1 Monday, 23 February 2015
2 (9.30 am)
3 Housekeeping
4 MR JUSTICE DAVID RICHARDS: So far as sitting times are
5 concerned, we'll sit until 2 o'clock. I will -- I'll
6 say it now and I'll say it again -- encourage everyone
7 to leave as quickly as possible at 2 o'clock, not to get
8 snarled up with whatever may be going on out there.
9 They will be setting up, I think, before 2 o'clock
10 but there are double doors and they have told me they
11 will try and keep the noise to a minimum.
12 So far as -- so if we -- on that basis, if we have
13 a half an hour break at 11.30. Does that seem all
14 right? Would you like a break ...?
15 So I think those are the logistics.
16 Mr Zacaroli.
17 Opening submissions by MR ZACAROLI (continued)
18 MR ZACAROLI: My Lord, as I anticipated I have three
19 additional points to make this morning. These will be
20 short, which is why I'm standing here rather than in the
21 middle, so it doesn't matter for these purposes.
22 The three points are these. First of all, to take
23 my Lord some cases that showed that section 132 of the
24 1825 Bankruptcy Act had no retrospective effect.
25 MR JUSTICE DAVID RICHARDS: Yes.

Page 1

1 MR ZACAROLI: Therefore, as my Lord correctly pointed out,
2 since the bankruptcy pre-dated the Act by some years,
3 section 132 had no application in Bower v Marris in
4 fact.
5 MR JUSTICE DAVID RICHARDS: Right.
6 MR ZACAROLI: The second point is to take my Lord to one
7 case that Mr Dicker took my Lord to. It's the Ohio
8 case.
9 MR JUSTICE DAVID RICHARDS: Yes.
10 MR ZACAROLI: The one US case in the bundles. I have three
11 or four points on that.
12 Then my third point is to go back to the Scottish
13 case, just to make clear what I didn't make clear on
14 Friday, that it is a case concerned with
15 interest-bearing debts where the interest was continuing
16 to accrue during the period in which the trust was being
17 administered.
18 MR JUSTICE DAVID RICHARDS: Very well.
19 MR ZACAROLI: So far as Bower v Marris is concerned, it's
20 probably best to take Bower v Marris first, the case
21 itself, and show my Lord the two references to the
22 statute in the judgment of Lord Cottenham. It's, as
23 my Lord knows, bundle 1A, tab 17.
24 MR JUSTICE DAVID RICHARDS: I have it somewhere else and
25 I just have to find it. (Pause)

Page 2

1 Yes, I have it. Thank you.
2 MR ZACAROLI: Two references. First of all, page 357, the
3 second paragraph on the page. It's a very brief
4 reference to section 132.
5 MR JUSTICE DAVID RICHARDS: Yes.
6 MR ZACAROLI: The fact that the bankrupt doesn't receive the
7 surplus until all creditors have received interest on
8 their debts. I have already submitted to my Lord that
9 was not a reference, or at least the judgment as a whole
10 is not purporting to determine anything about the rights
11 of the creditors without interest-bearing debts and that
12 reference doesn't change that.
13 MR JUSTICE DAVID RICHARDS: Yes.
14 MR ZACAROLI: The second reference is over the page,
15 page 358. It's a single line in the middle of the page,
16 where he refers to -- he's referred to Lord Hardwicke in
17 Bromley v Goodere:
18 "The order indeed appears to have been framed by
19 himself ...(reading to the words)... case without the
20 aid which the statute now affords."
21 It's clear that he is referring there to the
22 1825 Act.
23 MR JUSTICE DAVID RICHARDS: Yes.
24 MR ZACAROLI: Although, as I submitted on Friday, what he
25 was referring to there was the fact that the Act makes

Page 3

1 explicit what had been implicit before, namely that the
2 surplus is payable by way of interest to creditors with
3 interest-bearing debts before it goes back to the
4 bankrupt.
5 MR JUSTICE DAVID RICHARDS: Yes.
6 MR ZACAROLI: So to take my Lord then to the cases that we
7 have dug out over the weekend. There's a little bundle
8 of additional authorities that my Lord should have on
9 the desk.
10 MR JUSTICE DAVID RICHARDS: I have.
11 MR ZACAROLI: It's a black slim volume.
12 MR JUSTICE DAVID RICHARDS: Yes.
13 MR ZACAROLI: The first tab is 1 section from the 1832 Act,
14 section 135 for the 1825 Act and it read:
15 "... and it be enacted that this Act shall be
16 construed ...(reading to the words)... except where any
17 such alterations expressly declared."
18 The next two lines are irrelevant. They deal with
19 extending to aliens, denizens and women.
20 Next to the words "proviso for subsisting
21 commissions" on the left of the page, it reads:
22 "... and that nothing herein contained shall render
23 invalid ...(reading to the words)... whom any commission
24 has or shall have issued except as herein specifically
25 enacted."

Page 4

1 MR JUSTICE DAVID RICHARDS: Yes.
2 MR ZACAROLI: A number of authorities around the time it was
3 held that the Act is sometimes retrospective and
4 sometimes not. One has to look at each section
5 differently.
6 MR JUSTICE DAVID RICHARDS: Right.
7 MR ZACAROLI: The second tab in the bundle is a case called
8 in the matter of Shepherd from 1828, so after the Act
9 had come into force. It's a mercifully short report.
10 The headnote:
11 "This was a petition that the assignee should pay
12 over to the bankrupt the...(reading to the words)...
13 should pay the same amount of the surplus."
14 This was accordingly done but the Act -- that's the
15 1825 Act --
16 MR JUSTICE DAVID RICHARDS: I have read that. I see. So it
17 was the non-interest-bearing creditors who the assignee
18 was concerned about.
19 MR ZACAROLI: Yes.
20 MR JUSTICE DAVID RICHARDS: Yes.
21 MR ZACAROLI: Then the judgment at page 69. The
22 Vice Chancellor:
23 "Considering the words of the 132 and 135 sections
24 together, I cannot think it was intended that former
25 should be retrospective. And words in the section

1 are ..."
2 MR JUSTICE DAVID RICHARDS: Yes.
3 MR ZACAROLI: Then to look at the note at the bottom of the
4 page:
5 "The bankrupt laws take the property out of the
6 bankrupt only for the purposes of paying its creditors
7 and at the moment the debts is paid the assignees are
8 made trustees for the bankrupt."
9 That is a point we have made in our skeleton on the
10 basis of later authorities.
11 We can skip for a moment the next two tabs and go
12 straight to the last tab, tab 5. We refer to this only
13 for the reason that it's a decision of Lord Cottenham in
14 1837, that is four years before Bower v Marris. The
15 case concerned in passing the question of the
16 retrospectivity of the 1825 Act, although it doesn't
17 deal with the 132 section. It was in fact a case about
18 the surplus in the hands of assignees in circumstances
19 where not all creditors had pursued their claims.
20 MR JUSTICE DAVID RICHARDS: I see.
21 MR ZACAROLI: It looks like the assignees are suggesting or
22 their heirs are suggesting they could keep that money
23 because it was no longer the bankrupt's, having been
24 made available to creditors. The argument failed. But
25 for present purposes all my Lord needs to see is that on

1 page 4 and 5 of the report, the passages are highlighted
2 in yellow, I think.
3 MR JUSTICE DAVID RICHARDS: Yes.
4 MR ZACAROLI: You will see that there's -- in the argument,
5 this is -- reference to cases determining whether the
6 Act was retrospective or not. The bottom the page, the
7 following sections have held not to be retrospective and
8 there included section 132 and a reference back to two
9 cases, ex parte Sammon and ex parte Phillips.
10 MR JUSTICE DAVID RICHARDS: Hmm, hmm.
11 MR ZACAROLI: The second of those cases, at tab 4 in the
12 bundle -- I won't bother taking you to tab 3 which is
13 just a case that says the rule is settled.
14 Tab 4. This was a petition by the heir at law of
15 the bankrupt and others praying that the assignees might
16 convey to the petitioner the residue of the bankrupt's
17 estate without payment of interest to creditors who did
18 not bear interest, the same point. It's actually a very
19 short judgment but because there are so many notes every
20 page has only two lines of the judgment on it -- of the
21 argument.
22 MR JUSTICE DAVID RICHARDS: I see right.
23 MR ZACAROLI: The judgment itself is very short at page 684
24 "The fact fails in this case for the right to the
25 surplus vested many years ago ...(reading to the

1 words)... it is not open. It is concluded by the former
2 decisions."
3 MR JUSTICE DAVID RICHARDS: Yes. Thank you.
4 MR ZACAROLI: My Lord, I don't suggest that Lord Cottenham
5 didn't have the 1825 Act in mind when he was deciding
6 Bower v Marris. Clearly he did, but this shows another
7 reason why it was actually irrelevant --
8 MR JUSTICE DAVID RICHARDS: Yes.
9 MR ZACAROLI: -- to the facts of the case and he cannot have
10 been considering the interest of non-interest-bearing.
11 MR JUSTICE DAVID RICHARDS: Yes, I follow.
12 MR ZACAROLI: My Lord, then my second point is to deal with
13 the Ohio case. It is bundle 1B at tab 64. My
14 submission about this case is it's consistent with our
15 overall case that the Bower v Marris calculation is an
16 aspect of a creditor's rights under the general law
17 where payments on account are made, principal and
18 interest then accruing due.
19 Four passages to show my Lord. First of all, first
20 page of the report, right-hand side, column -- the
21 paragraph beginning 463. Just to remind my Lord what
22 the case was about.
23 MR JUSTICE DAVID RICHARDS: Yes.
24 MR ZACAROLI: The case was about a receivership. In fact it
25 was a single creditor of the defendant had claimed

1 $100,000 with interest thereon in 1921. He secured the
2 appointment of receivers.
3 The next page, the right-hand column, in the third
4 paragraph:
5 "This appeal involves the legality of an order
6 instructing the receiver in an equity receivership as to
7 the application to be made of the dividend payments
8 being payments upon interest-bearing debts."
9 MR JUSTICE DAVID RICHARDS: Yes.
10 MR ZACAROLI: The third reference is on page 5 of the
11 report. In the middle of the left-hand column,
12 paragraphs 4 begins:
13 "In 1835 the question became before
14 Chancellor Walworth in New York ..."
15 So he's here citing New York law on the point.
16 The following paragraph is a quote from that
17 decision. It refers to the principles of civil law.
18 I think my Lord was shown this passage.
19 MR JUSTICE DAVID RICHARDS: I was shown part of it, yes.
20 MR ZACAROLI: I simply rely upon the very last words in the
21 paragraph.
22 MR JUSTICE DAVID RICHARDS: Yes.
23 MR ZACAROLI: Where it refers to -- where both principle and
24 interest were due at the time of such payments.
25 MR JUSTICE DAVID RICHARDS: Yes.

1 MR ZACAROLI: The final reference is on page 6 of the
2 report. It begins on the left-hand column at the bottom
3 paragraph with the number 3 before it:
4 "It is true however that as a general rule, after
5 property of an insolvent is in ...(reading to the
6 words)... and payable after the date of the appointment
7 of the receivers."
8 Then after a reference to some authorities:
9 "But this not because the claims lose their
10 interest-bearing quality during the period ...(reading
11 to the words)... interest as well as principal is to be
12 paid."
13 Then paragraph 4:
14 "If, therefore, it appeared in the court below, as
15 it conceivably did, that the assets were sufficient
16 ...(reading to the words)... did not stop the running of
17 interest on the claims."
18 MR JUSTICE DAVID RICHARDS: Yes.
19 MR ZACAROLI: Then Gourlay v Watson, in the same bundle,
20 tab 51. Five passages to point out. First on all on
21 page 762 of the report, just above the second
22 hole-punch --
23 MR JUSTICE DAVID RICHARDS: Just give me a moment. (Pause)
24 MR ZACAROLI: Page 762. Just above the second hole-punch
25 the passage begins:

1 "Among the creditors was the firm of James
2 Watson & Co" --
3 MR JUSTICE DAVID RICHARDS: I'm not quite there at the
4 moment. This is page 762?
5 MR ZACAROLI: Yes, just above the second hole-punch.
6 MR JUSTICE DAVID RICHARDS: Thank you.
7 MR ZACAROLI: It's a very short paragraph. All it shows is
8 that the relevant reclaimer, I presume appellant, was
9 someone who had an interest-bearing debt as at the date
10 of the trust deed.
11 MR JUSTICE DAVID RICHARDS: Yes.
12 MR ZACAROLI: Page 764, in the opinion that was being
13 appealed in the first paragraph of that, the third line:
14 "The purposes of the trust were for payment of
15 various debts ... (3) any surplus to the trustees
16 themselves", and then:
17 "A list of creditors with the amounts of their
18 respective debts and the dates from which interest
19 should run was appended to the deed and these creditors
20 all signed a docket consenting to the arrangement which
21 the deed embodied."
22 MR JUSTICE DAVID RICHARDS: Yes.
23 MR ZACAROLI: Then turning to first of all the judgment of
24 Lord Young, page 767, at the bottom of the page, the
25 last paragraph:

1 "The doctrine of appropriation of payment by a
2 debtor making it is in my opinion inapplicable
3 ...(reading to the words)... from which interest was to
4 run."
5 That's the date of the deed in fact, August 1886.
6 MR JUSTICE DAVID RICHARDS: The date of the deed?
7 MR ZACAROLI: It is, yes.
8 MR JUSTICE DAVID RICHARDS: Yes, I see. Anyway, your point
9 is -- does that mean that Watson & Co -- did their -- do
10 we know whether their debt carried interest anyway?
11 MR ZACAROLI: Yes, and that's the first reference I made
12 because at the date of the deed it had interest accrued
13 already. That's page 762, the paragraph --
14 MR JUSTICE DAVID RICHARDS: So 11 August 1886, yes, indeed
15 MR ZACAROLI: So by then --
16 MR JUSTICE DAVID RICHARDS: I see, yes. Yes, indeed. Thank
17 you.
18 MR ZACAROLI: Staying with Lord Young for the moment, on
19 page 768, at the top of the page, the third line, the
20 middle of the line, he says:
21 "I have probably said enough to explain why I think
22 that simple interest at the date ...(reading to the
23 words)... interest subsequently accruing."
24 Then skipping down to just below the first
25 hole-punch, at the end of the line:

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1 "It being agreed by the parties to the trust
2 interest should run from 11 August 1886, it was the
3 right of the creditors to be treated and the duty of the
4 trustees to treat them accordingly."
5 MR JUSTICE DAVID RICHARDS: Yes.
6 MR ZACAROLI: Finally, a brief reference in the judgment of
7 Lord Moncrieff. The passage is at page 770,
8 paragraph -- the second paragraph:
9 "But when, as here, an estate is insolvent or
10 thought to be insolvent and there is not any present
11 prospect...(reading to the words)... without any
12 reference either side to an ultimate claim for
13 interest."
14 Then the next paragraph -- next but one paragraph,
15 he refers to the analogy of the law of bankruptcy. In
16 the middle of the paragraph:
17 "The payments of his debts have no reference to
18 interest accrued since that date."
19 So he's also referring to interest that has accrued
20 when payments are made.
21 MR JUSTICE DAVID RICHARDS: Since that -- the date of the
22 sequestration, yes.
23 MR ZACAROLI: That is in fact dealing with an analogous
24 point. The point in the case is the point I mentioned
25 above.

Page 13

1 MR JUSTICE DAVID RICHARDS: I follow.
2 MR ZACAROLI: My Lord, unless my Lord has any further
3 questions from me, those are my submissions now on
4 issues 2 and 39.
5 MR JUSTICE DAVID RICHARDS: I think I have one question,
6 maybe two. You relied on re Baughan for the proposition
7 that the statutory provision for the payment of interest
8 in the 1883 Act was exhaustive of creditors' rights to
9 post-bankruptcy interest. You also relied on what was
10 said in the Cork Report, but the only point I'd like to
11 make to see if you would like to comment on it is in
12 re Baughan there doesn't seem to have been any creditor
13 with an interest-bearing debt.
14 MR ZACAROLI: There's no reference to it.
15 MR JUSTICE DAVID RICHARDS: Yes.
16 MR ZACAROLI: That is correct. It doesn't -- rather like --
17 well --
18 MR JUSTICE DAVID RICHARDS: It may have been in those days
19 that interest at 4 per cent was a pretty good rate of
20 interest; I don't know, but, at any rate, you agree
21 there's no reference to that.
22 MR ZACAROLI: I agree it doesn't refer to it, yes. I accept
23 that, my Lord.
24 MR JUSTICE DAVID RICHARDS: Good. Just give me one moment.
25 (Pause)

Page 14

1 There was a point you made that -- I think I got the
2 point right -- that once a bankrupt has his discharge
3 the proved debts are discharged.
4 MR ZACAROLI: Yes.
5 MR JUSTICE DAVID RICHARDS: I may be expressing this
6 incorrectly. Therefore, on any basis, interest can't
7 continue to run.
8 MR ZACAROLI: Again --
9 MR JUSTICE DAVID RICHARDS: I may not have expressed it
10 entirely correctly. So there can't be any question of
11 interest continuing to run after the principal debt has
12 been paid.
13 Now, I just want to see where that proposition fits
14 in with what we're having to deal with here. Are you
15 able just --
16 MR ZACAROLI: Yes. Just to correct one slight point. It's
17 not the proved debt which is released, it's the debt,
18 the bankruptcy debts.
19 MR JUSTICE DAVID RICHARDS: Those which were capable of
20 proof, I suppose.
21 MR ZACAROLI: Yes, but it's clear that in bankruptcy it's
22 the debt plus the interest from which he is discharged.
23 MR JUSTICE DAVID RICHARDS: Yes, I see.
24 MR ZACAROLI: Where does that fit in? It fits in in this
25 way, primarily, I would say, that -- when one looks at

Page 15

1 issue 39, which is -- assuming rule 2.88(7) is construed
2 in the way we say it should be, is there a claim over
3 for such part of interest which was not dealt with by
4 rule 2.88(7)? The point is this, that in bankruptcy
5 there could be no claim over because there's no
6 scintilla, as it were, between the rule requiring what's
7 to be paid by way of interest and the surplus going to
8 the bankrupt who is freed from the debts. So in
9 bankruptcy there could be no such claim.
10 We say that it would be surprising, and this echoes
11 a submission I did make on Friday, if the policy of the
12 Act, so far as a personal debtor was concerned, was to
13 mean that there could me no remission to contractual
14 rights after interest under the statute had been paid,
15 it would be surprising if it was thought necessary to,
16 as a matter of policy, require such remission in the
17 case of a corporate debtor where the delay in the
18 administration of the estate doesn't just impact on the
19 debtor but impacts on those who fall behind unsecured
20 creditors in the priority waterfall.
21 So it's a sort of a fortiori case. If the policy
22 was thought sufficient not to allow the bankrupt to be
23 burdened by this additional -- whatever right was left
24 unsatisfied, then it ought to follow the same applies to
25 a company -- in relation to companies.

