lordship through it but there's a lengthy citation from 14 Bromley v Goodere and an even longer one from 15 Bower v Marris. A conclusion about eight lines up from 16 the end of paragraph 10, in the middle of the line, he 17 says: 18 "The law continued in this state until the passing 19 of 6th George 4 [that's -- we're now in 1824/1825] and 20 the rule which had prevailed in bankruptcy with regard 21 to the surplus was recognised and extended by that 22 statute which provided by its 132nd section that the 23 surplus should not be handed to the bankrupt until 24 interest after the date of commission should be paid on 25 all debts ...", et cetera.</p> <p style="text-align: center;">Page 134</p>	<p>1 approach; and, secondly, the statute provided for 2 interest on all debts which did not otherwise carry 3 interest. 4 MR JUSTICE DAVID RICHARDS: Right. 5 MR DICKER: My Lord, the administrators' submission is that 6 this case wrongly decided on the basis that 7 Mr Justice Blair failed to appreciate that the Canadian 8 statute included a mandatory direction and therefore 9 effectively repealed the previous regime. 10 I want to just, again, dealing with this as quickly 11 as I can. The facts, I think, if I just pick them up at 12 page 2, five lines down: 13 "The dispute was over whether the interest was to be 14 paid in accordance with the provisions of section 95(2) 15 of the Winding-up and Restructuring Act or on some other 16 basis" -- 17 MR JUSTICE DAVID RICHARDS: Where are you, sorry? 18 MR DICKER: Page 2, five lines down. 19 MR JUSTICE DAVID RICHARDS: Oh yes, I have it. 20 MR DICKER: I am sorry. 21 MR JUSTICE DAVID RICHARDS: Yes. 22 MR DICKER: "The dispute was over whether the interest was 23 to be paid in accordance ...(reading to the words)... 24 payment of interest and then to the payment of 25 principal."</p> <p style="text-align: center;">Page 136</p>

<p>1 The judgment, page 3, begins with a quotation which 2 is in fact from Fine Industrial Commodities. The 3 liquidators of the company, who were also 4 PricewaterhouseCoopers, made the following 5 recommendations which your Lordship will see at page 4: 6 "(a) the holders of all proper claims against 7 Confederation Trust's estate receive out of any surplus 8 post-liquidation interest on the outstanding balances of 9 their claims from the date of liquidation to the date on 10 which final payment of full principal amount of their 11 claims is made." 12 Then (c): 13 "Depending on the amount of the available surplus, 14 distributions to creditors should first be made on 15 account of interest and thereafter on account of the 16 principal balances of their claims as more particularly 17 set out in the liquidators' reports." 18 So in this case PricewaterhouseCoopers suggesting 19 that <i>Bower v Marris</i> should be applied. 20 The analysis starts towards the bottom of page 5, 21 paragraph 15: 22 "To answer the questions posed above, it necessary 23 in the first place to determine whether or not 24 section 95.2 of the Winding-Up Act applies to the 25 Confederation Trust."</p> <p style="text-align: center;">Page 137</p>	<p>1 paid in accordance with the provisions of 2 sub-section 95(2) ...(reading to the words)... or 3 a principal first focus as a starting point." 4 24, he says: 5 "95(2) applies in relation to the liquidation." 6 Then deals, at 29 onwards, with the calculation of 7 interest under 95(2). Again, in terms, in our 8 submission, remarkably similar to those in authorities 9 your Lordship has already seen, 29: 10 "The traditional rule in insolvency situations that 11 dividends are to be applied first ...(reading to the 12 words)... and contend for the reverse methodology." 13 30: 14 "Nothing in the language of section 95 itself to 15 indicate that Parliament intended to alter this 16 traditional methodology in the case of 17 a post-liquidation surplus." 18 Then you have, yet again, the appropriation 19 argument: 20 "The respondents submit, however, that 21 post-liquidation interest is only payable under payment 22 in full of all proven claims and there is nothing in the 23 legislation to suggest a recalculation is to be done 24 regarding distributions already made which would be 25 necessary if the interest portion of the surplus is to</p> <p style="text-align: center;">Page 139</p>