Page 16

1 MR JUSTICE DAVID RICHARDS: I can see the point that
2 interest cannot run on a debt that has been discharged,
3 but until it is discharged there may be a difference
4 between the interest received under the statute and the
5 interest to which the creditor would have been entitled
6 under his contract.
7 MR ZACAROLI: As a matter of theory, that's correct.
8 I mean, as we accept, if a creditor has a right under
9 the general law to appropriate on a Bower v Marris
10 basis, and that's all you're looking at, then the
11 quantum of interest which that creditor would be
12 entitled to after ten years would be different, that's
13 true, but the point is in bankruptcy that's --
14 undoubtedly disappears from the picture once you have
15 paid interest under the statute, on the assumption that
16 we're right on issue 2 of course.
17 MR JUSTICE DAVID RICHARDS: Yes.
18 MR ZACAROLI: Thank you.
19 My Lord, those are my submissions.
20 MR JUSTICE DAVID RICHARDS: Thank you very much.
21 Opening submissions by MR TROWER
22 MR TROWER: My Lord, so far as the joint administrators are
23 concerned of course much of the ground has been covered
24 by Mr Zacaroli, but there are just a few topics on which
25 they would like to make some short submissions and there

1 are five in particular.
2 MR JUSTICE DAVID RICHARDS: Yes.
3 MR TROWER: The first is some principles of statutory
4 construction. Mr Zacaroli indicated we would be making
5 a few short submissions on those, particularly by
6 reference to cases which have considered issues in the
7 context of this code, i.e. the Insolvency Act and the
8 insolvency rules.
9 Secondly, a few additional principles or additional
10 submissions on how it is that those principles of
11 statutory constructions ought to be applied to
12 rule 2.88. It's sort of inevitably will cover a little
13 bit of the same ground as Mr Zacaroli but we want to
14 concentrate on one or two points in particular.
15 MR JUSTICE DAVID RICHARDS: Yes.
16 MR TROWER: The third is some short submissions on issue 39.
17 MR JUSTICE DAVID RICHARDS: Yes.
18 MR TROWER: The fourth, and this will be very short, is the
19 relevance of our answer to issue 3 to what your Lordship
20 is considering, issues 2 and 39.
21 The fifth is a few concluding remarks on policy.
22 MR JUSTICE DAVID RICHARDS: Can I just say on issue 39,
23 issue 39 -- this often happens in cases that you get
24 sort of contingent issues down the track which, because
25 everyone is slight weary at the end of two days of

1 submissions on the main issues, sort of slightly get
2 footnoted. I think that's a danger in this case
3 actually, that issue 39 may not be getting the
4 attention. This not a criticism of anyone, but it's the
5 way these things tend to work.
6 So don't feel that you can -- it's appropriate just,
7 as it were, to skate over 39. I think one has to treat
8 it with the same degree of seriousness as all the other
9 issues that arise.
10 MR TROWER: Yes. Just on that, we -- I think it came from
11 Mr Zacaroli's skeleton first, dealing with issue 39 in
12 conjunction with issue 2 was a logical and sensible
13 thing to do.
14 MR JUSTICE DAVID RICHARDS: Yes.
15 MR TROWER: We certainly agree with that and can see because
16 the two are intimately interconnected for obvious
17 reasons, and the submissions that I'll be making to
18 your Lordship do actually draw out a little bit of that
19 and so I hope will help, but if there are -- if we
20 haven't covered enough of it, please do say so. We're
21 here to try and assist insofar as we're able to.
22 My Lord, what I will not be making any submissions
23 on -- your Lordship has heard an awful lot -- is issues
24 around the true nature of the so-called rule in
25 Bower v Marris. It's been very well dealt with, but

1 I would just like to for your Lordship's note to
2 indicate that in paragraphs 45 to 86 of our skeleton
3 there is a self-explanatory description of the history
4 of the law on creditors' entitlement to post-insolvency
5 interest and how it developed from old concepts of
6 remission to contractual rights to the modern code which
7 depends on the application of a specific fund to
8 compensate creditors for delay in the payment of their
9 proved claims.
10 So there is a historical description there that
11 your Lordship -- from which your Lordship can consider
12 the administrator's position but I really would be going
13 over the same ground that Mr Zacaroli has covered if
14 I were to take your Lordship to that.
15 MR JUSTICE DAVID RICHARDS: Yes.
16 MR TROWER: Now, going then, first, to questions of
17 construction. This is said against this background, and
18 it's perhaps most neatly encapsulated by paragraph 15 of
19 Wentworth's skeleton. They identify a series of
20 textbook authorities which explain how the 1986 Act
21 brought about a complete change to the law concerning
22 payment of interest, and replaced the existing complex
23 and unsatisfactory rules with new provisions. There's
24 a particular reference there to textbook analysis of
25 sections 189 of the Insolvency Act and rule 4.93 of the

1 rules. Rule 2.88, which is the one we're obviously
2 considering, is the application in a distributing
3 administration of those provisions.
4 Now, developing a little or moving a little bit from
5 that. In our skeleton, and perhaps your Lordship would
6 turn it up, in paragraphs 28 to 31, we have included
7 reference to a series of well-known authorities on the
8 approach to construing a new code. For present purposes
9 what I mean by that is a statutory -- by a new code is
10 a statutory provision or series of provisions which do
11 more than simply consolidate the existing law.
12 MR JUSTICE DAVID RICHARDS: Yes.
13 MR TROWER: Of those, there are a series of propositions in
14 28 and 29 which I'm not going to take your Lordship to
15 specifically -- the cases underlying them. I don't
16 think it's necessary. They are dealing with different
17 codes but there are a series of fairly well-known
18 points. The most well-known statement of general
19 principle in this context I think is set out in full in
20 paragraph 30. It's Lord Hershel in the Vagliano case if
21 your Lordship would just read that, just to remind
22 yourself of the way he put it. (Pause)
23 MR JUSTICE DAVID RICHARDS: Yes.
24 MR TROWER: Trying to tease out some of what is said there
25 in the context of the insolvency legislation, the 1986

1 insolvency legislation, it is, in our submission, worth
2 just looking in a bit more detail at four insolvency
3 cases. The first one is the re a debtor case from 1989
4 which is to be found in tab 1C, tab 103. This was
5 a decision of the Court of Appeal in which the only
6 reasoned judgment was given by Lord Justice Nicholls and
7 was given fairly early on in the context of the
8 legislation and was dealing with what had become
9 a rather unsatisfactory state of the law under the old
10 law in relation to the construction of statutory
11 demands. The question was whether or not a statutory
12 demand included within it words that were calculated to
13 perplex and, if it did, it was invalid for all purposes.
14 MR JUSTICE DAVID RICHARDS: Yes.
15 MR TROWER: So it's that sort of slightly ... but there's
16 a rather useful little point of principle or statement
17 of principle on page 276 of the judgment, where just
18 below letter F -- and of course this required
19 a construction of the new rules -- your Lordship sees
20 Mr Ley for the debtor:
21 "... submitted that the test to be applied by the
22 court in determining whether a statutory ...(reading to
23 the words)... on application to set aside bankruptcy
24 notices."
25 So that was the submission that was made.

1 Then the paragraph:
2 "I am unable to accept this. I do not think that on
3 this new bankruptcy case ...(reading to the words)...
4 only by the creditor serving it."
5 Then he went on and considered the decision of
6 Mr Justice Vinelott.
7 The message from that is caution is required in
8 applying old principles in construing new legislation.
9 There may be room for it but caution is required.
10 Now if your Lordship just keeps that bundle open and
11 moves to tab 111, there's a decision of the House of
12 Lords -- no, I mean 106. I am sorry, 106. There's
13 a decision of the House of Lords in a case called
14 Smith v Braintree. This case was a case about the true
15 construction of the moratorium provisions in relation to
16 stays of proceedings, where under the old law there had
17 been an exception in relation to or an exception --
18 there had been a principle in relation to proceedings by
19 local authorities for the recovery of rates that they
20 were entitled to continue to bring their own statutory
21 processes, notwithstanding the existence of the
22 moratorium.
23 MR JUSTICE DAVID RICHARDS: Yes.
24 MR TROWER: There's an interesting passage in the judgment
25 of Lord Jauncey, looking at the code generally. He

1 starts explaining what the debtor's two main arguments
2 are at page 229, between D and E:
3 "The debtor advanced two main arguments, namely that
4 since the Act of 1986 involved ...(reading to the
5 words)... from taking steps by putting pressure on the
6 debtor to obtain advantages over other creditors."
7 Then if one goes on to page 237, he first of all,
8 between E and F, explains his conclusion that case of
9 re Edgcombe, which had given the local authority its
10 argument, was wrongly decided.
11 MR JUSTICE DAVID RICHARDS: Yes.
12 MR TROWER: Then the point that matters, between G and H:
13 "In the second place, and in any event, the Act of
14 1986, although reenacting ...(reading to the words)...
15 to discharge without public examination."
16 This chimes slightly with the submission that
17 Mr Zacaroli made about the Marshalsea prison,
18 your Lordship may recall.
19 MR JUSTICE DAVID RICHARDS: Yes.
20 MR TROWER: "Thus, not only has the legislative approach to
21 bankruptcy ...(reading to the words)... or similar
22 provisions of appeal bankruptcy acts ...", and so on.
23 MR JUSTICE DAVID RICHARDS: Yes.
24 MR TROWER: Now, obviously this principle only goes so far
25 and that's well-established --

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1 MR JUSTICE DAVID RICHARDS: The interesting thing is that in
2 this case Lord Jauncey nonetheless, has quite a lengthy
3 exegesis on the previous law and indeed concludes that
4 the leading decisions were wrong.
5 MR TROWER: Yes, indeed.
6 MR JUSTICE DAVID RICHARDS: Anyway, there it is.
7 MR TROWER: So of course although appellate courts --
8 I won't say that you shouldn't go back into the old law
9 more than you need to, sometimes it is necessary in
10 order to set it in its proper context.
11 MR JUSTICE DAVID RICHARDS: Yes.
12 MR TROWER: My Lord, going on then. Perhaps a case that
13 your Lordship ought to see by way of illustration of how
14 far this goes, or how far it doesn't go, is a case
15 called re a debtor, another re a debtor case,
16 Mr Justice Hoffmann, tab 111. The issue here was the
17 meaning of the phrase "carrying on business" for the
18 purposes of a bankruptcy petition.
19 MR JUSTICE DAVID RICHARDS: Right.
20 MR TROWER: I don't think one needs any more -- to know any
21 more than that. If your Lordship goes to page 558,
22 starting between C and D, he considers the re a debtor
23 case. He then considers the Smith case, between G and
24 H. He goes on at the bottom of the page --
25 MR JUSTICE DAVID RICHARDS: It's just worth noting but the

1 passage at B to C I think is a sort of important
2 introduction.
3 MR TROWER: Yes, yes. That's right.
4 MR JUSTICE DAVID RICHARDS: Yes. Sorry, then you have taken
5 me down to ...?
6 MR TROWER: Down to the bottom at H:
7 "Those authorities show that in approaching the
8 language of the Act in 1986 ...(reading to the words)...
9 when used in subsequent legislation."
10 He then looks at a domiciled person ordinarily
11 resident:
12 "All of which have had attributed to them, both in
13 the context of bankruptcy ...(reading to the words)...
14 was intending to give those words a different meaning."
15 So there you have the other side of the coin, where
16 in the context of a long series of cases and a long
17 series of occasions on which particular phrases have
18 been analysed they have come to have as word
19 a particular meaning. Then of course the court will
20 take that into account when construing the same words
21 used in the new code, even though the policy which
22 underpins the new code may be different.
23 MR JUSTICE DAVID RICHARDS: Yes. There may be also be
24 principles of insolvency law which are so hallowed as to
25 require express, clear and express, language. To take

1 the most extreme example, I would say -- I would propose
2 that the fundamental principle of pari passu
3 distribution would require the most clear words to be
4 displaced.
5 MR TROWER: Indeed my Lord.
6 MR JUSTICE DAVID RICHARDS: And if one thinks of the
7 hindsight principle in relation to contingent debts,
8 that of course is now written into the Act or the rules,
9 but if it weren't and one just had the basic language,
10 which of course had been in the legislation before but
11 without, I think, the qualification for revisiting,
12 I would be inclined to think that the hindsight
13 principle would still apply. I'm not trying to open up
14 new areas, but these are examples of pretty fundamental
15 principles really.
16 MR TROWER: Yes. We'll come back to look at the
17 hindsight --
18 MR JUSTICE DAVID RICHARDS: Well, maybe pick that up then,
19 yes.
20 MR TROWER: My Lord, that's absolutely right. Actually the
21 final case I was going to show your Lordship actually is
22 linked to that. It's the case of MC Bacon which is
23 dealing with the meaning of preferences which of course
24 is another concept which has fairly or had fairly
25 hallowed concepts that underpinned it, although it was

1 redefined in the 1986 legislation in a way which
2 Mr Justice Millett indicated had to be construed in
3 accordance with its terms, and you had to leave behind
4 all the old baggage which we had had, such as dominant
5 intention. It was now all about influence by desire.
6 Just so your Lordship sees that, it's behind
7 tab 105, page 87. Just on the previous page, at 86, he
8 sets out the new provision. He says, just over the page
9 on 87, between A and B, this is the first case where the
10 meaning of the new provision has come to be analysed.
11 Then if your Lordship would read down to the
12 paragraph that ends just before F.
13 MR JUSTICE DAVID RICHARDS: So starting at --
14 MR TROWER: Starting at the section "replaces ..."
15 MR JUSTICE DAVID RICHARDS: Yes. (Pause)
16 Yes.
17 MR TROWER: My Lord, what we say about those cases is two
18 points in particular. The first is that section 2.88 is
19 a new code -- rule 2.88 is a new code. That being the
20 case, that is where you start. The submissions that
21 were made by the Senior Creditor Group and also by York
22 started in the wrong place in large part because they
23 started with the old rule, rather than starting with the
24 code.
25 Now, of course we accept that it may be necessary to

1 go back to some of the old law in order to set it
2 context what the new code is doing, but it doesn't go
3 any further than that.
4 Can I give your Lordship one last submission on this
5 which draws on a case which Mr Smith took you to, the
6 Kaupthing case, Mills. And the way it's put by
7 Lord Walker at the beginning of his judgment. It's in
8 1E at 156A.
9 This chimes with what your Lordship said about basic
10 principles of insolvency law requiring very explicit
11 words to change or alter in some way. It chimes in this
12 sense: we of course accept, and Kaupthing is an example
13 of this, that there may be some old principles, such as
14 the rule in Cherry v Boultbee, the rule against double
15 proof, or the anti-deprivation principle, which survive
16 outside explicit provisions of the code. So there isn't
17 a provision of the code which in terms explicitly sets
18 out those particular principles, but the continuation of
19 the principle must at least be, as a minimum, implicit
20 in the terms of the code insofar as it deals with that
21 subject matter.
22 That's the way it's put by Lord Walker at the
23 beginning of his judgment on page 811 in the first
24 paragraph.
25 MR JUSTICE DAVID RICHARDS: Yes.

1 MR TROWER: In the present case the part of the code which
2 we're concerned with is 2.88, the true construction of
3 which is aided by other parts of the rules and the Act,
4 but we respectfully submit that even -- at the end of
5 the day, even if what occurred in Bower v Marris can
6 properly be regarded as a rule, no part of it and what
7 it did is implicit or can be regarded as implicit in
8 rule 2.88, which is another way of looking at the
9 question of construction. And, unless you can at least
10 say that, such principles as one derives from the rule
11 in Bower v Marris really have to be discarded.
12 MR JUSTICE DAVID RICHARDS: Interestingly, in Waterfall 1
13 I said that Cherry v Boultbee has no application because
14 the matter is covered by the Companies Act.
15 MR TROWER: Yes, your Lordship is right. That was the
16 wrong -- the point can be made in relation to the rule
17 against double proof, perhaps, and anti-deprivation.
18 MR JUSTICE DAVID RICHARDS: Yes.
19 MR TROWER: So, as I say, applying these principles to the
20 code, what we submit is that there's nothing which
21 spells out in the modern code that a notional
22 re-allocation of dividends from principal to interest is
23 to be effected for the purposes of calculating interest
24 which is one way one thinks about the rule in
25 Bower v Marris.

1 MR JUSTICE DAVID RICHARDS: Yes.
2 MR TROWER: Nor is there anything which spells out that
3 payments of dividends are mere payments on account of
4 principal and interest and capable of being appropriated
5 to interest once a surplus arises, which is another way
6 of putting the case on the Senior Creditor Group's case.
7 We do suggest that for the sorts of reasons that
8 appear both in the skeleton argument of Mr Zacaroli in
9 his submissions and so on, and also which I'm just going
10 to highlight one or two of, there are number of
11 statutory provisions which are flatly inconsistent with
12 that being the case.
13 Now, 2.88(7), and for this exercise would
14 your Lordship turn up -- it may be easiest to use the
15 Red Book for this.
16 MR JUSTICE DAVID RICHARDS: The old one or the current one?
17 MR TROWER: It doesn't matter for these purposes. Whichever
18 one comes most easily to hand.
19 MR JUSTICE DAVID RICHARDS: I'll use the new one.
20 MR TROWER: Now, 2.88(7) is the operative provision which
21 gives creditors an entitlement to receive interest on
22 the debts proved and also imposes -- there are two sides
23 to the coin here which one mustn't lose sight of. It
24 gives them an entitlement and it imposes a liability on
25 the company to make a payment, which is one of the

1 findings your Lordship made in Waterfall 1, and an
2 obligation on the administrators to apply a fund for
3 a specific purpose.
4 MR JUSTICE DAVID RICHARDS: Yes.
5 MR TROWER: The entitlement, the liability and the
6 obligation only arise after the occurrence of an event,
7 which is payment of the debts proved. What does payment
8 of the debt proved mean? It means, we respectfully
9 submit, two things. Payment in full of the preferential
10 liabilities under section 175.2(a). If your Lordship
11 will turn back to that, page 175.2(a). So it means
12 payment in full of preferential liabilities under
13 section 175.2(a) and the wording there is "paid in full"
14 which is applied to administrations for your Lordship
15 note -- I don't think we need to turn it -- up by
16 schedule B1, paragraph 65.2.
17 MR JUSTICE DAVID RICHARDS: Yes.
18 MR TROWER: It also means payment in full of the unsecured
19 liabilities, i.e. the debts other than the preferential
20 debts, pursuant to rule 2.69.
21 MR JUSTICE DAVID RICHARDS: Yes.
22 MR TROWER: Now, we submit that it is clear that the concept
23 of these payments in full constituting, as they do, the
24 payment of the debts proved within the meaning of
25 rule 2.88(7) is inconsistent with the idea that dividend

1 payments are only to be treated as payments on account.
2 My Lord, there was one passage in the --
3 your Lordship was taken to Wight v Eckhardt for
4 a slightly different reason, but in the very paragraph
5 that we looked at there was a statement of principle by
6 Lord Hoffmann which helps on this. If we just turn it
7 up. It's bundle 1D, tab 132, paragraph 27 and starting
8 at the bottom of page 155.
9 MR JUSTICE DAVID RICHARDS: Yes.
10 MR TROWER: Now, this is a very well-known paragraph. Over
11 the page:
12 "The winding up does not either create use of
13 substantive rights in the creditors or destroy the old
14 ones. Their debts, if they are owing, remain debts
15 throughout; they are discharged by the winding up only
16 to the extent that they are paid out of dividends."
17 Now, that's the way he puts it.
18 MR JUSTICE DAVID RICHARDS: Yes.
19 MR TROWER: It's a perfectly ordinary concept of payment by
20 way of leading to a discharge on receipt of a dividend.
21 We submit that what this code contemplates is that
22 once that liability, i.e. the liability to the
23 preferential creditors or the unsecured creditors in
24 respect of their proved debt, has been extinguished by
25 payment of the 100p in the pound dividend, it's then,

1 and only then, that the statutory liability to pay
2 interest arises. A structure which, in our submission,
3 is wholly inconsistent with the idea that any part of
4 the liability for payment of the principal of the debt
5 proved remains outstanding. It follows from that that
6 because the principal of the debt proved has been
7 discharged by the payment in full, there isn't room for
8 treating it as a payment on account, which is what the
9 rule in Bower v Marris pre-supposes should happen under
10 this code.
11 MR JUSTICE DAVID RICHARDS: Yes.
12 MR TROWER: That's the first construction point I wanted
13 just to spend a little bit more time on.
14 The second one is that the creditors' entitlement to
15 interest is to be satisfied out of the fund, i.e. the
16 surplus.
17 MR JUSTICE DAVID RICHARDS: Mr Trower, I said I would have
18 a short break after an hour. Would that be a good
19 moment?
20 MR TROWER: That indeed would be a convenient moment.
21 MR JUSTICE DAVID RICHARDS: I'll rise for five minutes.
22 (10.30 am)
23 (Short break)
24 (10.35 am)
25 MR TROWER: My Lord, I was just about to start a submission

1 on the creditors' entitlement to interest being an
2 entitlement to be satisfied out of the fund, i.e. the
3 surplus.
4 MR JUSTICE DAVID RICHARDS: Yes.
5 MR TROWER: Which is in our submission an actual
6 identifiable fund, i.e. the surplus after the debt is
7 proved to be have paid in full. There isn't, in those
8 circumstances, room for a process of notional
9 re-allocation. A specific asset is required to be
10 applied in a particular manner.
11 Now, the concept of a specific fund in the form of
12 a surplus being subject to a mandatory direction for its
13 application was actually -- was introduced quite a long
14 time ago in relation to bankruptcy. It came in for the
15 first time in the 1883 Act.
16 And just -- I wasn't going to go into a great
17 historical exegesis but I think I ought to show
18 your Lordship this. The section on this point,
19 section 40, sub-section 5, of the 83 Act, which is
20 behind tab 27 in bundle 3A. It's section 40,
21 sub-section 5. You for the first time get the concept
22 of a surplus as a fund being applied.
23 Under the law -- while we're still in this volume --
24 that was in force at the time of Bower v Marris,
25 although, as we have seen this morning, not actually

1 applicable in the case of Bower v Marris, the concept is
2 different. If we go back to the 1825 Act, which is at
3 3A, tab 10, at look at section 132, a surplus had to
4 have arisen but its existence was simply a pre-condition
5 to the creditor's entitlement to receive interest.
6 So one can see how the legislative stricture that
7 was in force at the time of Bower v Marris wasn't
8 completely inconsistent with the exercise of a notional
9 re-allocation because it didn't require the surplus to
10 be used to pay the interest by way of application of
11 a fund. It remained more open to the court to conclude
12 that the interest could be paid by re-allocation of the
13 dividends already received. The existence of the
14 surplus was simply a pre-condition, not the asset from
15 which the interest had to be paid as a matter of
16 statutory direction.
17 My Lord, the next point is that the -- on the
18 construction of the rules -- is a purpose point. The
19 purpose for which the fund is to be applied is, we
20 submit, inconsistent with the concept of a notional
21 re-allocation or of treating the original dividend as
22 a payment on account. It has to be applied in payment
23 of interest on those debts, i.e. the debts proved, and
24 there isn't any hint of it being available to be applied
25 towards payment of an element of principal by some sort

1 of re-allocation process. That's stressed by the
2 mandatory use of the word "shall" and the phrase "before
3 being applied for any purpose". They both stress that
4 the use of the fund in paying interest on the debt
5 proved is mandatory.
6 Now, on this point it was said by York that
7 Wentworth and the joint administrators adopt an
8 inconsistent position because we accept that compound
9 interest is payable, where it is the rate applicable to
10 the debt apart from the administration, which
11 demonstrates that surplus can be applied towards payment
12 of interest on interest and not just interest on
13 principal.
14 MR JUSTICE DAVID RICHARDS: Yes.
15 MR TROWER: But we respectfully suggest that that submission
16 doesn't actually go as far as Mr Smith would like it to,
17 because as a matter of language compound interest is
18 still properly to be characterised as interest on the
19 underlying debt proved, even if it is compounded.
20 The next submission relates to the period for which
21 the interest is payable. The period for which the
22 interest is payable is the periods during which the
23 debts proved have been outstanding. That's the last few
24 words of sub-rule 7. This provision too, we say, is
25 inconsistent with the concept that the original dividend

1 is no more than a payment on account, for this reason.
2 The parties disagree as to whether the period
3 commences with the administration date or some later
4 date in the case of contingent or future debts, and
5 that's what issues 6 to 8 are all about. But if the
6 phrase "the period during which they have been
7 outstanding" is to have any meaning it must at least
8 end, we suggest, with the payment of 100p in the pound.
9 The draughtsman couldn't have used more inappropriate
10 language if he intended that the period for which
11 interest was payable extended beyond the time at which
12 a final 100p in the pound dividend had been paid.
13 So those are the sort of construction points on
14 2.88(7).
15 There are just a couple of other points that I ought
16 to take your Lordship through on linked aspects to the
17 code. The first one relates to 2.88(8). If
18 your Lordship would turn up paragraphs 41 to 43 of our
19 skeleton for this purpose. It's actually really -- it's
20 the last sub-paragraph of 41 and then paragraph 41, so
21 41.4, and then paragraphs 42 and 43, but the guts of the
22 point is illustrated in paragraph 42 of our skeleton.
23 Now, what this is designed to demonstrate is -- and
24 rule 2.88(8) is the rule that provides that all interest
25 payable under paragraph 7 ranks equally whether or not

1 the debts on which it is payable rank equally.
2 MR JUSTICE DAVID RICHARDS: Yes.
3 MR TROWER: What this is designed -- this submission relates
4 to is how the combination of section 175, which is the
5 obligation to pay preferential debt ahead of unsecured
6 debts, and rule 2.88(8), taken together, are
7 inconsistent with payments being notionally re-allocated
8 or the original dividends being treated as payments on
9 account.
10 As I have already -- we have already looked at 175
11 and we don't need to go back to it, but it requires, as
12 your Lordship knows, preferential debts to be paid in
13 full before unsecured debts.
14 MR JUSTICE DAVID RICHARDS: Yes.
15 MR TROWER: Rule 2.88, and there are equivalent provisions
16 in relation to liquidation and bankruptcy, requires
17 interest to be paid pari passu to unsecured preferential
18 debts. So you have those two regimes operating in
19 slight tension with each other.
20 Now, in any case in which there is a surplus, and
21 this point applies, can I stress, in any case in which
22 there's a surplus, so one is into 2.88 territory, that
23 there isn't enough to pay interest and principal in full
24 on all unsecured and all preferential debts, in that
25 circumstance, we do submit -- and I'll take

1 your Lordship through the illustration in
2 paragraph 42 -- that the payment of dividends can't be
3 treated as payments on account without breaching either
4 section 175 or rule 2.88(8). It simply can't work.
5 So if we just turn to the -- go and through
6 paragraph 42.
7 MR JUSTICE DAVID RICHARDS: Yes.
8 MR TROWER: The first two bits are just the statements of
9 principle.
10 MR JUSTICE DAVID RICHARDS: Yes.
11 MR TROWER: Then we start the example at sub-paragraph 5.
12 We assume for the purposes of argument that the
13 realisations in the estate amount to 22 million.
14 Preferential debts of 10 million. No floating charges
15 to make it complicated. The ordinary unsecured debts
16 amount to 10 million. Then there's interest at the rate
17 of 8 per cent, since the commencement of the
18 administration amounts to 8 million in total, of which
19 4 million relates to the prefs and 4 million relates to
20 the ordinary unsecured. So we have tried to keep it as
21 simple as we can.
22 Now, sub-section 6 then sets out what happens where
23 the legislation is applied in the manner for which the
24 administrators contend. So you have the first
25 10 million of the distributions is applied in paying the

1 prefs. The next 10 million is applied in paying the
2 unsecureds. Then there's a surplus of 2 million because
3 we've realised 22 altogether. It's applied across
4 equally the two categories of claims so that each -- the
5 unsecureds get 1 million and the prefs get 1 million.
6 MR JUSTICE DAVID RICHARDS: Right.
7 MR TROWER: Because they're equal in amount.
8 MR JUSTICE DAVID RICHARDS: Yes.
9 MR TROWER: Now, that's the conclusion that's reached in 7.
10 We then run into the difficulty with the Senior Creditor
11 Group and York's case which is described -- articulated
12 in sub-paragraph 8 of the skeleton, over the page. If
13 your Lordship would read to the beginning of that and
14 I'll then take --
15 MR JUSTICE DAVID RICHARDS: You want me to read --
16 MR TROWER: To the beginning of sub-8 and then I'll take you
17 through 8.
18 MR JUSTICE DAVID RICHARDS: Okay. (Pause)
19 The assumption here is that the prefs and the
20 ordinaries have been paid off simultaneously.
21 MR TROWER: Simultaneously. Yes, we have kept it as simple
22 as we can. (Pause)
23 MR JUSTICE DAVID RICHARDS: Right. I've read down to the
24 end of sub-paragraph 7.
25 MR TROWER: Then going to 8, we articulate what we submit is

1 the intractable problem which arises where an attempt is
2 made to distribute on the mode of calculation contended
3 for by SCG.
4 MR JUSTICE DAVID RICHARDS: I'll read that to myself.
5 MR TROWER: Yes, please. (Pause)
6 MR JUSTICE DAVID RICHARDS: Yes. I mean, I think what may
7 be said about this is that the payment made of the
8 £2 million is always payment of interest. It's not
9 payment of principal. It's only -- but that
10 Bower v Marris calculation is being done as a notional
11 exercise in order to calculate the amount of interest.
12 MR TROWER: This submission ultimately is -- this is another
13 illustration of part of the scheme which is flatly
14 inconsistent with the idea of a notional allocation.
15 That's the way this submission works. We don't put
16 it --
17 MR JUSTICE DAVID RICHARDS: I am wondering whether that's
18 right because you are saying in sub-paragraph 8 that the
19 payment of -- the whole 2 million must be paid to the
20 prefs because on the notional re-allocation they have
21 not been paid the total amount of principal to which
22 they are entitled in priority.
23 MR TROWER: Yes. What it requires one to say is that
24 notwithstanding the obligation to pay in full as
25 internally within the prefs, there is then a notional

1 re-allocation which is available.
2 MR JUSTICE DAVID RICHARDS: Yes.
3 MR TROWER: I accept that, but we respectfully suggest that
4 that is actually inconsistent with an internal part of
5 the scheme that requires the payment in full of the
6 prefs in respect of principal before you get to the
7 stage at which the unsecured creditors are being paid.
8 So what it's doing is it's introducing -- if you
9 use -- if you apply Bower v Marris, you are introducing
10 into the operation of the scheme a re-allocation
11 principle that is inconsistent with the idea elsewhere
12 in the scheme that there has been payment in full of the
13 prefs before the unsecureds. It doesn't -- what this
14 example demonstrates in a preferential creditor context
15 is that for one purpose the prefs are treated as being
16 paid in full in principle, ahead of the unsecureds,
17 i.e. in order to comply with section 175, but then they
18 are treated for another purpose as not having been paid
19 in full.
20 MR JUSTICE DAVID RICHARDS: That's right, yes.
21 MR TROWER: We respectfully suggest that this -- the way
22 this example works through illustrates that the only
23 way -- that you simply can't reconcile the way in which
24 175 and 2.88 work internally as a matter of mandatory
25 direction under the code and still, at the same time,

1 have some form of notional re-allocation which cuts
2 across what the combination of 175 and 2.88 require.
3 MR JUSTICE DAVID RICHARDS: I think the point I had in mind
4 was that I'm not sure the consequence you spell out here
5 would follow.
6 MR TROWER: Well, I understand that. I mean, I can see that
7 you may -- but what you're then doing is if the
8 consequence that is spelt out here does not follow, what
9 you are then doing is you are treating the preferential
10 creditors as paid in full for one purpose under the code
11 but not for another.
12 MR JUSTICE DAVID RICHARDS: Correct. In one of the
13 19th century cases I noted -- I can't remember which
14 case it was. I think actually it was a companies case.
15 MR TROWER: Yes.
16 MR JUSTICE DAVID RICHARDS: I think it must have been, come
17 to think of it. The judge directed that for the
18 purposes of paying interest, the preferential creditors
19 and the ordinary creditors, non-preferential creditors,
20 ranked pari passu, i.e. it was judge-made law which we
21 now find -- which we -- if I am right that that was
22 a companies case, then -- and of course that was in the
23 days when Bower v Marris, everyone agrees, was
24 applied --
25 MR TROWER: I see the force of your point.

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1 MR JUSTICE DAVID RICHARDS: I forget which case it was, but
2 one of the ones I've been taken to over the last few
3 days.
4 MR TROWER: We'll have a look at see if we can find that.
5 MR JUSTICE DAVID RICHARDS: It must actually have been
6 Humber Ironworks, come to think of it. It might just be
7 worth looking at that.
8 MR TROWER: Yes.
9 MR JUSTICE DAVID RICHARDS: I say "it must have been", it
10 may not have been. I'm not absolutely sure it was.
11 (Pause)
12 I'm not sure it was, but I should have made a note
13 of it, but I didn't.
14 MR TROWER: Perhaps we can see if we can --
15 MR JUSTICE DAVID RICHARDS: See if you can track that down
16 I'm pretty sure I did sort of note that at some point.
17 Were there preferential payments in bankruptcies?
18 MR TROWER: I think we discovered that there were.
19 MR JUSTICE DAVID RICHARDS: Well, in that case it could have
20 been a bankruptcy case, I suppose, but --
21 MR TROWER: Yes, because actually the origin of preferential
22 payments goes back a long way. It goes back to the time
23 at which the Crown asserted rights in --
24 MR JUSTICE DAVID RICHARDS: Right, okay. Well, it's one of
25 these cases, I think.

1 MR TROWER: We'll see if we can find it and come back to it.
2 MR JUSTICE DAVID RICHARDS: Yes.
3 MR TROWER: The only other rule I just wanted to take
4 your Lordship to was rule 2.99, just really because this
5 is the rule which I don't think your Lordship has seen
6 yet which deals with the payment of dividends. There
7 was an interesting little point that we thought
8 your Lordship just ought to be aware of in 2.99(3) where
9 you have a bill of exchange or a negotiable instrument,
10 the payment of the dividend is actually endorsed on the
11 face of the negotiable instrument, which is consistent
12 with the concept -- is actually quite difficult to
13 reconcile with the concept of a payment on account of
14 principal and interest. Or, to put it the other way,
15 it's rather more consistent with the idea that the debt
16 is -- debt of the principal is being discharged
17 pro tanto by the amount of the dividend.
18 Those were the only other bits of the code that
19 I thought your Lordship ought to see.
20 MR JUSTICE DAVID RICHARDS: Right. Thank you.
21 MR TROWER: Can I just move on then to -- I have dealt with
22 the principles of statutory construction and made some
23 submissions on the application of those principles to
24 rule 2.88.
25 Can I move on to issue 39 which was my third topic.

1 MR JUSTICE DAVID RICHARDS: Yes.
2 MR TROWER: Now, in their skeleton Wentworth dealt very
3 fully with the arguments as to why there's no available
4 claim for creditors to get compensation for the time
5 taken to discharge the claim to interest as a matter of
6 general principle. That's paragraphs 88 to 116 of their
7 original skeleton and 67 to 79 of their reply skeleton.
8 MR JUSTICE DAVID RICHARDS: Just give me a moment.
9 MR TROWER: We adopt and don't repeat those arguments.
10 MR JUSTICE DAVID RICHARDS: That's 118 --
11 MR TROWER: It is 88 to 116 of their original skeleton and
12 they come back to issue 39 in their reply skeleton at 67
13 to 79.
14 MR JUSTICE DAVID RICHARDS: Really issue 39, let me just see
15 if I have this right, seems to have three strands to it.
16 One is whether those persons -- those creditors who have
17 a right to interest outside the administration, whether
18 it be a contract or a judgment or whatever, are remitted
19 to their rights.
20 MR TROWER: Yes.
21 MR JUSTICE DAVID RICHARDS: So as to be able to make
22 a non-provable claim for the difference between the
23 interest they have received and the interest to which
24 they were otherwise entitled. That's one possibility.
25 Another possibility is a Sempra Metals-type claim.

1 MR TROWER: Yes.
2 MR JUSTICE DAVID RICHARDS: The third possibility is a claim
3 for interest for in effect delay in paying interest.
4 MR TROWER: Yes.
5 MR JUSTICE DAVID RICHARDS: A delay in paying statutory
6 interest, so they seem to be three separate strands.
7 MR TROWER: Yes, I think that's right. I wasn't actually --
8 there's quite full discussion in the skeletons of the
9 second and third ones, the Sempra Metals-type claim and
10 interest for delay.
11 MR JUSTICE DAVID RICHARDS: Right.
12 MR TROWER: I was actually just going to concentrate on the
13 first one insofar as it relates -- because it relates
14 straight into issue 2.
15 MR JUSTICE DAVID RICHARDS: Just to be clear about it
16 though, what you have -- in Wentworth's skeleton,
17 paragraphs 88 to 116, they go to --
18 MR TROWER: They are dealing with the Sempra Metals --
19 MR JUSTICE DAVID RICHARDS: I think --
20 MR TROWER: I think particularly in reply they come back on
21 that.
22 MR JUSTICE DAVID RICHARDS: Anyway, yes, and the reply --
23 MR TROWER: Maybe it's in their first skeleton.
24 MR JUSTICE DAVID RICHARDS: Issue 39 is at paragraph 67
25 onwards of their -- I think that's Wentworth, yes --

1 reply skeleton. There's quite a few -- there are four
2 pages there. (Pause)
3 I will confess to you, Mr Trower, I read all the
4 skeletons before we started.
5 MR TROWER: Yes.
6 MR JUSTICE DAVID RICHARDS: I have not really revisited the
7 skeletons since we started.
8 MR TROWER: Yes.
9 MR JUSTICE DAVID RICHARDS: Obviously -- sorry, "skeletons"
10 is not really the right word, is it? As I remarked at
11 the beginning, there was quite a lot in them. I think
12 you are gently hinting to me that actually issue 39 is
13 quite well traversed in the written submissions.
14 MR TROWER: Yes.
15 MR JUSTICE DAVID RICHARDS: What I clearly should do is to,
16 as it were, as a separate exercise, go through those
17 written submissions and then, if I feel that more
18 assistance is needed, ask for it, which I will do, but
19 let me not -- bearing that in mind, do say whatever you
20 want to say about issue 39.
21 MR TROWER: Yes. I was actually going to concentrate on the
22 first bit --
23 MR JUSTICE DAVID RICHARDS: Which is the remission to
24 rights.
25 MR TROWER: Yes, which brings one back into issue 2

1 because -- and really this point is particularly
2 developed against us in the Senior Creditor Group's
3 skeleton and I think it's round about paragraph 456,
4 although one finds it else where as well.
5 In summary, it's their suggestion that the
6 calculation of interest on the basis for which the joint
7 administrators and Wentworth contend would leave
8 creditors with a non-provable claim. It's that point.
9 MR JUSTICE DAVID RICHARDS: Yes, exactly.
10 MR TROWER: Our answer, and our answer in relation to that
11 is that the statutory code and, in particular, rule 2.88
12 operates to oust the ability of a creditor to
13 appropriate the payments received in discharge first of
14 interest. That's the way we put it.
15 So thereafter there isn't room for the continued
16 existence of any right to appropriate or the operation
17 of any presumption as to how the creditor would have
18 appropriated.
19 Put another way, the rule of appropriation on which
20 the whole Bower v Marris argument is founded doesn't
21 have a role to play in the payment and receipt of
22 dividends as part of the construction of the rule and
23 can't play a role thereafter because the rules
24 themselves have already dictated the order in which the
25 payments are made and received.

1 MR JUSTICE DAVID RICHARDS: Yes. I mean, Mr Zacaroli
2 emphasised to me that Bower v Marris establishes that
3 where you have payments made by process of law, such as
4 distributions in a bankruptcy, there is no -- there is
5 no appropriation at that stage because these are not
6 payments that in respect of which the intentions of the
7 debtor or creditor are relevant.
8 MR TROWER: Yes.
9 MR JUSTICE DAVID RICHARDS: But what you're saying is that
10 in this context, in the context of the current
11 insolvency legislation, it is the legislation itself
12 which dictates that it is -- the payments are
13 appropriate to principal.
14 MR TROWER: Yes. Well, I wouldn't necessarily use the
15 language of appropriation to principal because then
16 immediately gets one back into the old baggage; the
17 dividends are paid in discharge of the principal
18 which --
19 MR JUSTICE DAVID RICHARDS: With the result that there is no
20 room for any subsequent re-allocation or
21 re-appropriation or appropriation.
22 MR TROWER: My Lord, indeed, that's right.
23 MR JUSTICE DAVID RICHARDS: The old law was there wasn't any
24 appropriation, so the creditor could exercise his
25 default right of appropriation.

1 MR TROWER: Yes.
2 MR JUSTICE DAVID RICHARDS: You're saying there's no room
3 for that?
4 MR TROWER: There's no room for it once the exercise has
5 been worked through in accordance with rule 2.88.
6 MR JUSTICE DAVID RICHARDS: Yes, I see.
7 MR TROWER: Now, despite -- can I say this, that there is
8 a suggestion that this position that we adopt is
9 inconsistent with our answer to issue 30 which
10 your Lordship may or may not recall as being
11 a submission that was made by Mr Dicker. Can I just
12 explain that, because I think it does help to illustrate
13 where the dividing line is drawn.
14 If we turn up issue 30, which -- I don't know where
15 your Lordship has been looking at it.
16 MR JUSTICE DAVID RICHARDS: I have it here somewhere.
17 I think I have it at the beginning of the bundle.
18 MR TROWER: Yes, it's in our skeleton at page 76.
19 This issue is whether there exists a non-provable
20 claim against LBIE where the total amount of interest
21 received by a creditor applying a rate of applicable to
22 the debt apart from the administration on a sterling
23 admitted claim, when converted into the relevant foreign
24 currency on the date of payment, is less than the amount
25 of interest which would accrue applying the rate

1 applicable to the debt apart from the administration to
2 the original foreign currency claim.
3 Now, we accept, in our answer to this issue, that
4 there is a claim, but it's important to understand what
5 we are accepting by that. The claim that we accept in
6 our answer to issue 30 as continuing to exist is the
7 claim to vindicate in full the contractual claim to
8 interest held by a foreign currency creditor to the
9 extent that has not been fully met by the statutory
10 interest payable pursuant to rule 2.88(7).
11 This claim is the mirror image in the context of
12 interest of the foreign currency conversion claim in
13 respect of principal which your Lordship determined in
14 Waterfall 1. So you have a foreign currency claim in
15 respect of principal which your Lordship decided in
16 relation to and this is the mirror image in relation to
17 interest, this particular claim.
18 Now, we say that that claim is capable of continuing
19 to exist, notwithstanding the operation of the code,
20 because the creditor hasn't had his full right to
21 interest discharged. However, that is a qualitatively
22 different question from the question which arises in
23 relation to issue 39 -- the first part of issue 39 --
24 which is derived on from the creditor's so-called right
25 to appropriate which isn't a contractual right, it's

1 simple a principle as to how payments are presumed to be
2 applied. There isn't room for a continued existence of
3 that type of claim once the statutory code which
4 dictates the principal must be paid in full before
5 post-administration interest can become payable.
6 So the point, and it may be we'll have to come back
7 to this in the context later on in the discussion when
8 we're looking at foreign currency conversion claims, but
9 it was important that I left with your Lordship in the
10 context of issue 39 this particular thought: because it
11 is said against us that because we accepted that a claim
12 could arise in the context of issue 30, that necessarily
13 meant or was inconsistent with a position that there was
14 no non-provable claim arising out of the operation of
15 rule 2.88 and a claim which relied for its foundation on
16 an application of the rule in Bower v Marris.
17 So what --
18 MR JUSTICE DAVID RICHARDS: Well, what we're talking about
19 here, remission to contractual rights, may or may not --
20 I don't think does involve necessarily the rule in
21 Bower v Marris at all.
22 MR TROWER: No, it doesn't.
23 MR JUSTICE DAVID RICHARDS: It doesn't because -- so we
24 assume there is no Bower v Marris re-allocation and so
25 on.