<p>1 There's a reference in 16: 2 "Prior to the enactment of section 95(2) the 3 Winding-Up Act did not contain any provision for the 4 payment of post-liquidation interest. Section 95 read 5 as follows ..." 6 Then 17: 7 "Section 95(2) was added. It states: any surplus 8 referred to in sub-section (1) shall first be applied in 9 payment of interest from the commencement of the 10 winding-up at the rate of 5 per cent per annum on all 11 claims proved in the winding-up and according to their 12 priority." 13 21, there's a reference to: 14 "At common law the interest stops rule applied in 15 winding-up proceedings." 16 In other words, cut-off date. 17 Reference at the top of page 7 to <i>Humber Ironworks</i>, 18 <i>Bower v Marris</i>, et cetera. 19 22: 20 "Even without specific reference to post-liquidation 21 interest in winding-up legislation, there were 22 circumstances at common law where such interest could be 23 paid out of surplus." 24 Then the last three lines of 22: 25 "The dispute is over whether the interest is to be</p> <p style="text-align: center;">Page 138</p>	<p>1 be distributed on a payment of interest first basis. 2 Section 95 therefore mandates that distributions are to 3 be credited first to the proven claim amounts they say. 4 My Lord, 32: 5 "I see no reason why section 95 should be 6 interpreted in a fashion that departs ...(reading to the 7 words)... proven claims that been paid on the 8 winding-up." 9 Reference to <i>Canada Deposit Insurance v Canadian</i> 10 <i>Commercial Bank</i>. 11 My Lord, if your Lordship just notes in the 12 quotation, the judge in that case referred to 13 Lord Selwyn's statement in <i>Humber Ironworks</i>, that no 14 person should be prejudiced by the accidental delay 15 which in consequence of the formal proceedings of the 16 court in other circumstances actually occur in realising 17 the assets; and adds a further caution that no person 18 should be prejudiced by such delay in the distribution 19 of assets. 20 33: 21 "In the circumstances of this case, not so much the 22 unsecured creditors ...(reading to the words)... its 23 creditors call for the application of the generally 24 accepted rule." 25 My Lord, the next jurisdiction is Scotland. The</p> <p style="text-align: center;">Page 140</p>

<p>1 decision a case called Gourlay v Watson. It's at 2 file 1B, tab 51. My Lord, the case is relevant for two 3 reasons. Firstly, it held the ruling of Bower v Marris 4 was also applicable in Scotland. Secondly, it's another 5 example of a case that rejects an argument based on 6 appropriation. 7 My Lord, Mr Smith, I think, deals with the decision 8 in some detail in his skeleton and I was going to leave 9 it to him to deal with the detail of it. Can I just -- 10 MR JUSTICE DAVID RICHARDS: Do you have the reference in his 11 skeleton, just out of interest? 12 MR DICKER: Yes, York's skeleton, paragraphs 56 to 62. 13 MR JUSTICE DAVID RICHARDS: Thank you very much. 14 MR DICKER: My Lord, just so your Lordship, as it were, 15 identifies the critical point, I can do it from one 16 judgment. It's that of Lord Moncrieff at 769. The case 17 actually concerned a trust deed. Lord Moncrieff said: 18 "This case must be treated as that of a trust of the 19 distribution of an estate which was actually or in all 20 likelihood insolvent at the commencement of the trust. 21 The Lord Ordinary proceeds upon the ground that 22 trustees, whom he identifies not correctly I think with 23 the debtors, appropriated the payments which they made 24 to the creditors to reduction of the principal of their 25 debts, and that this appropriation was acquiesced in by</p> <p style="text-align: center;">Page 141</p>	<p>1 MR DICKER: Absolutely. Then obviously outside of the 2 insolvency a creditor is also able to say, "You haven't 3 paid me. I'm commencing proceedings", and therefore to 4 recover the full amount. 5 MR JUSTICE DAVID RICHARDS: Yes. 6 MR DICKER: My Lord, I said absent agreement or statutory 7 provision to the contrary, it's obviously open to 8 creditors to ultimately agree something different and 9 there is one example that the parties have managed to 10 find where statute has done that which is in relation to 11 counter court judgments. 12 MR JUSTICE DAVID RICHARDS: Oh, yes. Right. Thank you for 13 that. 14 MR DICKER: Then the only thing I was going to say is the 15 second paragraph from the end where he says: 16 "The analogy of the law of bankruptcy, both here and 17 in England, in accordance with this view", and at the 18 end of that paragraph there's a reference to Warrant 19 Finance Company's case, Humber Ironworks. 20 MR JUSTICE DAVID RICHARDS: Yes. 21 MR DICKER: My Lord, if your Lordship permits me, I'd like 22 just to deal quickly with Ireland. 23 MR JUSTICE DAVID RICHARDS: Yes. 24 MR DICKER: There are three judgments, all in the same case, 25 in relation to a company called Hibernian Transport</p> <p style="text-align: center;">Page 143</p>