1 MR TROWER: Yes.
2 MR JUSTICE DAVID RICHARDS: So the principal has been paid
3 on the dates on which the distributions were made.
4 MR TROWER: Yes.
5 MR JUSTICE DAVID RICHARDS: Then the exercise is to compare
6 the interest that the creditor has received by way of
7 statutory interest with the interest that they would
8 have received under their contract.
9 MR TROWER: Indeed. That exercise is an exercise which we
10 accept, or a right which we accept, by our answer to
11 issue 30, can continue to give rise to a non-provable
12 claim.
13 MR JUSTICE DAVID RICHARDS: But not if the debts -- if the
14 contractual debt is in sterling, which is also the
15 currency of proof.
16 MR TROWER: Correct.
17 MR JUSTICE DAVID RICHARDS: But --
18 MR TROWER: There's only a right --
19 MR JUSTICE DAVID RICHARDS: I can see why it's said that
20 your answer to question -- issue 30 is inconsistent.
21 MR TROWER: Yes.
22 MR JUSTICE DAVID RICHARDS: But it slightly depends on
23 precisely how you formulate your position on issue 30,
24 I think.
25 MR TROWER: Yes. But the core of the point here is that the

1 right that is sought to be vindicated, and which is
2 under consideration under issue 30, is a right that is
3 capable of surviving the operation of the statutory
4 code. There is no equivalent right of equivalent
5 quality that is capable of surviving in the context of
6 the operation of the rule in Bower v Marris, which is
7 the comparison excise that we're carrying out.
8 MR JUSTICE DAVID RICHARDS: Yes, but I think the focus
9 though is not on Bower v Marris at all but is on the
10 remission to contractual rights.
11 MR TROWER: Yes, but there isn't a -- you're not talking
12 about -- there isn't room for a remission to contractual
13 rights so as to enable a creditor to exercise an
14 unexercised right of re-allocation of dividends and
15 appropriation to interest first, ahead of principal --
16 MR JUSTICE DAVID RICHARDS: I see.
17 MR TROWER: -- in the light of the way rule 2.88 operates.
18 MR JUSTICE DAVID RICHARDS: I see.
19 MR TROWER: Which is a different question from the question
20 of the survival of a contractual right for the purposes
21 of rule 30.
22 MR JUSTICE DAVID RICHARDS: I see.
23 MR TROWER: Sorry, didn't --
24 MR JUSTICE DAVID RICHARDS: I think I see what you mean,
25 that the -- sorry, I am being rather stupid here -- the

1 remission to contractual rights under issue 39 assists
2 the Senior Creditor Group only if they can apply
3 Bower v Marris.
4 MR TROWER: Yes.
5 MR JUSTICE DAVID RICHARDS: Yes.
6 MR TROWER: Which they can't.
7 MR JUSTICE DAVID RICHARDS: Because, after all, they are
8 getting interest at 8 per cent or their higher
9 contractual rate for the periods provided by the rule.
10 MR TROWER: Yes.
11 MR JUSTICE DAVID RICHARDS: That can include compound
12 interest. So the only thing they are missing is
13 Bower v Marris.
14 MR TROWER: Yes.
15 MR JUSTICE DAVID RICHARDS: I see, yes. Sorry, I was being
16 a bit slow there.
17 MR TROWER: I am sorry, that's a much clearer way of
18 putting it.
19 MR JUSTICE DAVID RICHARDS: I see. But, equally, with your
20 issue 30 you're clearly not conceding that the foreign
21 currency creditor can apply Bower v Marris?
22 MR TROWER: Oh, no. No.
23 MR JUSTICE DAVID RICHARDS: What you're saying is that there
24 may be a currency conversion claim?
25 MR TROWER: There may be a currency conversion claim

1 applicable --
2 MR JUSTICE DAVID RICHARDS: Because what he has received in
3 sterling is not equal to what -- if he had been allowed
4 to prove in the foreign currency and obtain interest --
5 MR TROWER: Yes.
6 MR JUSTICE DAVID RICHARDS: -- at the statutory rate, be
7 it per cent or a higher rate, in the foreign currency.
8 MR TROWER: Yes, indeed.
9 MR JUSTICE DAVID RICHARDS: I follow. Yes, I see. Thank
10 you.
11 MR TROWER: What that helps to illustrate is, amongst other
12 things, the true nature, if any, of what it is that the
13 Senior Creditor Group and York have to assert
14 constitutes the subsisting right, and we say there isn't
15 one, that is required to be vindicated by the existence
16 of a non-provable claim in the context of
17 Bower v Marris.
18 MR JUSTICE DAVID RICHARDS: Yes. Right. Yes, thank you.
19 MR TROWER: My Lord, what I am conscious of is that -- so
20 that was the sort of first aspect of your Lordship's
21 three aspects in relation to issue 39. I haven't
22 dealt -- and wasn't actually intending to, but I'm very
23 happy to come back to that -- with the second and third.
24 What we will do is just go back again, and we think
25 your Lordship will get what you need from the skeletons,

1 but we will go back again at look at that.
2 MR JUSTICE DAVID RICHARDS: Yes. I will read those and then
3 indicate whether I would welcome some more oral
4 submissions.
5 MR TROWER: Yes.
6 My Lord, my next topic was just a very short topic,
7 I hope, on the relevance of our answer to issue 3.
8 MR JUSTICE DAVID RICHARDS: Oh, yes.
9 MR TROWER: Just if your Lordship would turn this up and
10 probably have our skeleton open as well because I need
11 to deal with a fiddly little point which arises on the
12 skeleton.
13 You were told that everyone has reached common
14 ground on issue 3, i.e. that for the purpose of rule
15 2.88(9), and this is looking at the rate applicable to
16 the debt apart from the administration, for that purpose
17 "rate" can include a compound rate.
18 MR JUSTICE DAVID RICHARDS: Yes.
19 MR TROWER: Now, doubtless for forensic purposes that's been
20 described as a concession by the joint administrators,
21 but what I just wanted to draw your Lordship's attention
22 to, because quite a lot has been made of this, is the
23 way in which we expressed our position in paragraphs 115
24 and 124 of our skeleton argument, because an argument to
25 bolster Bower v Marris has been -- the Bower v Marris

1 argument has been based on the back of what we said.
2 What we said in 115 was that as a matter of
3 construction the word "rate" is apt to include every
4 factor that determines the total amount of money that is
5 payable by way of interest for a particular period of
6 time, including the numerical percentage and the way in
7 which that numerical percentage is to be applied,
8 i.e. simple or compound.
9 MR JUSTICE DAVID RICHARDS: Yes.
10 MR TROWER: The argument was then made against us that the
11 logic of our position was that the so-called rule in
12 Bower v Marris was also a factor that had to be taken
13 into account in determining the rate that was applicable
14 to the debt apart from the administration. That's the
15 way it was put.
16 Now, with respect to my learned friends, that is
17 false logic. What we were addressing in 115 and 124 was
18 the question of the meaning of the word "rate" and the
19 factors that we referred to there, as your Lordship
20 sees, were numerical percentage, whether it's simple or
21 compound. There might be other factors as well, for
22 example frequency of rests in relation to compound
23 interest might be another factor. The possibility of
24 contractual default interest on unpaid interest might be
25 another factor. But nobody could reasonably have

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1 thought that that form of words was apposite to cover
2 the application of the rule in Bower v Marris which was
3 nothing to do with the word "rate".
4 The words were simply used to express the concept
5 that a range of factors can be applied to a principal
6 amount outstanding to identify the true rate for
7 rule 2.88(9) purposes.
8 MR JUSTICE DAVID RICHARDS: The point has been made I think,
9 by Mr Zacaroli, that before you can apply Bower v Marris
10 you need to know the rate.
11 MR TROWER: Indeed. That may be an even cleaner way of
12 making the point, but to try and sort of elevate off the
13 back of that that somehow there's an application of the
14 rule of -- in Bower v Marris brought in through the
15 backdoor by the way in which we have expressed ourselves
16 is frankly not really a submission that holds any water
17 at all.
18 MR JUSTICE DAVID RICHARDS: Yes, I follow.
19 MR TROWER: My Lord, I was then going to go on and just
20 address a short point on policy and principle --
21 MR JUSTICE DAVID RICHARDS: Yes.
22 MR TROWER: -- which is my last topic.
23 Now, Mr Zacaroli covered the ground very fully at
24 the end of his submissions on Friday and we obviously
25 adopt what he said and don't have very much to add, but

1 the one point that we would wish to stress, and it has
2 real practical ramifications so far as office holders
3 are concerned, is that it was clear from the
4 Cork Report, and the relevant paragraph is 1392, and
5 your Lordship I'm sure will recall it, that the existing
6 rules on interest required to be rendered simpler and
7 more certain.
8 MR JUSTICE DAVID RICHARDS: Yes.
9 MR TROWER: As Mr Zacaroli explained, creditors now have
10 a package of rights introduced by, in the case of
11 administration, rule 2.88, and it is a firm and, we
12 would say, deliberate move away from the liquidation
13 model of reversion to contractual rights in any form.
14 You only get it coming in for the purposes of
15 assessing the right. The package of rights based on the
16 bankruptcy model spells out in clear terms what should
17 happen. On any view, we respectfully suggest,
18 application of the principles to be derived from
19 Bower v Marris adds a level of complexity and
20 uncertainty, both cutting across the desire for
21 simplicity and certainty, which is flatly inconsistent
22 with the way in which the Cork Report intended this
23 particular aspect of the code to be implemented.
24 MR JUSTICE DAVID RICHARDS: Yes.
25 MR TROWER: Now, it is, we suggest, a coherent policy

1 objective to have a complete code dealing with
2 a particular subject matter of this sort. This subject
3 matter is the compensation for creditors arising out of
4 the fact that they have had to wait for payment of
5 interest as compensation for being kept out of the -- or
6 they have had to wait for compensation for being kept
7 out of their money on a proved debt.
8 It doesn't require any form of reversion to or
9 a consideration of the rights that they would have had
10 if the insolvency had not intervened, particularly in
11 circumstances where, as your Lordship has seen, and
12 I don't need to take your Lordship back through it,
13 there is introduced a coherent and consistent code for
14 the treatment of interest in relation to people who do
15 and people who do not have existing contractual rights.
16 What one sees now, with the case which is advanced
17 by the joint administrators and Wentworth, is simply the
18 working through of that part of the code which is
19 concerned with that subject matter and should be
20 approached in accordance with its terms for that reason.
21 From a policy perspective, that level of certainty is
22 something that is both coherent and, we would suggest,
23 would be materially undermined by the introduction
24 through the backdoor of Bower v Marris-type
25 re-allocation principles and payments on account.

1 Can I just say, in conclusion, it is qualitatively
2 quite different from the consideration of the rights of
3 people such as foreign currency creditors who have been
4 required to convert into sterling for the purposes of
5 proof but who then retain the existing unvindicated
6 right which can be reflected in a non-provable claim.
7 From a qualitative point of view, the continuing
8 subsistence of that right is quite different from the
9 question of how it is that the code provides that people
10 should be given compensation for late payment of their
11 proved debts out of the surplus.
12 So that was all we wanted to say on policy. Your
13 Lordship can get straight from the Cork Report to the
14 answer that we respectfully suggest your Lordship should
15 reach on this part of the case.
16 My Lord, that was all I was proposing to say at this
17 stage.
18 MR JUSTICE DAVID RICHARDS: Yes. That's fine. It occurs to
19 me, although I'm not quite sure whether the Cork Report
20 spells it out, but there was a clear logic in their
21 position in choosing judgment rate from the date of
22 liquidation, or whatever, which seems to be that it
23 slightly goes back, I think, to the explanation of some
24 of the inheritance cases, that the liquidation,
25 winding-up order or whatever was to be treated as

1 equivalent to a judgment so from then on everyone was to
2 have judgment rate.
3 MR TROWER: Yes.
4 MR JUSTICE DAVID RICHARDS: Which was a quid pro quo for the
5 moratorium, but there's a sort of internal logic for
6 saying that should be the rate that applies to everyone.
7 MR TROWER: Yes.
8 MR JUSTICE DAVID RICHARDS: Then there clearly was some
9 lobbying that went on after that because you then get
10 this, "Oh, well, it's judgment rate or a higher
11 contractual rate".
12 MR TROWER: Yes.
13 MR JUSTICE DAVID RICHARDS: Quite what the circumstances of
14 that were, I don't know, but it actually, I think,
15 undermines a certain degree of internal logic in the
16 Cork Committee approach, I mean not totally, but clearly
17 if you went and got a judgment you would then have
18 judgment rate, you wouldn't have your contractual rate
19 at that point because your debt has merged into the
20 judgment.
21 MR TROWER: Yes. So, on one view, one of the questions is
22 how much of the old baggage does the sub-rule 9 bring
23 back in?
24 MR JUSTICE DAVID RICHARDS: Sure, sure.
25 Well, Mr Trower, if you have completed on this,

1 that's fine. I just had one or two points I want to
2 raise with you, not points of, as it were, detail on
3 submissions you have made.
4 MR TROWER: Yes.
5 MR JUSTICE DAVID RICHARDS: First of all, just a request on
6 my part to anyone who wishes to pick it up. I would
7 quite like to see that part of the Irish bankruptcy
8 report that actually touched on Bower v Marris. I don't
9 know whether that's a difficult request to make, but
10 I imagine it can be accessed somewhere. I don't want
11 the whole report but that's dealing -- you remember the
12 one? It is Hibernian, where they -- it looks as if we
13 may have it.
14 MR DICKER: My Lord, we have an additional bundle of
15 authorities which does contain that.
16 MR JUSTICE DAVID RICHARDS: Thank you. That deals with that
17 point.
18 Secondly, Mr Trower, can you tell me in relation to
19 the appeal in Waterfall 1 whether every -- I mean,
20 I have no idea what is in contention on the appeal so
21 are you able to tell me whether every aspect of that
22 decision is being appealed or are bits of it not being
23 appealed?
24 MR TROWER: I can't tell you off the top of my head. A lot
25 of it is.

1 MR JUSTICE DAVID RICHARDS: A lot of it is. Is there
2 anything which isn't, is perhaps the best way of putting
3 it?
4 MR TROWER: We will check. We don't think there is, but
5 we'll check and come back to you on that.
6 MR JUSTICE DAVID RICHARDS: That's fine. Thank you very
7 much.
8 Finally, just, if I may, ask this about the
9 administrators' position. I think on Waterfall -- well,
10 I am really concerned with your position on this
11 hearing. We have parties representing the subordinated
12 creditors, the unsubordinated creditors who are
13 advancing arguments. You have indicated that you add
14 arguments in some cases in particular if, for whatever
15 reasons, those parties who are not represented parties
16 as such are advancing them, but the approach of the
17 administrators here is not to assert the interests of
18 any particular group of interested parties, these are
19 points that the administrators consider should be put
20 before the court?
21 MR TROWER: Yes. I mean, that's absolutely right and the
22 administrators' position in relation -- as your Lordship
23 will see, the administrators don't take a position at
24 all in relation to some of the issues because they don't
25 think it necessary to do so.

1 MR JUSTICE DAVID RICHARDS: Yes.
2 MR TROWER: But they didn't conceive on this application it
3 was right to argue from a particular position
4 throughout, although of course there are some of the
5 arguments, as your Lordship will have seen from the
6 skeleton, where we have firmly aligned ourselves with
7 one argument or another.
8 MR JUSTICE DAVID RICHARDS: Yes, but that's not because you
9 see your task as asserting the interests of that
10 particular group but because you consider that the
11 counsel, solicitors, administrators' team as a whole
12 consider that to be the right course?
13 MR TROWER: The right course, yes.
14 MR JUSTICE DAVID RICHARDS: Good. Those are actually the
15 questions I wanted to ask. It's now almost 11.30.
16 Mr Dicker, are you going first and then Mr Smith?
17 MR DICKER: Mr Smith kindly agreed, subject to
18 your Lordship, that I should go first.
19 MR JUSTICE DAVID RICHARDS: Yes, certainly. That's
20 absolutely fine by me. We'll take our half an hour
21 break now and we'll resume at 12 o'clock.
22 MR DICKER: My Lord, I wonder, just before your Lordship
23 goes, if I might just hand up perhaps our supplemental
24 bundle of authorities.
25 MR JUSTICE DAVID RICHARDS: Yes, certainly. (Handed)

1 I will await with interest. 12 o'clock then.
2 (11.30 am)
3 (Short break)
4 (12.00 pm)
5 Reply submissions by MR DICKER
6 MR JUSTICE DAVID RICHARDS: Yes, Mr Dicker.
7 MR DICKER: My Lord, one cannot help, if may say so, but
8 admire the skilful way which Mr Zacaroli constructed his
9 submissions, but we do say one need to be careful to see
10 where the Pied Piper is leading.
11 The question is a simple one --
12 MR JUSTICE DAVID RICHARDS: What does that make me? I'm not
13 sure, anyway ...
14 MR DICKER: The question is a very simple one. How do you
15 calculate the amount of interest to be paid to creditors
16 in the event of a surplus? There are two
17 methods: interest first or principal first.
18 It's notable that every case in England and in the
19 various Commonwealth jurisdictions the parties have been
20 able to find since Bower v Marris have reached the same
21 answer, interest first. Wentworth can't find a single
22 case which has taken the principal first approach.
23 We say it's also notable that all of the judges in
24 all of the cases appear to have considered that this was
25 also the right, just and fair result. Again, Wentworth

1 cannot find a single criticism of the operation of the
2 rule in any case, textbook or article. It's also
3 notable, we say, that the last case which considered
4 point, re Lines Brothers number 2, proceeded on the
5 basis that the answer was so obvious as not to be
6 a matter for argument.
7 My Lord, it therefore follows that your Lordship is
8 being invited to be the first judge since 1842 to reach
9 a different conclusion; to say that under the 1986 Act
10 the legislature decided to change direction and to apply
11 a principal first approach for policy reasons which are,
12 as your Lordship will see, misconceived, incoherent or
13 non-existent.
14 Now, obviously, if that is what the statute
15 requires, of course that the is the answer your Lordship
16 needs to give, but it's worth standing back, we say, in
17 the first instance to consider why and how these
18 authorities have all reached exactly the same answer.
19 My Lord, I am afraid one has to start with one of
20 the most basic principles of insolvent law, namely
21 creditors first, debtor last. Although the mechanics
22 are slightly different for bankruptcy and company
23 insolvency, the underlying principle is the same.
24 In bankruptcy, the bankrupt's estate is assigned to
25 his trustees in bankruptcy for the benefit of his

1 creditors and it's only entitled to any residue after
2 their claims have been satisfied in full. The discharge
3 of the bankrupt is a separate matter. Discharge of the
4 bankrupt releases the person of the bankrupt from his
5 debts and liabilities if provable but does not affect
6 his estate which has been assigned to his trustees.
7 It's very basic stuff. My Lord, in company law the same
8 principle is enshrined in the concept of members last.
9 Now, Wentworth say the principle was breached in
10 bankruptcy in 1883, apparently because bankruptcy was no
11 longer regarded as a criminal offence, with the result
12 that all creditors were only entitled to 4 per cent.
13 My Lord, in our submission that's incorrect. I will
14 deal with that later, but whatever special policy
15 factors may or may not have existed in bankruptcy to
16 justify a flat rate of 4 per cent, assuming my learned
17 friend is right, those principles have never applied to
18 company winding up. Even in bankruptcy, we are
19 obviously now back to the pre-1883 regime, if I may put
20 it like that, the 1986 Act on any basis doesn't simply
21 provide a flat rate, whether 4 per cent or 8 per cent.
22 Now, what is the relationship between this basic
23 principle and the rule in Bower v Marris? My Lord, we
24 say the rule is a general equitable rule and that
25 appears to be common ground. It's certainly often

1 described as such. Your Lordship may remember
2 Lord Cottenham in Bromley v Goodere, page 52 --
3 MR JUSTICE DAVID RICHARDS: Lord Hardwicke.
4 MR DICKER: I am sorry, Lord Hardwicke, and there's
5 a similar comment in Midland Montagu v Harkness. I'll
6 just give your Lordship the reference. 1C, tab 119, at
7 page 328.
8 The rule reflects a general rule of equity and
9 fairness that where payments are made by process of law,
10 interest is presumed to be paid before principal. It is
11 referred to as the ordinary approach. My Lord, it's not
12 limited to contractual rights. That's common ground.
13 The rationale for the rule, we say, is also much broader
14 than simply protecting creditors' contractual rights.
15 One can see that from the authorities.
16 Nor is it limited to bankruptcy and company winding
17 up, but, in the context of insolvency, it reflects the
18 basic idea that if a debtor turns out to be solvent,
19 a creditor should not be prejudiced by the payments made
20 by process of law when the debtor was insolvent; in
21 other words, it continues to ensure that the ordinary
22 approach applies. That is exactly what you would expect
23 given the basic principle of creditors first, debtor
24 last. There's no difficulty with the rule co-existing
25 with the insolvency scheme. It's simply a fund

1 calculation rule for the purposes of interest which is
2 designed to ensure that the interest first approach
3 applies in the event of a surplus, nothing more, nothing
4 less.
5 Now, whether it's reflected in the regime obviously
6 depends on the construction of the regime.
7 My learned friend Mr Trower said, "You need to start
8 with the new law" he accepted you may need the old law
9 to put the new law in context but said it's no more than
10 that.
11 My Lord, in our submission context is often vital;
12 it's certainly, at the lowest, very important in this
13 case. My Lord, your Lordship is familiar with
14 judge-made law as to the operation of the statutory
15 insolvency scheme and familiar with subsequent
16 codification of such judge-made law and also with the
17 language of the statute being updated from time to time.
18 We entirely accept that caution is required before
19 necessarily assuming that old law applies, but we also
20 say there are some aspects which the court will proceed
21 on the basis those aspects continue unless express
22 language is used to reverse the position. One aspect of
23 that of course is anything which touches on what might
24 be described as fundamental features, fundamental
25 principles underlying the statutory scheme.

1 That, we say, is a relevant point in this case.
2 My Lord may recall in re Mills the Lord Chancellor
3 making precisely that point. Can I just show your
4 Lordship again the relevant passage in re Mills. It's
5 1A, tab 9. The passage is on page 643. It starts just
6 above the second hole-punch in the middle of the line.
7 There's a sentence that begins:
8 "When the statute made the certificate above ..."
9 MR JUSTICE DAVID RICHARDS: Yes.
10 MR DICKER: "When the statute made the certificate a bar it
11 required very express words to declare the ...(reading
12 to the words) ... have a right to retain it against any
13 claim the bankrupt can set out."
14 My Lord, the other reference to similar effect, just
15 to remind your Lordship, is in the Attorney General of
16 Canada v Confederation Trust case at 1D/133.
17 MR JUSTICE DAVID RICHARDS: Yes.
18 MR DICKER: The relevant paragraphs are, firstly,
19 paragraph 30 where the judge says:
20 "... nothing in the language section 95 of the
21 Winding Up and Restructuring Act itself to indicate that
22 Parliament intended to alter this traditional
23 methodology in the case of a post-liquidation surplus."
24 Then there's a submission that, well, they must have
25 done because there's no express reference to the

1 possibility of a recalculation.
2 32, the judge says:
3 "I see no reason why section 95 should be
4 interpreted in a fashion that departs from the
5 traditional approach."
6 He then describes that.
7 Over the page, paragraph 33, the second sentence,
8 line 4:
9 "While I agree with the respondent's submission,
10 there is no inherent policy ...(reading to the words)...
11 for the application of the general accepted rule for the
12 allocation of payments."
13 So we say it's an undoubtedly useful and in our
14 submission necessary task to ensure that one reads
15 rule 2.88 in context and therefore starts with the
16 previous regime.
17 Now, just dealing with this. Again, not by
18 reference to, as it were, the detail of the cases, by
19 the substance of what is happening. It's easiest to
20 start with a regime which has not codified its approach
21 to post-insolvency interest; in other words, bankruptcy
22 before 1824, companies winding up before 1986. All that
23 one has in that situation are two basic anchor points.
24 The first is a requirement that the assets of the debtor
25 are to be distributed pari passu amongst proved debts

1 and, secondly, a provision that the debtor is entitled
2 to the surplus. There's no express provision for the
3 payment of post-insolvency interest to creditors at all,
4 but the court have held that such a right is implicit in
5 the statutory scheme and construe the scheme as
6 requiring interest to be paid out of the surplus in the
7 ordinary way.
8 MR JUSTICE DAVID RICHARDS: Is that actually the right way
9 round? Certainly some of the authorities seem to put it
10 in terms that while on one view post-liquidation
11 interest might be provable because it arises out of an
12 existing obligation, nonetheless for the reasons the
13 judges give they will stop interest at the date of
14 liquidation or bankruptcy.
15 MR DICKER: My Lord, you have two concepts. The first is
16 pari passu distribution in respect of proved debts, yes,
17 and the judges initially held proved debts means
18 principal plus interest accrued to the date of winding
19 up -- to the date of bankruptcy. The only other
20 provision in the Act is a provision which says the
21 bankrupt gets the surplus, so one has a gap -- potential
22 gap between the two, what happens to post-insolvency
23 interest. What we say the judges are doing is
24 effectively applying a fundamental principle to saying
25 creditors first, debtor last, and if, by the time one

1 comes to distribute the surplus the creditors have not
2 been satisfied in full, they should receive full
3 satisfaction of their claims before any surplus goes to
4 the bankrupt.
5 Now, my Lord, one can see the way in which this
6 works very clearly from Bromley v Goodere itself. Just
7 taking your Lordship very quickly back to that case,
8 my Lord, it's bundle 1A at tab 5. My learned friend
9 Mr Zacaroli's submission in relation to this case was
10 that there was no statutory provision at all dealing
11 with post-insolvency interest at the time of
12 Bromley v Goodere so it's entirely judge-made law. Now,
13 it's certainly true there was no express provision, but
14 your Lordship needs to see the basis upon which the
15 decision was reached. We say it was concerned with
16 construing a statutory scheme, identifying the
17 principles that underpin that scheme and applying those
18 to the issue at hand.
19 If one starts, for example, with the 1570 Act, which
20 introduced the concept of commissioners, individuals
21 appointed to manage the bankrupt's estate, we have
22 these, as I put it, two anchor points. First of all,
23 the commissioners were obliged to pay proved debts
24 pari passu and the Act also referred to an "overplus",
25 the entitlement of the bankrupt to a surplus in the

Page 77

1 event that there was one.
2 Now, Lord Hardwicke, and your Lordship knows, held
3 the debts of the bankrupt were the debts due at the time
4 of bankruptcy, but he also held that the surplus
5 returnable was not the surplus remaining after payment
6 of those debts but the surplus after payment of all
7 liabilities, including interest accruing since the date
8 of bankruptcy. That, of course, was just a reflection,
9 we say, or an application of the fundamental principle,
10 creditors first, debtor last.
11 Any other result would certainly have been bizarre
12 so far as the 1570 Act is concerned because there was no
13 doctrine of discharge at that stage. So if the surplus
14 was simply returned to the bankrupt, as Lord Hardwicke
15 pointed out, all that will happen is the creditor will
16 sue the bankrupt and that's pointless.
17 Now, the assignees argued that the 1623 Act had
18 changed the position because it contained for the first
19 time an express prohibition concerning interest on
20 debts. It was contained in the 1623 Act, and
21 Lord Hardwicke sets out the relevant provision in the
22 middle of page 51 of his judgment. Your Lordship will
23 see the reference to "21 of Jac. 1 cap. 19".
24 MR JUSTICE DAVID RICHARDS: Hmm, hmm.
25 MR DICKER: He ends that:

Page 78

1 " ... shall not be relieved upon any such judgment
2 for any more than a rateable part of their just and due
3 debts with the other creditors of the bankrupt without
4 respect to any such penalty or greater sum contained in
5 any such judgment."
6 Lord Hardwicke's response is:
7 "This Act only meant to exclude creditors from the
8 benefit of the penalty as against creditors and not as
9 against the bankrupt himself."
10 The next argument by the assignees was that the
11 fundamental principles had been changed by the 1705 Act
12 which released the bankrupt from debts due or released
13 the bankrupt from debts which weren't due by the time of
14 bankruptcy.
15 Now, even though the bizarre result that would have
16 applied previously no longer applied, Lord Hardwicke,
17 again, guided by fundamental principle, rejected that
18 submission. He does that at the top of paragraph 52, in
19 the first full paragraph. At the end, he concludes:
20 "Therefore, I'm of the opinion it was meant to
21 discharge the person of the bankrupt and his estate
22 subsequently accrued and not the estate in the hands of
23 the assignees."
24 Now, it's true that the -- one can call it this --
25 the rule in Bower v Marris was only reflected in order

Page 79

1 to Lord Hardwicke's judgment. That was, we say,
2 essentially because the same reason that led to the
3 inclusion that interest was payable also led to the
4 conclusion that it was calculated upon an interest first
5 approach. Essentially the argument in favour of one is
6 effectively the argument in favour of the other. If
7 creditors are going to be paid first, then of course
8 they need to be paid what they're entitled in the
9 ordinary way and that sweeps in the rule in
10 Bower v Marris. Whilst Wentworth are right, therefore,
11 to say there was no discussion of effectively the rule
12 in Bower v Marris, if I can call it that, in
13 Bromley v Goodere, that is, we say, because
14 Lord Hardwicke was concerned with a deeper principle,
15 namely creditors first, debtors last, and it was that
16 which led him to the conclusion which he reached.
17 My Lord, now that approach to the statutory scheme
18 is echoed in a subsequent Australian case that my
19 learned friend took you to, MacKenzie v Rees. It's
20 bundle 1B at tab 71. As your Lordship knows, the case
21 was concerned with whether and in what circumstance
22 interest was payable out of a surplus. One issue, as my
23 learned friend pointed out, was whether certain claims
24 carried interest at all and the answer to that was "no".
25 Your Lordship isn't concerned with that.

Page 80

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1 The second issue was whether the Act contemplated
2 interest being paid out of the surplus at all. My
3 learned friend took you to a paragraph in the judgment
4 of Justice Dixon in the High Court of Australia at
5 pages 10 to 11. If I may just make a few points in
6 relation to that passage. If your Lordship goes to
7 page 10, he ends the paragraph at the top by saying:
8 "The principle which stops interest upon debts for
9 the purposes of proof upon assets, so that the rights of
10 creditors may be equitably adjusted, but allows it to
11 run on as a claim upon a surplus has been applied in the
12 winding up of companies. The principle has long
13 received statutory recognition and to some extent
14 expression."
15 Then your Lordship will see a reference to, for
16 example, section 132 of the 85 Act:
17 "The Commonwealth Bankruptcy Act 1924 to 1933
18 contains no analogous provisions. Indeed, some
19 difficulty may be felt in reconciling the operation of
20 the principle as bad of our law of bankruptcy with the
21 express language of some provisions of the Act, but
22 I think it is possible to give effect both to the
23 principle and to the form in which the legislation is
24 cast by treating the principal as one determining the
25 order in which debts are to be discharged in the course

1 of administration. That is by accepting the more modern
2 view that rule is one of justice and convenience ..."
3 Then the next sentence:
4 "Thus, the wide language of section 81(1) may be
5 taken as covering intermediate interest so it is not
6 altogether excluded as a claim against the assets and,
7 at the other end, section 118 may be regarded as
8 conferring upon the debtor a right to the surplus only
9 after immediate interest has been paid."
10 In other words, if you look at the cut-off rule, the
11 cut-off rule doesn't cut off post-insolvency interest,
12 although it might appear to. When one looks at the
13 surplus, the surplus isn't payable to the bankrupt only
14 after payment of proved debts. You have this
15 intermediate position that needs to be dealt with.
16 Mr Justice Dixon says:
17 "The principle then may be considered as operating
18 between these two termini, so to speak, and as requiring
19 that for the purpose of adjusting the rights of
20 creditors, interest accruing after sequestration shall
21 be put out of consideration in the first interest and
22 shall be allowed only if and when a surplus is
23 ascertained."
24 So this is an approach to construing the statutory
25 scheme.

1 Now, my learned friend said, "Ah, yes, but this case
2 was only about whether interest was payable at all. It
3 said nothing about the rule in Bower v Marris".
4 My Lord, that's true so far as detailed discussion is
5 concerned, but it's difficult to believe that the
6 High Court of Australia was not aware of the point.
7 Can I show your Lordship some of the authorities,
8 both referred to in argument and cited during the course
9 of the judgment. If your Lordship goes back to page 4,
10 picking up some of the more familiar ones. Mr Hart,
11 with him Mr Mack for the respondent. Halfway down he
12 refers five lines from the end of that page, ex parte
13 Mills and ex parte Champion.
14 Ex parte Champion, your Lordship may recall, is the
15 one where the editor said the order made by
16 Lord Hardwicke is taken as a precedent invariably
17 applied.
18 Then at the top of page 5, a reference to
19 Bromley v Goodere.
20 If one goes on to page 9, the judgment of
21 Justice Dixon himself the first full paragraph -- sorry,
22 right first paragraph, four lines from the end,
23 reference to ex parte Mills.
24 MR JUSTICE DAVID RICHARDS: Yes.
25 MR DICKER: There's a reference, page 13, to a case your

1 Lordship hasn't seen but, again, relevant, Lord Eldon in
2 ex parte Koch, just above the second hole-punch.
3 Page 23, from the judgment of Justice Williams, the
4 first full paragraph, right at the end, ex parte Mills,
5 ex parte Reeve.
6 The only other reference, if your Lordship goes back
7 to page 10, your Lordship has already seen the reference
8 to the Warrant Finance Company case, which of course is
9 Humber Ironworks.
10 MR JUSTICE DAVID RICHARDS: Sorry, I was just reading on to
11 what Lord Eldon said. The last reference you gave me
12 was ...?
13 MR DICKER: Your Lordship has already seen it. The last
14 reference back is to Humber Ironworks.
15 NEW SPEAKER: Yes.
16 MR DICKER: Perfectly clear, we say, that the High Court of
17 Australia, having held that interest was payable out of
18 the surplus before it was returned to the bankrupt,
19 envisaged that interest being payable in the ordinary
20 way in accordance with the authorities to which it had
21 been referred.
22 MR JUSTICE DAVID RICHARDS: Yes.
23 MR DICKER: Your Lordship will see, page 28, the order made:
24 "Direct the trustee that Thomas Brown and
25 Sons Limited are entitled to prove against surplus for

1 interest at the rate of 7 per cent on the amount of
2 their debt outstanding from time to time after that
3 date. The other creditors shall be allowed to prove
4 pari passu if they can establish their original debts
5 carried interest by contract ...", et cetera.
6 Now, as we say, having decided that interest after
7 cut-off date was payable out of the surplus, it
8 naturally followed that interest was to be calculated in
9 the ordinary way and that's how the courts approached
10 things.
11 My Lord I'll come back to my learned friend
12 Mr Zacaroli's submission that Bower v Marris disappeared
13 between 1870 and the decision of Lines Brothers number 2
14 in 1984. Your Lordship may just like to note at this
15 point, a decision of the High Court of Australia citing
16 Bromley v Goodere and re Humber Ironworks.
17 My Lord, not a court that I think one can say exists
18 in a backwater.
19 MR JUSTICE DAVID RICHARDS: No.
20 MR DICKER: My Lord, so that's how the courts approach it
21 when there is no express statutory provision dealing
22 with post-insolvency interest.
23 The next stage is to consider what happens when
24 particular inherent or implicit aspects of the statutory
25 regime are codified by means of an express provision.

1 Your Lordship is very familiar with this process. One
2 saw it in relation to the cut-off date. Lord Hardwicke
3 held that that was how the statute was intended to
4 operate. At that stage it was judge-made law.
5 Subsequently it became subject to an express provision.
6 Now, there's an obvious point that needs to be made
7 at this stage. The mere fact of codification doesn't
8 necessarily change anything. It entirely depends on the
9 terms of the codification. If the statutory provision
10 simply enacts the effect of the previous judge-made law,
11 nothing has changed.
12 Now, if one then looks at the 1825 Act, and my
13 learned friend's submissions in relation to that, one
14 can see that the mere fact the statute now contains an
15 express provision dealing with post-insolvency interest
16 does not affect the position. We have a statutory
17 express provision but it's common ground that
18 Bower v Marris applied, at least to interest reserved or
19 payable at law under section 132.
20 My Lord, what my learned friend says, however, is
21 that Bower v Marris only applies because section 132
22 involves a remission to contractual rights, effectively
23 building on his approach to Bromley v Goodere. Now,
24 my Lord we say it's extremely important to step
25 carefully at this point. Firstly, the phrase "remission

1 to contractual rights" is a natural one to use when the
2 relevant claims are contractual claims, but my learned
3 friend accepts that Bower v Marris applies not merely to
4 contractual rights but where I think we got to during
5 the course of his oral submissions was that it applies
6 to any pre-existing rights, whether statutory pursuant
7 to a judgment, it doesn't matter.
8 We obviously say it goes further than that, but if
9 one just bears that in mind, i.e. we're not just
10 concerned with contractual rights. But the second point
11 is the phrase "remission to contractual rights"
12 obviously doesn't mean you're remitted to your
13 contractual right in the literal sense. No one
14 envisages the creditors having to go out and sue the
15 debtor on their contractual rights for their interest to
16 which they're entitled. The distribution of the surplus
17 is done by the assignees as part of the statutory
18 scheme. They have a duty to apply the surplus in
19 payment of interest before distributing the residue to
20 the bankrupt.
21 The third point is this: remission to contractual
22 rights is just another way of saying that creditors are
23 entitled to have their claims satisfied in full; in
24 other words, you can also express what is happening here
25 as simply a basic principle of insolvency law, namely

1 creditors first, debtors last.
2 Put another way, this part of section 132 respects,
3 reflects or mirrors creditors' rights outside of an
4 insolvency by providing that such claims have to be
5 satisfied and interest is to be calculated in the
6 ordinary way.
7 Again, one gets the critical question: what do the
8 statutory rights provide, do they respect, reflect and
9 mirror the contractual rights and do they preserve the
10 ordinary approach? We say that's what Lord Cottenham
11 was referring to in Bower v Marris when he said:
12 "As this mode of appropriation is regulated by Acts
13 of Parliament, the doctrine of appropriation cannot have
14 any place."
15 As your Lordship will recall, he then went on to
16 consider the operation of the scheme; what he was
17 essentially doing in construing the statutory scheme.
18 The fourth point is, as such it's perfectly natural
19 to describe the rule in Bower v Marris as a rule of the
20 insolvency scheme. Again, just to give your Lordship
21 one example of that. It's Midland Montagu, which my
22 learned friend showed you. It's bundle 1C, at tab 119.
23 As your Lordship recalls, this was a scheme of
24 arrangement case. The important point concerned or
25 arose because of the terms of the scheme. If

1 your Lordship goes to pages 324, clause 11.4 of the
2 scheme is just by the second hole-punch.
3 MR JUSTICE DAVID RICHARDS: Yes.
4 MR DICKER: 11.4 is headed, "Entitlement to post-fixed date
5 interest in certain cases":
6 "Any prescribed creditor who claims to be entitled
7 to any monies retained from distribution to that
8 prescribed creditor pursuant to sub-clause 11(3),
9 according to the rules and principles applicable in the
10 winding up of a company, with a surplus of assets over
11 liabilities or such other rules and principles as the
12 court considers appropriate, may make application
13 [essentially for payment of interest]."
14 MR JUSTICE DAVID RICHARDS: Can I just read this to myself
15 again. (Pause)
16 Yes, I see.
17 MR DICKER: The critical words picked up by
18 Chief Justice McLelland were the words, "According to
19 the rules and principles applicable in the winding up of
20 a company". And your Lordship will see that at page 331
21 between lines 30 and 35. Line 31, at the end, he says:
22 "However, the schemes incorporate the rule stated in
23 Bower v Marris as part of the rules and principles
24 applicable in the winding up of a company and, in any
25 event, are binding on the parties not by contract but by

1 operation of law."
2 MR JUSTICE DAVID RICHARDS: Sorry, this is 331 and it's --
3 MR DICKER: 331, between lines 30 and 35.
4 MR JUSTICE DAVID RICHARDS: Yes, I have it. I'll read to
5 myself from the start of the paragraph. (Pause)
6 Yes. Just to the end of that paragraph?
7 MR DICKER: Yes.
8 My Lord, we say nothing remotely surprising in this.
9 One starts with fundamental principles of the statutory
10 scheme. Those fundamental principles require specific
11 treatment in certain cases and it's perfectly natural
12 then to say that specific application of the fundamental
13 principle is essentially a rule of the statutory scheme.
14 MR JUSTICE DAVID RICHARDS: Yes.
15 MR DICKER: So if codification is not the problem, what is?
16 My Lord, it can't either be the fact the statute gives
17 creditors new rights under the statute. One can see
18 that from the 1825 Act itself. Wentworth accepts that
19 Bower v Marris applied to the first part of section 132,
20 the part dealing with interest reserved or payable at
21 law, despite the fact that the second part also granted
22 creditors a new right to interest on debts that did not
23 otherwise carry interest at 4 per cent.
24 So we have an Act which gives creditors new rights.
25 Everyone effectively gets out with a minimum of