<p>1 the creditors was evidenced by the receipts which they 2 granted." 3 He says: 4 "I do not think this is a correct view of the case." 5 The next paragraph: 6 "When, as here, an estate is insolvent or thought to 7 be insolvent and there is not any present prospect that 8 the creditors will be paid even the principal of their 9 debt in full, payments of debts/dividends are made and 10 accepted on a different footing." 11 A reference to, at the time, the creditors' claim 12 for accruing interest ignored and the dividends are paid 13 nominally in extinction of the accumulated debt. 14 MR JUSTICE DAVID RICHARDS: Just out of interest, Mr Dicker, 15 at the top of that page there's a general proposition 16 about solvent debtors. Is that, just out of interest, 17 the position in English law, do you know? 18 MR DICKER: My Lord the answer to that is "yes", unless 19 otherwise agreed or provided for by statute. There is 20 a decision of the Privy Council in the bundles, called 21 Nemichand, which states that if a debtor, as it were, 22 attempts to appropriate a payment in respect of 23 principal, the creditor is entitled to turn round and 24 say, "I'm not having that" -- 25 MR JUSTICE DAVID RICHARDS: I reject the payment, yes.</p> <p style="text-align: center;">Page 142</p>	<p>1 Corporation. The first one is at bundle 1C, tab 107. 2 My Lord, these decisions are relevant because, 3 firstly, like the others, they hold that the approach in 4 Bower v Marris applies in Ireland. But they're also 5 relevant because the Irish legislation includes 6 a provision for statutory interest at the Judgments Act 7 rate. 8 It's clear that in Ireland Bower v Marris also 9 applies to statutory interest at the Judgments Act rate; 10 in other words, not just where you're dealing with 11 a contractual right. The only wrinkle being that the 12 relevant provision providing for statutory interest at 13 the Judgments Act rate only applies in bankruptcy. It 14 doesn't apply in relation to companies winding up. It 15 doesn't apply in relation to companies winding up for 16 similar reasons as it doesn't apply in England as held 17 by Vice Chancellor Pennycuik in Rolls-Royce, the 18 legislation being very similar. 19 MR JUSTICE DAVID RICHARDS: Yes. 20 MR DICKER: My Lord, starting at 107, the first of two first 21 instance decisions essentially on the same issue, as 22 your Lordship will see. The facts just below the 23 reference to section 86 of the Bankruptcy Act: 24 "During the course of the liquidation monies 25 realised from the sale of its assets were held on</p> <p style="text-align: center;">Page 144</p>

<p>1 deposit earning interest. As result of the interest 2 earned, the funds in the possession of the official 3 liquidator were more than sufficient to discharge all 4 the debts of the company ascertained at the commencement 5 of the winding-up, together with the creditors' claims 6 for interest and costs." 7 Dropping a paragraph: 8 "The official liquidator brought an application to 9 court to determine whether the unsecured creditors of 10 the company were entitled to interest on their debts as 11 ascertained in priority to the shareholders' claim to 12 the residue." 13 Held, by Mr Justice Carroll: 14 "Unsecured creditors entitled to be paid on their 15 debts as ascertained. Existence of a surplus in the 16 liquidation of a company through interest earned on 17 monies held on deposit did not mean that the company was 18 solvent at the date of the commencement of the winding 19 up (Fine Industrial Commodities distinguished)." 20 That was the approach at first instance. 21 In 2: 22 "Therefore the rules of bankruptcy implied 23 accordingly unsecured creditors entitled to interest on 24 their debts as ascertained payable at the rate from time 25 to time payable on judgment debts."