1 4 per cent. The mere fact the statute gives creditors
2 new rights didn't deprive them of the benefit of the
3 rule in Bower v Marris.
4 Now, there is a difference between my learned friend
5 and I as to what parts of section 132 the rule applies
6 to. He says only the first part. We say both.
7 MR JUSTICE DAVID RICHARDS: Yes.
8 MR DICKER: But the first is concession on the first part is
9 the important point at this stage. We have an Act that
10 gives you new rights. The mere fact it gives you new
11 rights doesn't necessarily mean that you lose the
12 benefit of Bower v Marris, that somehow you now treat
13 this as a complete code in some way inconsistent with
14 the operation of the rule.
15 My Lord, obviously there is a difference between the
16 parties in relation to the second part of section 132,
17 giving right to interest at 4 per cent. As
18 your Lordship knows, my learned friend's submission is
19 essentially a technical argument, I think he described
20 it as, that Bower v Marris could not have applied to
21 this part because the rule requires interest to be due
22 and that interest at 4 per cent is not due at the date
23 of the relevant payments of dividends. My Lord, I have
24 already commented that if that was correct, one might
25 have expected Lord Cottenham to have commented on this

1 distinction in Bower v Marris. He was concerned with
2 whether the interest first approach embodied in the
3 order in Bromley v Goodere was to be applied and he said
4 "yes". In that context, he referred to section 132. He
5 appears to have regarded that section as providing him
6 with some assistance, given that although 132 wasn't, it
7 appears, the applicable section here, we say it would be
8 very surprising indeed if Lord Cottenham had thought
9 Bower v Marris only applies to the first part of
10 section 132 and doesn't apply to the second part but
11 didn't make that plain in his judgment.
12 MR JUSTICE DAVID RICHARDS: It's not a point that arose for
13 consideration.
14 MR DICKER: No, it wasn't.
15 MR JUSTICE DAVID RICHARDS: He didn't need to consider the
16 1832 -- the 1825 Act at all, but in considering the
17 position at common law or in equity he found -- he
18 referred to section 132.
19 MR DICKER: And he says that Lord Hardwicke managed to reach
20 the result he reached without the assistance provided by
21 section 132.
22 MR JUSTICE DAVID RICHARDS: Yes.
23 MR DICKER: My Lord, we say, it would have been odd if
24 effectively what he was saying is Bower v Marris only
25 applies to the first part of 132. Obviously the Act had

1 been in force by then for some 20 years. It was very
2 likely that any bankruptcies which came before the
3 courts in future would be governed by that Act, rather
4 than another. Your Lordship is quite right the point
5 wasn't raised. One might have thought that if my
6 learned friend's submissions are right there's a point
7 sufficiently obvious that it would have been mentioned
8 by Lord Cottenham.
9 My Lord, the other point, just to pick up, is from
10 section 13 -- was from the 1825 Act itself. My Lord may
11 remember in my learned friend's new bundle of
12 authorities, tab 1, the section he referred you to, 135,
13 starts by saying:
14 "And be it enacted this Act shall be construed
15 beneficially ...(reading to the words)... except where
16 any such alteration is expressly declared."
17 Now, the way in which the 1825 Act was described in
18 re Langstaffe, we submit, is entirely consistent with
19 this. Just dealing with my learned friend's point in
20 relation to Langstaffe, if your Lordship can go into
21 bundle 1A, tab 19. My Lord, it's obviously a judgment,
22 we say, well worth reading in its entirety, but just at
23 page 5, the paragraph at the top of the page, just below
24 the second -- first hole-punch, there's a reference to
25 "sixth George 4 cap. 16", which is the 1825 Act.

Page 93

1 MR JUSTICE DAVID RICHARDS: Yes.
2 MR DICKER: He says:
3 "The law continued in this state until the passing
4 of the 1825 Act and the rule which had prevailed in
5 bankruptcy with regard to the surplus was recognised and
6 extended by that statute provided by its 132nd section
7 the surplus should not be handed to the bankrupt until
8 interest after the date of the commission shall be paid
9 on all debts upon which interest was then payable in the
10 case of a surplus at the rate expressly reserved or by
11 law then payable and on all other debts at the rate of
12 4 per cent."
13 MR JUSTICE DAVID RICHARDS: What's the rule he's referring
14 to there?
15 MR DICKER: Well, my Lord, in a sense we say it's
16 effectively the same thing. One has an entitlement
17 going back to Bromley v Goodere to interest out of the
18 surplus. Lord Hardwicke effectively said, well, if
19 interest is to be paid, if you're entitled to interest,
20 it's payable in the ordinary way, thus the order.
21 MR JUSTICE DAVID RICHARDS: I suppose it's the previous
22 sentence, isn't it?
23 MR DICKER: Yes.
24 MR JUSTICE DAVID RICHARDS: Thank you.
25 MR DICKER: My Lord, one further point following on from

Page 94

1 this in relation to section 132. Wentworth's
2 submissions therefore appear to be that Bower v Marris
3 applied to the first part of section 132 but not to the
4 second part. Your Lordship will recall later in his
5 submissions my learned friend Mr Zacaroli said this was
6 a very unlikely position for the legislature to have
7 taken, either the rule applied in both cases or it
8 applied in neither case.
9 Now, obviously Wentworth argue it applies in neither
10 case because they start with interest at 4 per cent.
11 They say there's a technical reason Bower v Marris can't
12 play --
13 MR JUSTICE DAVID RICHARDS: You say "technical reason".
14 I mean, one uses the word "technical" as a matter of
15 advocacy in a somewhat diminishing pejorative respect,
16 but actually it's quite a substantial point, isn't it,
17 that if nothing is accrued due on the date on which the
18 payment is made, what is there to appropriate?
19 MR DICKER: My Lord, if that's how one looks at the
20 principle, your Lordship is right.
21 MR JUSTICE DAVID RICHARDS: But is that not how
22 Bower v Marris worked?
23 MR DICKER: Well, again, as Mr Justice Barrett pointed out
24 in the Tahore case, one has to be careful when looking
25 at the old cases. To the extent that they were dealing

Page 95

1 with creditors with contractual rights to interest, then
2 perhaps not surprisingly they described the answer they
3 came to in terms which resonated with the fact that
4 there was a contractual right to interest. We say the
5 policy underlying Bower v Marris is wider than simply
6 giving creditors interest which happened to be due at
7 the time of principal. It's a general policy in an
8 insolvency that creditors --
9 MR JUSTICE DAVID RICHARDS: I know you say that, but in
10 Tahore Holdings, which is Mr Justice Barrett, he was
11 concerned, as I understand it, to say -- and did say --
12 that it applied where you have interest due under
13 a judgment and that there was no distinction between
14 interest due under a contract and interest due under
15 a judgment or, as you mentioned earlier, under
16 a statute, but it was interest which was accruing during
17 the relevant period. So if a payment was made you could
18 say, well, at that date, by virtue of the judgment,
19 there was principal and interest payable.
20 MR DICKER: And, my Lord, again, one proceeds in a sense
21 incrementally. One point he did make was the obvious
22 point that when you look at the cases which involve
23 contractual claims for interest, not surprisingly the
24 language is in those terms. He says it also applies in
25 the case of judgments and was capable effectively of

Page 96

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1 applying directly that the same approach -- the same
2 justification for contractual rights, but we say
3 Bower v Marris, the rule in Bower v Marris is more
4 fundamental than simply requiring interest to be due at
5 the relevant date. The rule is essentially saying that
6 in an insolvency creditors shouldn't be prejudiced by
7 payments being made by process of law. It's intended to
8 reflect the underlying position that interest -- the
9 ordinary approach is that interest is paid first.
10 I think your Lordship at the start of this application
11 said, in a sense, this case may require a little
12 extension of the position. We say if an extension is
13 required, it's a perfectly justified one.
14 MR JUSTICE DAVID RICHARDS: But it's fairly fundamental,
15 isn't it, or one can say it is, that if a payment is
16 made on 1 March that unless there are two albeit linked
17 different debts due on 1 March, the payment -- there's
18 no appropriation or allocation to be made?
19 MR DICKER: My Lord, I was going to deal with interest --
20 statutory interest later, but, my Lord, what we do say
21 is that there's no conceptual difficulty in saying when
22 it becomes clear that there is a surplus, if we're right
23 about -- and if, as certainly Wentworth accepts, the
24 fact that payments have been made in discharge of proved
25 debts is not by itself an end of it. That differs

1 slightly, I think, from the administrators in that
2 respect. The question then is how do you approach
3 matters?
4 We say no difficulty in saying when one gets to
5 a surplus and effectively calculates how much interest
6 is payable, it's by then clear that effectively applying
7 hindsight, whatever, the same approach to recalculation,
8 if one wants to put it that way, statutory interest was
9 effectively accruing day-by-day, albeit contingently on
10 there eventually being a surplus.
11 MR JUSTICE DAVID RICHARDS: Yes.
12 MR DICKER: I mean, one could imagine a similar contractua
13 provision entitling one to interest but contingent on
14 the event. The event happens. What is the difficulty
15 in a contractual sense of saying it's now clear, the
16 contingency having happened, recalculating, applying
17 hindsight whatever, that interest effectively was
18 accruing?
19 MR JUSTICE DAVID RICHARDS: Yes.
20 MR DICKER: My Lord, as I say, I'll come back to statutory
21 interest because of course it raises -- potentially
22 raises some additional questions, but just continuing,
23 if I may.
24 I have made the point that in relation to the 1825
25 Act it's common ground that Bower v Marris applied to at

1 least part of it, despite existence of interest at
2 4 per cent in the second part.
3 What then is said to be the difference between the
4 85 Act and the 1986 Act? The administrators say the
5 1825 Act did not contain a mandatory direction for the
6 payment of interest, it was merely a pre-condition for
7 the distribution of the surplus to the bankrupt.
8 My Lord, I have already submitted this is
9 a distinction without a difference. The 1825 Act
10 imposed essentially the same duty on the assignees. The
11 bankrupt demands the surplus. The assignees can't
12 return it to him without discharging their duty to apply
13 interest and -- apply the surplus in payment interest
14 due toe creditors. One can see that this distinction is
15 a distinction without a difference from two cases
16 your Lordship has seen, Attorney General of
17 Canada v Confederation Trust and re Hibernian. Both
18 cases involved -- contained a mandatory direction
19 requiring the surplus to be applied in payment of
20 interest.
21 MR JUSTICE DAVID RICHARDS: Yes.
22 MR DICKER: Despite this, the rule in Bower v Marris still
23 applied and that is why Wentworth has to say that these
24 cases were both wrongly decided.
25 MR JUSTICE DAVID RICHARDS: Yes.

1 Mr Dicker, we're coming up to 1 o'clock. Would that
2 be a convenient moment to have give our transcribers
3 a short break?
4 MR DICKER: Yes.
5 MR JUSTICE DAVID RICHARDS: Five minutes.
6 (12.59 pm)
7 (Short break)
8 (1.05 pm)
9 MR JUSTICE DAVID RICHARDS: Mr Dicker.
10 MR DICKER: My Lord, I am not intending to exhaust my
11 submissions on statutory interest at this stage but just
12 picking up three points I'll come back to.
13 The first is we say there's absolutely no difficulty
14 if there is a surplus in treating the company as if it
15 had always been solvent. Indeed, your Lordship may
16 recall cases like re Rolls-Royce and Fine Industrial
17 which say precisely that the reason why the bankruptcy
18 provision doesn't apply is because the bankruptcy
19 provision applies in relation to insolvent, (inaudible)
20 the rules require reference to the bankruptcy where the
21 company is insolvent and this company has to be treated
22 as if it always was solvent.
23 My Lord, if your Lordship takes the Cork Report in
24 bundle 4, tab 3. The Cork Committee had no difficulty
25 using of the language of run-in. Your Lordship can see

1 that from 1395C where they recommend --
2 MR JUSTICE DAVID RICHARDS: Hold on. I have -- have we
3 looked at that before?
4 MR DICKER: Yes.
5 MR JUSTICE DAVID RICHARDS: 1395, I'm sorry, for some reason
6 it's not in here. Just give me a moment. (Pause)
7 For some reason it's gone in the wrong place,
8 I suspect.
9 MR DICKER: Can I hand your Lordship a copy. (Handed)
10 MR JUSTICE DAVID RICHARDS: Thank you very much indeed.
11 MR DICKER: Unfortunately it's marked.
12 MR JUSTICE DAVID RICHARDS: Don't worry, it will save me the
13 trouble.
14 MR DICKER: 1395C:
15 "During the insolvency in the event of there being
16 a surplus ...(reading to the words)... and liabilities
17 until a final dividend is declared, the rate being ..."
18 MR JUSTICE DAVID RICHARDS: Yes. Yes, I see.
19 MR DICKER: The third point is your Lordship couldn't
20 conclude against us on this point in our submission
21 without holding that Whittingstall v Grover was wrongly
22 decided. My Lord, my learned friend Mr Smith dealt with
23 that case and will deal with it reply.
24 MR JUSTICE DAVID RICHARDS: All right.
25 MR DICKER: But your Lordship may recall there were rules in

1 that case that essentially made the payment of interest
2 conditional on there being a surplus that caused
3 Mr Justice Chitty no difficulty at all in applying
4 Bower v Marris to the interest provided for by those
5 rules which was payable only in the event of a surplus.
6 My learned friend, I think, also submitted that the
7 terms of the English statute are materially different
8 from the terms of section 95(1) in Canada and section 86
9 in Ireland. My Lord, we say that submission which was
10 not developed is incorrect. There is no material
11 difference for these purposes.
12 So one then comes to construction of the rule.
13 My Lord, as we understand it, there is a difference in
14 approach between the administrators, on the one hand,
15 and Wentworth, on the other. Mr Trower submitted during
16 the course of his submissions this morning that payments
17 of dividends effectively did discharge proved debts and
18 principal and therefore it necessarily followed that
19 interest needed to be calculated on that basis.
20 MR JUSTICE DAVID RICHARDS: Yes.
21 MR DICKER: As we understand it, Wentworth's position is
22 a little more subtle. They say, not so, we entirely
23 accept the approach taken in the cases. Payments do not
24 amount to an actual appropriation, discharge, whatever
25 word one wants to use. They say, however, when you come

1 to look at the language of the rule, nevertheless the
2 language requires you to calculate it in a particular
3 way, namely principal first.
4 My Lord, I wasn't proposing to say any more about
5 the administrators' approach. I dealt with that in
6 opening. We say it's wrong and one can see some of the
7 consequences if they're right; for example, in relation
8 to co-obligors.
9 Turning to Mr Zacaroli's submissions on construction
10 of rule 2.88. He made four points on construction which
11 he said must be correct if the rule in Bower v Marris is
12 to apply, which four points he said were incompatible
13 with the language of the rule.
14 The four points are, firstly, you have to assume
15 that what has been paid to date is interest, not proved
16 debt. It, therefore, secondly, requires the proved debt
17 to be treated as if it has not been paid in full.
18 Thirdly, he said it permits interest to be paid long
19 after the proved debt has in fact been paid in full.
20 Fourthly, it required what is being paid pursuant to
21 the rule to be proved debt and not interest.
22 My Lord, the first three points are of course
23 correct. It is a necessary part of the rule that there
24 is a notional redistribution. You are assuming that
25 what has been paid to date is interest. You are

1 treating proved debts as if they hadn't been paid in
2 full.
3 The third point, permits interest to be paid long
4 after the proved debt has in fact been paid, again is
5 true.
6 The fourth point, it required to what is being paid
7 pursuant to the rule to be the proved debt and not
8 interest, we say for the reasons your Lordship
9 identified is incorrect. The payment is interest. It's
10 calculated by way of a notional re-allocation but it's
11 nevertheless still interest that is being paid.
12 There's a tendency in some of my learned friend's
13 submissions essentially to characterise our argument,
14 not merely as a matter of calculation but as if we are
15 in fact saying, "Here is the surplus. It is to be
16 applied in payment of principal -- effectively interest
17 first" -- sorry, I'll start again. To characterise our
18 argument as effectively saying: dividend payments were
19 in fact made in respect of proved debts irrevocably.
20 Secondly, that what is being paid now is interest --
21 sorry, those were paid in respect of interest and what
22 is left is principal later.
23 My Lord, that, we say, just ignores the whole
24 calculation basis of the approach that we're taking.
25 We do say that my learned friend Mr Zacaroli chose

1 not to grapple with the substance of our argument,
2 namely that there is actually nothing in rule 2.88 that
3 tells you how interest is to be calculated.
4 What, again, we say is there that prevents you from
5 being able to take this approach? The answer is
6 nothing. Firstly, if your Lordship takes up 2.88, the
7 rule provides for interest to be paid after all proved
8 debts in full. That was an express or implied feature
9 of every other regime that we have looked at. It just
10 reflects the basic ranking of proved debts and
11 post-insolvency interest. There's no reason to construe
12 it as meaning anything more than that.
13 Secondly, the rule provides the surplus to be
14 applied in paying interest on those debts. Again, that
15 was also a feature of all the other regimes. One might
16 say, of course, you're going to be paying interest on
17 proved debts, what else are you going to be paying it
18 on? It doesn't answer the question of how you calculate
19 the amount of interest to be paid.
20 Thirdly, the rule certainly states that interest is
21 to be paid in respect of the period during which they
22 have been outstanding. Again, that's also a feature of
23 previous regimes. Of course you pay interest in respect
24 of the periods during which the debts have been
25 outstanding. That's the nature of interest.

1 MR JUSTICE DAVID RICHARDS: What is the end date?
2 MR DICKER: What is the ...?
3 MR JUSTICE DAVID RICHARDS: The end date.
4 MR DICKER: That's the issue that troubled
5 Mr Justice Mervyn Davies in Lines Brothers. Again, he,
6 we say, effectively following the fallacy of
7 appropriation, initially thought, "Hang on, how can this
8 be right? I get to a stage where proved debts have been
9 paid in full; in other words, principal has been paid in
10 full, how can interest continue to accrue beyond that
11 date?"
12 We say because it's a question of calculation. It's
13 a question of calculation that requires a notional
14 re-allocation and, having notionally re-allocated that's
15 simply the way the re-allocation works.
16 MR JUSTICE DAVID RICHARDS: I just remind myself of that, if
17 I may. I don't want to take you the of your course.
18 Mr Justice Mervyn Davies's decision is in ...?
19 MR DICKER: 1C/95.
20 MR JUSTICE DAVID RICHARDS: Of course it is, yes.
21 MR DICKER: The relevant passage --
22 MR JUSTICE DAVID RICHARDS: His first judgment is at 453.
23 MR DICKER: It's in the first judgment, 453, between letters
24 E and G. (Pause)
25 MR JUSTICE DAVID RICHARDS: Yes. The difference of course

1 is we now have rule 2.88(7).
2 MR DICKER: Absolutely, but the same issue arose.
3 Mr Justice Mervyn Davies was effectively saying, "How
4 can I end up in this position?"
5 MR JUSTICE DAVID RICHARDS: Yes, but that's because he's
6 looking at Bower v Marris and how that works. I'm here
7 having to construe a statutory provision that says that
8 interest is payable in respect of the period during
9 which the proved debt is outstanding.
10 MR DICKER: Your Lordship is, but the reference to
11 "outstanding" is precisely the same issue as troubled
12 Mr Justice Mervyn Davies. He effectively said --
13 MR JUSTICE DAVID RICHARDS: It may be the same issue, but
14 this is a statutory provision. That's point I'm making.
15 MR DICKER: Yes, but if one takes it in stages. We have in
16 Lines Brothers Mr Justice Mervyn Davies saying that
17 there's a problem here, "I'm obviously intended to pay
18 interest in respect of debts whilst they're
19 outstanding". He's saying, "How can I do that, because
20 this debt ceased to be outstanding" --
21 MR JUSTICE DAVID RICHARDS: But if you apply Bower v Marris,
22 of course it didn't. And that's the point, isn't it?
23 MR DICKER: Yes, and if you enter into the same spirit of
24 things under rule 2.88(7) and say rule 2.88(7) doesn't
25 explain how you calculate the amount of interest, if one

1 accepts that 2.88(7), because it doesn't tell you how
2 you calculate the amount, permits you to have the same
3 sort of notional recalculation that occurred in
4 Lines Brothers number 2, then the word "outstanding" is
5 no more of a problem under rule 2.88(7) than it was
6 under the previous regime.
7 MR JUSTICE DAVID RICHARDS: So the period during which they
8 have been outstanding is not to be understood as being
9 a period down to the payment of the debts proved in full
10 but is to be understood as outstanding, having
11 notionally applied the rule in Bower v Marris?
12 MR DICKER: Correct.
13 MR JUSTICE DAVID RICHARDS: Yes, I see. Right. I follow.
14 MR DICKER: We say no difficulty in taking that approach.
15 Again, one can see that from the approach taken in
16 Attorney General of Canada v Confederation Trust and
17 re Hibernian. Exactly the same issue arose under those
18 statutory provisions. It didn't cause those judges any
19 hesitation.
20 In our submission that must be right. It would be
21 extraordinary if the draughtsman had intended to remove
22 the operation of Bower v Marris, if he had decided to do
23 so, by using a relatively innocuous phrase, that you pay
24 interest on debts for the periods during which they were
25 outstanding. The starting point has to be: this is

1 a question of calculation, how do you calculate the
2 amount of interest? Lines Brothers number 2 says you do
3 it through this notional approach. Having done that,
4 there is no difficulty with any of the language in
5 2.88(7).
6 My Lord, the other point is this: we do say one does
7 need to read 2.88(7) and (9) together.
8 MR JUSTICE DAVID RICHARDS: Yes.
9 MR DICKER: It is those rules, read together, which define
10 how much interest creditors are to receive out of the
11 surplus. If you read those rules together, we say the
12 natural meaning is that they were, at least in part,
13 intended to reflect, respect and mirror the creditors'
14 rights outside of an insolvency. That's the phrase "the
15 rate applicable to the debt apart from the
16 administration". We say what the draughtsman was doing
17 there was essentially saying, "I want creditors to get
18 the interest they would have got outside of the
19 administration".
20 We say that is the natural meaning of those words.
21 My learned friend Mr Trower criticised me for making
22 what he described as a forensic point. I'm sure he
23 would have included word "cheap" --
24 MR JUSTICE DAVID RICHARDS: Well, he didn't.
25 MR DICKER: But he didn't. My Lord, we do rely on the way

1 the administrators have phrased this, not as
2 a concession or anything on their part but an
3 illustration of the fact that this is a perfectly
4 natural way of reading those words in 2.88(9).
5 Can I just show your Lordship again the way they
6 put it.
7 MR JUSTICE DAVID RICHARDS: I have it in mind.
8 MR DICKER: Well, my learned friend did make one point which
9 he said, "They never expressly included the rule in
10 Bower v Marris as part of the overall package of factors
11 that go up to determining the total amount of interest
12 to be received". My Lord, that's not correct. They did
13 precisely that in paragraph 65 which showed your
14 Lordship.
15 MR JUSTICE DAVID RICHARDS: Sorry, I thought you were going
16 to take me to 115. Ill have a quick look at 65. Well,
17 that's in the context of Humber Ironworks and so on.
18 MR DICKER: My Lord, it's the last sentence:
19 "Creditors were remitted to the package of rights
20 that would have applied in the absence of any
21 liquidation."
22 That is the phrase that is used subsequently in
23 relation to what 2.88(9) does.
24 MR JUSTICE DAVID RICHARDS: Right.
25 MR DICKER: There they say "have included", because

1 naturally it does, the rule in Bower v Marris. Of
2 course it's a rule that determines the total amount of
3 interest that creditors receive.
4 MR JUSTICE DAVID RICHARDS: Yes.
5 MR DICKER: My learned friend Mr Trower says, "Well, there's
6 nothing that spells out that a notional re-allocation is
7 to occur or that payments are treated as merely general
8 payments on account", but of course that's true, but one
9 can equally say there's nothing that expressly excludes
10 this. It's interesting to note that Wentworth accept
11 that although there's nothing that expressly preserves
12 it or refers to it, nevertheless cases holding that
13 payments are simply treated as general payments on
14 account continues to be correct. One might equally say
15 where does that come from under the rules? It's not
16 expressly stated.
17 My Lord, my learned friend Mr Trower made a point in
18 relation to preferential debts. I think your Lordship
19 identified the answer to it. Again, it goes away if one
20 proceeds on the basis that what we have here is
21 a calculation to be done in accordance with the same
22 approach as in Lines Brothers number 2.
23 My Lord, two submissions on the complete and
24 exhaustive code argument. The first is a point I've
25 already made. The fact you get new rights under the

1 1986 Act does not by itself lead to the conclusion that
2 Bower v Marris no longer applies. We have already seen
3 that from the 1825 Act.
4 Secondly, none of the facts -- rights are in fact in
5 substance new, in the sense they didn't appear in
6 previous regimes. If one focuses on bankruptcy, the
7 4 per cent provision is the direct descendant of the
8 8 per cent Judgments Act rate. That's been there since
9 1825. Similar points can be made in relation to the
10 other aspects which are said to be new, for example the
11 uplift for a creditor with a contractual right to
12 interest up to 8 per cent. Again, that was the effect
13 previously. One-off compounding, similarly. If you
14 prove principal plus interest to the date of bankruptcy,
15 if there is a surplus and you're entitled to interest,
16 it's obviously includes your proved debt.
17 It does, we submit, raise a more general question.
18 Why would the legislature have wanted to give creditors
19 a statutory right to interest which mirrored all of
20 their other pre-existing rights, except the benefit of
21 the rule in Bower v Marris? One might rhetorically ask,
22 what does the legislature have against the idea of
23 a creditor being entitled to interest calculated on the
24 basis of interest first? Why is that objectionable?
25 Why pick on that feature and only that feature?

1 Now, I think Mr Zacaroli and Mr Trower both said
2 1986 brought about a complete change in the law
3 governing interest. My learned friend Mr Trower
4 referred your Lordship to -- reference to a couple of
5 textbooks dealing with companies winding up. Palmer,
6 I think, was one of the references. He didn't show your
7 Lordship the textbooks but I think referred to
8 Wentworth's skeleton that mentioned it.
9 MR JUSTICE DAVID RICHARDS: I see, yes. Probably.
10 MR DICKER: Those textbooks are all concerned with companies
11 winding up and, in a sense, the regime in companies
12 winding up was materially different from the previous
13 regime on any basis.
14 Section 66(1) which had caused so much problem was
15 no longer there and there was an introduction of a right
16 to interest on debts which didn't otherwise carry
17 interest.
18 My learned friends both, I think, repeatedly
19 referred to references to the Cork Report, to the need
20 to avoid complexity, a desire for simplicity as if that
21 somehow sub silentio was code for the rule in
22 Bower v Marris. My Lord, it's perfectly plain that's
23 not what the authors of the Cork Report had in mind.
24 What they were referring to as complex was what they
25 identified, namely the operation of section 66(1).

1 My Lord, I didn't hear any submissions which sought
2 to deal with your Lordship's judgment in Waterfall 1;
3 the conclusion your Lordship reached that in certain
4 circumstances there is a lacuna and interest is payable
5 out of the surplus, although not covered by the rules.
6 MR JUSTICE DAVID RICHARDS: Well, that's a case -- that's
7 the point, isn't it, not covered by the rules? I'm not
8 sure it goes either way in the case here because there
9 is -- what I concluded was that, as you rightly say,
10 there was a lacuna where no statutory interest is
11 payable.
12 MR DICKER: To turn it round, the rules don't provide for
13 the payment of statutory interest in this situation. As
14 a result, creditors have a non-provable claim for the
15 shortfall that they otherwise suffered.
16 MR JUSTICE DAVID RICHARDS: What we're concerned with here,
17 clearly, is a case where there is a statutory regime for
18 interest; the case now before us. What I was concerned
19 with there was a case where there wasn't a statutory
20 regime for interest. So that's why I query -- I'm not
21 entirely surprised I didn't hear anything about
22 Waterfall 1 on this point, for that reason.
23 MR DICKER: My Lord, there may be a sort of terminological
24 issue here then, in the sense of how far does the rule
25 go, because the premise of your Lordship's conclusion of

1 course was that in a sense it was only intended to deal
2 with this situation. It wasn't intended to deal with,
3 because there was a lacuna, another situation, and thus
4 creditors had a non-provable claim in that situation.
5 We say, similarly, in relation to the present case,
6 you could equally say, well, the rules provide for
7 interest in certain circumstances. They don't provide
8 for creditors to receive payment in full.
9 MR JUSTICE DAVID RICHARDS: I think the only point -- I'm
10 not sure you can really stretch that particular issue in
11 Waterfall 1 to this case.
12 MR DICKER: Well, then, I won't.
13 MR JUSTICE DAVID RICHARDS: Anyway --
14 MR DICKER: Then I won't push that point any more.
15 MR JUSTICE DAVID RICHARDS: Right.
16 MR DICKER: My Lord, so far as the inconsistency with
17 question 30 is concerned, the point we were making here
18 was Wentworth and the administrators' approach on
19 question 30 is inconsistent with this being a complete
20 and exhaustive code. You are getting more interest than
21 the rules provide; in other words, the rules provide for
22 interest to be payable out of the surplus on
23 a particular basis. One aspect of that basis is that
24 claims are converted into sterling. So one may say
25 that's what the statutory scheme provides, interest on

1 debts converted into sterling as at the date of
2 administration. One may also say, if my learned friends
3 are right, that's all the legislature intended anyone to
4 get.
5 It's common ground that is not the practical effect
6 of the rules. The practical effect is that the
7 creditors whose claims were originally denominated in
8 a foreign currency and suffered from depreciation of
9 sterling against that currency are able to claim the
10 shortfall in their interest recoveries; in other words,
11 get more interest than the rules provide.
12 My learned friend Mr Trower's solution to this was
13 not, we say in our submission, a solution of substance.
14 What he essentially says is, well, that's not really
15 about interest, that's currency conversion claim.
16 My Lord, we say, again, that's a distinction without
17 a difference. Both Wentworth and the administrators
18 accept that there are circumstances in which you can get
19 all interest beyond that provided by the terms of the
20 rules.
21 Now, one may say, if that's right, why is that
22 permissible in relation to that situation but not
23 permissible in relation to a creditor who's entitled,
24 for example, under a contract, to interest on the basis
25 that any payments he receives he will appropriate to

1 interest first, not principal?
2 My Lord, that brings me on to the general question
3 of policy and principle. Can I start with what should
4 be an uncontroversial point. Any construction
5 your Lordship comes up with, we say, must have
6 a sensible policy rationale and be consistent with the
7 basic principles and objectives of the statutory regime.
8 My Lord, I don't want to take long over this but
9 there is an interesting illustration of this, we submit,
10 in the decision in one of the Kaupthing cases in the
11 Court of Appeal which your Lordship has at 1E, tab 153.
12 MR JUSTICE DAVID RICHARDS: Yes.
13 MR DICKER: Now, just to explain to your Lordship what the
14 case involved and what the argument was. The case
15 concerned insolvency set-off. The debt owed by the
16 creditor to the insolvent company was a future debt so
17 we have an outward claim by the debtor for a future
18 debt. There was also a cross-claim.
19 Now, the creditor's argument was essentially
20 this: insolvency set-off requires an account to be taken
21 and a balance struck. For that purpose it requires the
22 future debt to be discounted back to the date of
23 administration, and that's undoubtedly right. It then
24 required the two sums to be set off against each other.
25 If there was a balance owed by the creditor to the

1 debtor, that balance was effectively, having been
2 discounted, still is, discounted amount, but
3 nevertheless payable only in accordance with the
4 original contractual terms.
5 MR JUSTICE DAVID RICHARDS: Yes, I see.
6 MR DICKER: So the creditor was effectively saying, "I have
7 it discounted to the present value but I don't have to
8 pay it until its eventual payment date".
9 MR JUSTICE DAVID RICHARDS: Yes, I see.
10 MR DICKER: The argument succeeded at first instance.
11 Your Lordship will see paragraph 17 to paragraph 20 of
12 the judgment of Lord Justice Etherton deals with the
13 argument at first -- with the conclusion at first
14 instance. Just two short points. Paragraph 18:
15 "The judge acknowledged that his conclusion might
16 have unfortunate consequences for the general body of
17 creditors."
18 Paragraph 20:
19 "He said however that he felt compelled to that
20 conclusion because the terms of statutory formula and
21 because the rules apply to all sums due to the company
22 not simply so much of the sums due to the company as are
23 required to match the depositor's claim in the account."
24 So the judge was effectively saying, "If you look at
25 the insolvency rules, they talk about discounting for

1 the purposes of effecting the set-off. They don't
2 simply say you set off just as much as you need and no
3 more".
4 The response of Lord Justice Etherton is at
5 paragraphs 31 to 34.
6 31:
7 "For all those reasons Mr Fisher submitted that if
8 ...(reading to the words)... only be met by amendment.
9 32. Notwithstanding those powerful and well
10 presented arguments, I would will allow this appeal
11 ...(reading to the words)... where possible to maximise
12 the value of the company and its assets."
13 The last sentence of that paragraph:
14 "The purpose of insolvency set-off has nothing to do
15 with the release of liabilities owed to the company,
16 save to the extent necessary to achieve those
17 objectives."
18 Then 34:
19 "Contrary to the approach of the judge and the
20 submission of Mr Fisher, I consider it perfectly
21 possible to interpret rule 2.85(7) and (8) without
22 straining their language so as to produce a sensible
23 meaning in accordance with a sound policy objective of
24 general principles of insolvency administration."
25 So this isn't a dry exercise of statutory

1 construction. One needs to identify a construction
2 which makes sense consistent with basic principles and
3 objective of statutory regime.
4 My Lord, Wentworth's main submission, so far as
5 policy is concerned, appeared to be that everyone was in
6 this together and everyone was suffering from delays so
7 they should all be treated equally. My Lord, we do
8 respectfully say that's an extraordinary submission.
9 Firstly, creditors and shareholders are not all in this
10 together so as to deserve to be treated equally. The
11 shareholders have agreed that they will come last.
12 Secondly, the submission also makes it
13 incomprehensible creditors are entitled to receive
14 compound -- to receive interest, including compound
15 interest, and shareholders are not. If they're all in
16 it together why are creditors receiving interest and
17 shareholders are not?
18 Thirdly, the submission does not begin to explain
19 why creditors should be entitled to the benefit of
20 compound interest, not to the benefit of the rule in
21 Bower v Marris. Again, one has to ask: why was the
22 legislature apparently happy for creditors to have the
23 benefit of compound interest but not the rule in
24 Bower v Marris? One can easily imagine a situation in
25 which the economic effect of the two are identical. Why

1 did the legislature have a problem with the rule in
2 Bower v Marris, given the approach taken in all of the
3 cases since Bower v Marris itself, given the absence of
4 any criticism of that rule in any case in any article or
5 any textbook over those 250 years?
6 MR JUSTICE DAVID RICHARDS: So you're saying that you could
7 take a case: on the one hand simple interest but with
8 the application of Bower v Marris and, on the other
9 hand, compound interest could have much the same
10 economic outcome?
11 MR DICKER: Yes.
12 MR JUSTICE DAVID RICHARDS: Yes.
13 MR DICKER: Wentworth says you shouldn't have Bower v Marris
14 as it leads to lack of certainty. This was the next
15 argument. They referred your Lordship to
16 MacKenzie v Rees, making the point that certainty is one
17 reason for having a cut-off in the event of an insolvent
18 liquidation. My Lord, again we say this is a bad
19 argument. On this argument it's inexplicable that there
20 was ever a rule in Bower v Marris. If certainty is
21 a problem, we would have expected the rule never to have
22 existed.
23 Humber Ironworks recognised the practical reasons
24 for having a cut-off date when the company was insolvent
25 but also held that Bower v Marris applied; in other

1 words, drawing a distinction between the two cases.
2 The distinction, with the greatest of respect, we
3 submit is obvious. Where a company is insolvent, there
4 are good, practical reasons for having a cut-off date to
5 ensure pari passu distribution amongst all the
6 creditors. Where there is a surplus that may be
7 returned to the shareholders, that practical reason is
8 outweighed by the fact creditors should not be left
9 unsatisfied when the surplus is returned to the
10 shareholders.
11 My learned friend also submitted that there were
12 various practical problems with the application of the
13 rule in Bower v Marris. It doesn't seem to have
14 troubled any of the judges in any of the previous cases.
15 We submit there are no real problems. If a single
16 payment of interest is made, no difficulty arises; if
17 interim payments of interest are made, of course one
18 will need to make appropriate provision. There should
19 be no difficulty in doing that.
20 Finally, my learned friend said, well, we're not
21 contending the legislature has in fact abolished the
22 rule in Bower v Marris. They are just saying it's
23 irrelevant. My Lord, again, we say this is a matter of
24 language, rather than substance, whether one calls --
25 whether one says that the rule is irrelevant, is

1 inapplicable or has been reversed, it doesn't matter.
2 The substance of the position on their case is it no
3 longer applies post-1986.
4 My learned friend Mr Zacaroli also said
5 Bower v Marris was lost for 100 years between 1870 and
6 1984 and only came back to light in re Lines Brothers
7 number 2. He said, leaving aside Gourlay v Watson,
8 there is no authority that refers to it until you get to
9 Lines Brothers number 2 which was after the Cork Report
10 My Lord, so far as reported cases are concerned,
11 your Lordship has seen a number.
12 Whittingstall v Grover, Gourlay v Watson,
13 Smith v Law Guarantee Trust Company,
14 Calgary v Medicine Hat, Ohio Savings Bank v Willys,
15 MacKenzie v Rees. So formally, it's not simply limited
16 to Gourlay.
17 The suggestion at the other end, that it only
18 resurfaced in Lines Brothers 2, is in any event
19 incorrect. It was cited in Lines Brothers number 1 in
20 the Court of Appeal. Your Lordship, I think, has that
21 in our supplemental bundle at tab 6.
22 MR JUSTICE DAVID RICHARDS: Yes.
23 MR DICKER: My Lord, just page 3:
24 "The following additional cases were cited in
25 argument ..."

1 The second one is Bower v Marris.
2 My Lord can see the counsel for the bank, page 4.
3 Page 5, at the bottom, David Graham QC and Robin Potts.
4 MR JUSTICE DAVID RICHARDS: Yes.
5 MR DICKER: Page 8, at the bottom, letter H, saying:
6 "It is implicit in the Humber Ironworks case and the
7 earlier case of Bower v Marris that post-liquidation
8 interest creditors cannot receive anything until all
9 pre-liquidation debts have been satisfied in full ..."
10 So it doesn't appear to be a case that the counsel
11 involved were unaware of until they discovered it for
12 the purposes of Lines Brothers number 2.
13 Now, your Lordship will see Lines Brothers number 1
14 in the Court of Appeal was decided on 11 February 1982.
15 The Cork Report was published in June 1982. Although
16 it's not in the bundles, the Cork Report, page 1309, in
17 the context of currency conversion claims, expressed the
18 view that they were firmly of the view the principles
19 stated in the two most recent cases provide an
20 appropriate solution to the problem of the conversion of
21 foreign money claims into sterling.
22 MR JUSTICE DAVID RICHARDS: I think I commented on this in
23 Waterfall because who decided lines number 1 at first
24 instance?
25 MR DICKER: Mr Justice Slade.