</p> <p style="text-align: center;">Page 145</p>	<p>1 My Lord, then dropping a paragraph, there's 2 a reference to section 284 of the Companies Act. 3 MR JUSTICE DAVID RICHARDS: Yes. 4 MR DICKER: "Providing the same rules apply in the winding 5 up of insolvent companies are in force under the law of 6 bankruptcy." 7 This obviously raised exactly the same issue as in 8 Rolls-Royce. 9 MR JUSTICE DAVID RICHARDS: Yes. 10 MR DICKER: The judge, however, coming to a different 11 conclusion because the facts. Your Lordship will see 12 that at 269, the second paragraph: 13 "I do not disagree with that interpretation but I do 14 draw a distinction between those cases and the present 15 case. In the present case the company's surplus does 16 not arise from the realisation of assets but from 17 massive amounts of interest earned over a long period." 18 In the next paragraph, he says: 19 "In my view the reality of the situation is that 20 this company, unlike the companies in the cases cited, 21 could not be deemed to have always been solvent. 22 Therefore section 284 of the Companies Act applies, as 23 does the bankruptcy rule relating to interest." 24 So there's a reference to the bankruptcy rule. 25 Rolls-Royce is distinguished because you can't really</p> <p style="text-align: center;">Page 147</p>
<p>1 3: 2 "Those creditors entitled to contractual interest 3 entitled to be paid the balance of the sum due after 4 giving credit for the amount received in respect of 5 statutory interest." 6 That's Humber Ironworks. 7 If your Lordship goes to the judgment, 266, at the 8 bottom, ten lines up: 9 "The creditors argued they are entitled to interest 10 either on a statutory interpretation of 284 of the 11 Companies Act or, alternatively, on equitable grounds. 12 Section 304 of the Irish Bankrupt and Insolvency Act 13 provided if the produce of the estate of any bankrupt or 14 insolvent shall be sufficient to pay 20 shillings in the 15 pound ...(reading to the words)... to be paid to such 16 bankrupt or insolvent. This direction has been amended 17 by section 86." 18 That's at 267: 19 "If the estate of any bankrupt is sufficient to pay 20 £1 in the pound at any rate of interest currently 21 applicable on judgment debts and to leave a surplus, the 22 court shall order such surplus to be paid or delivered 23 to or vested in the bankrupt, his personal 24 representatives ...(reading to the words)... to be paid 25 at the rate currently payable on judgment debts."</p> <p style="text-align: center;">Page 146</p>	<p>1 say this company was always solvent and therefore within 2 the territory of the bankruptcy rules. 3 In that basis, in the penultimate paragraph on that 4 page, he holds: 5 "After payment of the statutory interest, the 6 contractual creditors are entitled to be paid the 7 balance of the sum for contractual interest ...(reading 8 to the words)... to contractual interest and the surplus 9 to reduction of capital (see also re Lines Brothers 10 number 2)." 11 Now, that obviously was felt not to be clear enough 12 so far as the parties were concerned because they came 13 back, at tab 108, essentially to have the same issue 14 determined all over again. The last half of the first 15 paragraph, Mr Justice Carroll says: 16 "The question which arises is whether the dividend 17 paid to the creditors in 1983 and 1986 must be 18 appropriate" -- 19 MR JUSTICE DAVID RICHARDS: I am sorry, where are you now? 20 MR DICKER: I am sorry, it's the first paragraph, line 4. 21 MR JUSTICE DAVID RICHARDS: Page 271? 22 MR DICKER: 272. 23 MR JUSTICE DAVID RICHARDS: Thank you. 24 MR DICKER: "The question which arises is whether the 25 dividend paid to the creditors in 1983 and 1986 must be</p> <p style="text-align: center;">Page 148</p>

<p>1 appropriated first to statutory interest and the surplus                  2 to reduction of principal or whether the payments were                  3 made solely in reduction of principal."                  4 The last paragraph, line 4, refers to the Irish                  5 Bankruptcy Law Committee which took the view that in                  6 England interest was to be computed as running interest,                  7 treating the dividends as ordinary payments on account,                  8 and applying each dividend in the first place to the                  9 payment of the interest which would have been due at the                  10 date of dividend if there had been no bankruptcy and                  11 Bromley v Goodere, ex parte Morris, Bower v Marris,                  12 et cetera, referred to.                  13 At 273 there's reference in the bottom third to                  14 section 86 and the conclusion, right at the bottom of                  15 that page, is:                  16 "If statutory interest is payable, it seems to me it                  17 should be computed as running interest following                  18 Bower v Marris."                  19 MR JUSTICE DAVID RICHARDS: Yes. Thank you.                  20 MR DICKER: My Lord, that case then went to the                  21 Court of Appeal and the judgment is at tab 112.                  22 My Lord, what the Court of Appeal essentially did was                  23 hold that Vice Chancellor Pennycuick's reasoning in                  24 Rolls-Royce was correct.                  25 MR JUSTICE DAVID RICHARDS: I see, right.</p> <p style="text-align: center;">Page 149</p>	<p>1 MR JUSTICE DAVID RICHARDS: Right. Very well. Thank you                  2 very much. 10.30 tomorrow morning.                  3 (4.25 pm)                  4 (The court adjourned until                  5 Thursday, 19 February 2015 at 10.30 am)                  6                  7                  8                  9                  10                  11                  12                  13                  14                  15                  16                  17                  18                  19                  20                  21                  22                  23                  24                  25</p> <p style="text-align: center;">Page 151</p>
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<p>1 MR DICKER: In other words, the bankruptcy provision doesn't                  2 apply in relation to companies winding up.                  3 MR JUSTICE DAVID RICHARDS: Yes.                  4 MR DICKER: The reason given by Mr Justice Carroll wasn't                  5 a good enough point of distinction. It didn't suggest                  6 that in bankruptcy Bower v Marris wouldn't apply to                  7 statutory interest. There's no criticism, as it were,                  8 of what would have been the position in bankruptcy and                  9 it also held that in companies winding up, although one                  10 was therefore limited simply to contractual rights of                  11 creditors because the bankruptcy provision giving you                  12 4 per cent didn't apply, in relation to contractual                  13 rights of creditors Bower v Marris did apply.                  14 Your Lordship will see that, I think, most shortly                  15 right at the end, page 6. There are three points at the                  16 end which are declarations. Firstly:                  17 "Contractual creditors are entitled to interest on                  18 their debts at their respective contractual rates.                  19 "2. A declaration that for the purposes of                  20 determining ...(reading to the words)... towards                  21 interest then due and then towards principal."                  22 MR JUSTICE DAVID RICHARDS: Yes, I see.                  23 MR DICKER: My Lord, I have one more Commonwealth authority                  24 to take your Lordship to but it may be more convenient                  25 to do that tomorrow morning.</p> <p style="text-align: center;">Page 150</p>	<p style="text-align: center;">INDEX</p> <p>1 Opening submissions by MR TROWER .....1                  2 Opening submissions by MR DICKER .....33                  3                  4                  5                  6                  7                  8                  9                  10                  11                  12                  13                  14                  15                  16                  17                  18                  19                  20                  21                  22                  23                  24                  25</p> <p style="text-align: center;">Page 152</p>
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