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1 MR JUSTICE DAVID RICHARDS: That's right. I think I sort of
2 surmised that they may not have had the
3 Court of Appeal -- I don't know. I can't remember now,
4 but I take the points about the dates.
5 MR DICKER: The dates work. And if they didn't, we haven't
6 been able to identify the second case.
7 MR JUSTICE DAVID RICHARDS: Would it have been
8 Lines number 1 at first instance?
9 MR DICKER: They talk about two cases.
10 MR JUSTICE DAVID RICHARDS: Well, Dynamics and Lines
11 number 1. Anyway, I can't remember now the point.
12 I did comment on that, but, still, I take your point
13 that Mr Graham would have known about Bower v Marris
14 before.
15 MR DICKER: My Lord, it's difficult to know -- one doesn't
16 know who had knowledge of the rule. It may well be that
17 all counsel were familiar with it. The only reason
18 I mention Mr Graham, of course, is he was on the
19 Committee.
20 MR JUSTICE DAVID RICHARDS: Absolutely, I follow.
21 MR DICKER: My learned friend also said that any rule there
22 had been had been pretty much forgotten for about
23 100 years. In our submission the suggestion that the
24 knowledge of rule was lost to practitioners is even more
25 remarkable. It's referred to in

1 re Humber Ironworks v Joint Stock Discount Company
2 cases, celebrated cases on any basis. It's true that
3 one is capable of reading those cases and focusing on
4 the position of an insolvent company, but it's discussed
5 clearly and at length and to suggest that, as it were,
6 no practitioners were aware of the rule, given that, for
7 100 years, we do say is surprising.
8 Other materials including the -- other materials
9 include the 1973 report produced by the Irish Bankruptcy
10 Committee.
11 MR JUSTICE DAVID RICHARDS: Yes.
12 MR DICKER: My Lord has that in the new bundle we managed to
13 locate it. It's at tab 9.
14 MR JUSTICE DAVID RICHARDS: I don't suggest anyone tries to
15 find the answer to this, but of course Rolls-Royce had
16 become, as we know, a solvent liquidation in the 1970s.
17 So the problem was there, but I'm not suggesting anyone
18 tries to find out whether Mr Nicholson applied the rule
19 in Bower v Marris or not.
20 MR DICKER: My Lord, Mr Fisher has just passed me a note.
21 Just so far as Lines Brothers number 1 at first instance
22 is concerned, it's 1C, tab 90, and the penultimate page
23 cites Bower v Marris.
24 MR JUSTICE DAVID RICHARDS: Right. Thank you.
25 MR DICKER: It's the first full paragraph:

1 "Mr Stubs [the last four lines] submitted that such
2 a fundamental principle ...(reading to the words)...
3 bankruptcy cases of Bower v Marris and
4 Bromley v Goodere."
5 MR JUSTICE DAVID RICHARDS: Sorry, just give me a second.
6 So we're on the penultimate page.
7 MR DICKER: The first full paragraph, beginning, "Mr Stubs
8 submitted ..."
9 The submission was:
10 "This competition must be resolved in favour of
11 those foreign currency creditors ...(reading to the
12 words)... all creditors in respect of pre-liquidation
13 debts have been satisfied in full."
14 A reference to Humber Ironworks, Bower v Marris and
15 Bromley v Goodere.
16 The quotation, if one drops to the next paragraph,
17 and goes to the quotation by Lord Justice Selwyn at
18 page 645 is that:
19 "The account must in any event" --
20 MR JUSTICE DAVID RICHARDS: I see that, yes. Okay. So it
21 was very much in play then in lines number 1. It was --
22 okay. That's very interesting.
23 MR DICKER: My Lord, without wishing to labour the point, in
24 our respectful submission it was not only known, it was
25 regarded as -- the answer was regarded as sufficiently

1 obvious the position was common ground in Lines Brothers
2 number 2.
3 MR JUSTICE DAVID RICHARDS: Yes.
4 MR DICKER: It would be extraordinary if the Cork Committee
5 had been ignorant of Bower v Marris. Even more
6 extraordinary given the fundamental principle which it
7 enshrined, and Mr Stubs referred to there, chose to have
8 got rid of it without even deigning to mention it.
9 My Lord, it's true that the number of reported cases
10 over the century since 1890 that refer to Bower v Marris
11 are relatively sparse. There are obviously two possible
12 reasons for that. Firstly, insolvencies which turn out
13 to produce a surplus are themselves relatively rare.
14 Secondly, as in Lines Brothers number 2, the parties
15 thought the answer was obvious. If one goes back to
16 Bower v Marris, Lord Cottenham saying -- referring to
17 previous cases and commenting that the rule was so well
18 understood as not to be the subject of question. It may
19 well be, and again one is simply surmising, that it's
20 only where there is enough money at stake, as here, an
21 effort has been made to try and re-argue the point.
22 MR JUSTICE DAVID RICHARDS: Yes.
23 MR DICKER: My Lord, there is obviously a subsidiary issue
24 in relation to whether Bower v Marris also applies to
25 interest at the Judgments Act rate. My Lord, I think

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1 I have probably made -- identified our submissions in
2 relation to that.
3 If you have a company which is in surplus, there is
4 no difficulty about proceeding on the basis as if that
5 company has always been solvent. That's what
6 Rolls-Royce, Fine Industrial and various other cases
7 say. If you do that, although the right to interest was
8 conditional on there being a surplus, it turning out to
9 be a surplus, the courts approaching matters as if the
10 company always was solvent, no difficulty at all in
11 saying where we are now requires us to proceed on the
12 basis that interest did in fact accrue on each of the
13 principal dates. Certainly no difficulty in saying when
14 it comes to calculate the amount of interest, no
15 difficulty and no objection in principle to saying the
16 courts ought to calculate it, given the company is
17 solvent, in the way that it would have been calculated
18 had everyone known that it was solvent at the relevant
19 time.
20 There's an interesting echo of that, my Lord may
21 recall Lord Justice Farwell's comment in the
22 Calgary v Medicine Hat Land where he refers to a trust
23 and says it's obviously important that the court is able
24 to ensure that the trust fund ends up being distributed
25 in the way it should have been had the court known what

1 the true position was at the start. We say there is an
2 echo of that in this case.
3 MR JUSTICE DAVID RICHARDS: Yes.
4 MR DICKER: Conceptually, if one wants to go further, we say
5 no difficulty in saying creditors had a statutory right
6 to interest out of the surplus. It was contingent, but,
7 in the event of a surplus, one can treat it, having been
8 due from time to time when principal was paid.
9 I have already made the submission that this
10 technical argument doesn't appear to have caused the
11 judges any difficulty in the Attorney General of Canada
12 case or in re Hibernian.
13 MR JUSTICE DAVID RICHARDS: Yes.
14 MR DICKER: My Lord, again, I think I have made this point,
15 but my learned friend Mr Zacaroli showed your Lordship
16 lots of cases which involved references to debts being
17 due. We say, not surprisingly, if the underlying claim
18 with which the court was concerned there was
19 a contractual claim to interest on which interest was,
20 on any basis, accruing due. Put another way, the mere
21 fact that it's sufficient that interest was due, in that
22 sense, in those cases, doesn't indicate that it's
23 necessary for the operation of the rule. In our
24 submission it's not.
25 My Lord, I am conscious it's 2 o'clock.

1 MR JUSTICE DAVID RICHARDS: Yes.
2 MR DICKER: I'm also conscious that there is one topic which
3 I have not yet dealt with and it's my learned friend's
4 submission, asserted for the first time in his reply
5 skeleton, that under the 1883 Act interest was payable
6 at a flat rate of only 4 per cent, and then developed in
7 argument during the course of his oral submissions.
8 My Lord, in our submission it's wrong.
9 I don't want to spend too much time dealing with it
10 as it's probably ultimately irrelevant, for two reasons.
11 The first is even if the 1883 Act had imposed a flat
12 rate of interest at 4 per cent, it doesn't by that
13 necessarily follow that the rule in Bower v Marris was
14 excluded. Obviously the two things are different.
15 Secondly, even if interest had only been payable at
16 a flat rate of 4 per cent in bankruptcy, that ceased in
17 1986.
18 MR JUSTICE DAVID RICHARDS: Are you saying that he's wrong
19 in what he says about the 1883 Act?
20 MR DICKER: Yes.
21 MR JUSTICE DAVID RICHARDS: I think I'll hear you on that
22 tomorrow morning.
23 MR DICKER: It will take me a little while. I can't
24 certainly deal with it in one minute.
25 MR JUSTICE DAVID RICHARDS: Good. All right. We'll resume

1 at 10.30 tomorrow morning. Can I just repeat that
2 I think it's a good idea if you could all move out from
3 this floor, this court and this floor, as soon as you
4 can. Thank you very much.
5 (2.00 pm)
6 (The court adjourned until
7 10.30 am on Tuesday, 24 February 2015)
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1 INDEX

2 Housekeeping 1
3 Opening submissions by MR ZACAROLI 1
(continued)
4
Opening submissions by MR TROWER 17
5
Reply submissions by MR DICKER 69
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Page 133

A

ability 50:12
able 15:15 19:21 47:21 66:21 69:20 105:5 116:9 125:6 129:23
abolished 122:21
absence 110:20 121:3
absolutely 27:20 45:10 67:21 68:20 100:13 107:2 125:20
accept 14:22 17:8 23:2 28:25 29:12 37:8 43:3 53:3,5 55:10 55:10 73:18 102:23 111:10 116:18
accepted 54:11 73:8 75:11
accepting 53:5 82:1
accepts 87:3 90:18 97:23 108:1
accessed 66:10
account 8:17 26:20 31:3 33:1 34:8 36:22 38:1 39:9 40:3 46:13 60:13 63:25 111:8 111:14 117:20 118:23 127:19
accrue 2:16 52:25 106:10 129:12
accrued 12:12 13:18,19 76:18 79:22 95:17
accruing 8:18 12:23 78:7 82:20 96:16 98:9,18 130:20
achieve 119:16
acknowledged 118:15
Act 1:24 2:2 3:22,25 4:13 4:14,15 5:3,8 5:14,15 6:16 7:6 8:5 14:8 16:12 18:7 20:20,25 24:4,13 26:8 27:8 30:3,14 35:15,19 36:2 70:9 71:20 74:21 76:20 77:19 77:24 78:12 78:17,20 79:7,11 81:1 81:16,17,21 86:12 90:18 90:24 91:9 92:16,25 93:3,10,14,17 93:25 94:4 98:25 99:4,4 99:5,9 112:1 112:3,8 128:25 131:5 131:11,19
acts 24:22 88:12
actual 35:5 102:24
add 61:25 67:13
additional 1:19 4:8 16:23 18:9,9 66:14 98:22 123:24
address 61:20
addressing 60:17
adds 62:19
adjourned 132:6
adjusted 81:10
adjusting 82:19
administered 2:17
administration 16:18 21:3 37:10 38:3 40:18 47:17 52:22 53:1 59:16 60:14 62:11 82:1 109:16,19 116:2 117:23 119:24
administrati... 32:14
administrators 17:22 32:2 37:7 40:24 50:7 59:20 63:17 67:9 67:17,19,22 67:23 68:11 98:1 99:4 102:14 103:5 110:1 115:18 116:17
administrato... 20:12
admire 69:8
admitted 52:23
adopt 37:7 47:9 52:8 61:25
advanced 24:3 63:16
advancing 67:13,16
advantages 24:6
advocacy 95:15
affect 71:5 86:16
affords 3:20
afraid 70:19
ago 7:25 35:14
agree 14:20,22 19:15 75:9
agreed 13:1 68:17 120:11
agrees 44:23
Ah 83:1
ahead 39:5 43:16 56:15
aid 3:20
aided 30:3
albeit 97:16 98:9
aliens 4:19
aligned 68:6
allocation 42:14 75:12 97:18
allow 16:22 119:10
allowed 58:3 82:22 85:3
allows 81:10
alter 29:11 74:22
alteration 93:16
alterations 4:17
altogether 41:3 82:6
amendment 119:8
amount 5:13 40:13,16 41:7 42:11 42:21 46:17 52:20,24 60:4 61:6 69:15 85:1 102:24 105:19 107:25 108:2 109:2 110:11 111:2 118:2 129:14
amounts 11:17 40:18
analogous 13:23 81:18
analogy 13:15
analysed 26:18 28:10
analysis 20:24
anchor 75:23 77:22
answer 18:19 50:10,10 52:9 53:3,6 55:10,20 59:7 64:14 69:21 70:5 70:15,18 80:24 96:2 105:5,18 111:19 126:15 127:25 128:15
anticipated 1:18
anti-deprivat... 29:15 30:17
anyway 12:8 12:10 25:6 48:22 69:13 115:13 125:11
apart 37:10 52:22 53:1 59:16 60:14 109:15
apparently 71:10 120:22
appeal 9:5 22:5 24:22 66:19 66:20 117:11 119:10 123:20 124:14 125:3
appealed 11:13 66:22,23
appear 31:8 69:24 82:12 95:2 112:5 124:10 130:10
appeared 10:14 120:5
appears 3:18 71:25 92:5,7
appellant 11:8
appellate 25:7
appended 11:19
applicable 36:1 37:9 52:21 53:1 58:1 59:15 60:13 89:9,19,24 92:7 109:15
application 2:3 9:7 20:7 21:2 22:23 30:13 35:13 36:10 46:23 54:16 61:2,13 62:18 68:2 75:11 78:9 89:12 90:12 97:10 121:8 122:12
applied 18:11 22:21 32:14 35:10,22 36:19,22,24 37:3,11 40:23,25 41:1,3 44:24 54:2 60:7 61:5 71:17 79:16,16 81:11 83:17 86:18 90:19 91:20 92:3 95:3,7,8 96:12 98:25 99:19,23 104:16 105:14 108:11 110:20 121:25 126:18
applies 16:24 39:21 65:6 72:22 73:3 73:19 86:21 87:3,5 91:5 92:9,25 95:9 96:24 100:19 112:2 123:3 128:24
apply 27:13 32:2 43:9 57:2,21 61:9 70:10 87:18 92:10 99:12 99:13 100:18 103:12 107:21 118:21
applying 23:8 30:19 52:21 52:25 76:24 77:17 97:1 98:6,16 102:3
appointed 77:21
appointment 9:2 10:6
apposite 61:1
approach 21:8 24:20 65:16 67:16 69:22 70:11 72:11 72:22 73:2 75:5,20 80:5 80:17 82:24 85:20 86:23 88:10 92:2 97:1,9 98:2,7 102:14,23 103:5 104:24 105:5 108:14 108:15 109:3 111:22 115:18 119:19 121:2
approached 63:20 85:9
approaching 26:7 129:9
appropriate 17:9 19:6 50:13,16 51:13 53:25 89:12 95:18 116:25 122:18 124:20
appropriated 31:4 50:18
appropriation 12:1 50:19 51:5,15,21,24 51:25 56:15 88:12,13 97:18 102:24 106:7
apt 60:3
areas 27:14
argue 68:3 95:9
argued 78:17
argument 6:24 7:4,21 24:10 31:8 40:12 50:20 59:24 59:24 60:1 60:10 68:7 70:6 79:10 80:5,6 83:8 91:19 104:13 104:18 105:1 111:24 117:14,19 118:10,13 121:15,19,19 123:25 130:10 131:7
arguments 24:1,3 47:3,9 67:13,14 68:5 119:10
arisen 36:4
arises 31:5 34:2 42:1 53:22 59:11 76:11 122:16
arising 54:14 63:3
arose 88:25 92:12 107:2 108:17
arrangement 11:20 88:24
article 70:2 121:4
articulate 41:25
articulated 41:11
ascertained 82:23
aside 22:23 123:7
aspect 8:16 58:20 62:23 66:21 73:22 115:23
aspects 38:16 58:21 73:20 73:21 85:24 112:10
assert 58:13 67:17
asserted 45:23 131:4
asserting 68:9
assessing 62:15
asset 35:9 36:14
assets 10:15 75:24 81:9 82:6 89:10 119:12

assigned 70:24 71:6
assignee 5:11 5:17
assignees 6:7 6:18,21 7:15 78:17 79:10 79:23 87:17 99:10,11
assist 19:21
assistance 49:18 92:6 92:20
assists 57:1
assume 40:12 54:24 103:14
assuming 16:1 71:16 73:19 103:24
assumption 17:15 41:19
attempt 42:1
attention 19:4 59:21
Attorney 74:15 99:16 108:16 130:11
attributed 26:12
August 12:5,14 13:2
Australia 81:4 83:6 84:17 85:15
Australian 80:18
authorities 4:8 5:2 6:10 10:8 20:20 21:7 23:19 26:7 66:15 68:24 70:18 72:15 76:9 83:7 84:20 93:12
authority 24:9 123:8
authors 113:23
available 6:24 36:24 43:1 47:3
avoid 113:20
await 69:1
aware 46:8 83:6 126:6
awful 19:23

B

B 26:1 28:9
back 2:12 4:3 7:8 25:8 27:16 29:1 32:11 36:2 39:11 45:22 45:22 46:1 47:12 48:20 49:25 51:16 54:6 58:23 58:24 59:1 60:1 61:13 63:12 64:23 65:23 67:5 70:16 71:19 77:7 83:9 84:6,14 85:11 94:17 98:20 100:12 117:22 123:6 128:15
backdoor 61:15 63:24
background 20:17
backwater 85:18
Bacon 27:22
bad 81:20 121:18
baggage 28:4 51:16 65:22
balance 117:21 117:25 118:1
bank 123:14 124:2
bankrupt 3:6 4:4 5:12 6:5 6:6,8 7:15 15:2 16:8,22 71:3,4,4 74:13 76:21 77:4,25 78:3 78:14,16 79:3,9,12,13 79:21 82:13 84:18 87:20 94:7 99:7,11
bankruptcies 45:17 93:2
bankruptcy 1:24 2:2 13:15 15:18 15:21 16:4,9 17:13 22:23 23:3 24:21 24:22 25:18 26:13 35:14 39:16 45:20 51:4 62:16 66:7 70:22 70:24,25 71:10,10,15 71:18 72:16 75:21 76:14 76:19 78:4,8 79:14 81:17 81:20 94:5 100:17,18,20 112:6,14 126:9 127:3 131:16
bankrupt's 6:23 7:16 70:24 77:21
bar 74:10
Barrett 95:23 96:10
based 60:1 62:15
basic 27:9 29:9 70:20 71:7 71:22 72:18 72:23 75:23 87:25 105:10 117:7 120:2
basis 1:12 6:10 15:6 17:10 50:6 70:5 71:20 73:21 77:14 102:19 104:24 111:20 112:24 113:13 115:23,23 116:24 126:2 129:4,12 130:20
Baughan 14:6 14:12
bear 7:18
bearing 49:19
bears 87:9
beginning 8:21 29:7,23 41:13,16 49:11 52:17 127:7
begins 9:12 10:2,25 74:7
believe 83:5
beneficially 93:15
benefit 70:25 79:8 91:2,12 112:20 120:19,20,23
best 2:20 67:2
beyond 38:11 106:10 116:19
bill 46:9
binding 89:25
bit 18:13 19:18 21:4 22:2 34:13 49:22 57:16
bits 40:8 46:18 66:22
bizarre 78:11 79:15
black 4:11
body 118:16
bolster 59:25
Book 31:15
bother 7:12
bottom 6:3 7:6 10:2 11:24 25:24 26:6 33:8 124:3,5
Boultbee 29:14 30:13
Bower 2:3,19 2:20 6:14 8:6 8:15 17:9 19:25 30:5 30:11,25 34:9 35:24 36:1,7 42:10 43:9 44:23 50:20 51:2 54:16,21,24 56:6,9 57:3 57:13,21 58:17 59:25 59:25 60:12 61:2,9,14 62:19 63:24 66:8 69:20 71:23 79:25 80:10,12 83:3 85:12 86:18,21 87:3 88:11 88:19 89:23 90:19 91:3 91:12,20 92:1,9,24 95:2,11,22 96:5 97:3,3 98:25 99:22 102:4 103:11 107:6,21 108:11,22 110:10 111:1 112:2,21 113:22 120:21,24 121:2,3,8,13 121:20,25 122:13,22 123:5 124:1 124:7 125:13 126:19,23 127:3,14 128:5,10,16 128:24 131:13
Braintree 23:14
breached 71:9
breaching 40:3
break 1:13,14 34:18,23 68:21 69:3 100:3,7
brief 3:3 13:6
bring 23:20 65:22
brings 49:25 117:2
broader 72:13
Bromley 3:17 72:2 77:6,12 80:13 83:19 85:16 86:23 92:3 94:17 127:4,15
Brothers 70:4 85:13 106:5 107:16 108:4 109:2 111:22 123:6,9,18,19 124:12,13 126:21 128:1 128:14
brought 20:21 61:14 113:2
Brown 84:24
building 86:23
bundle 2:23 4:7 5:7 7:12 8:13 10:19 23:10 33:7 35:20 52:17 66:14 68:24 77:8 80:20 88:22 93:11 93:21 100:24 123:21 126:12
bundles 2:10 124:16
burdened 16:23
business 25:17
B1 32:16

C

C 25:22 26:1
calculate 42:11 69:15 103:2 105:18 107:25 108:2 109:1 129:14 129:16
calculated 22:12 80:4 85:8 88:5 102:19 104:10 105:3 112:23 129:17
calculates 98:5
calculating 30:23
calculation 8:15 42:2,10 50:6 73:1 104:14,24 106:12,13 109:1 111:21
Calgary 123:14 129:22
call 79:24 80:12
called 5:7 23:13 25:15
calls 122:24
Canada 74:16 99:17 102:8 108:16 130:11
cap 78:23 93:25
capable 15:19 31:4 53:18 56:3,5 96:25 126:3
careful 69:9 95:24
carefully 86:25
carried 12:10 80:24 85:5
carry 90:23 113:16
carrying 25:17 56:7
case 2:7,8,10 2:13,14,20 3:19 5:7 6:15 6:17 7:13,24 8:9,13,14,15 8:22,24 13:24 16:17 16:21 19:2 21:20 22:3 23:3,13,14,14 24:8 25:2,12 25:14,15,23 25:23 27:21 27:22 28:9 28:20 29:5,6 30:1 31:6,6 31:12 36:1 38:4 39:20 39:21 41:11 44:14,14,22 45:1,19,20 62:10 63:16 64:15 69:18 69:22 70:2,3 73:13 74:1 74:16,23 77:7,9 80:18 80:20 83:1 83:25 84:8 88:24 94:10 95:8,10,24 96:25 97:11 101:23 102:1 114:6,8,17,18 114:19 115:5 115:11 117:14,14 121:4,7 123:2 124:6 124:7,10 125:6 130:2 130:12
cases 1:23 4:6 7:5,9,11 18:6 18:23 21:15 22:3 26:16 28:17 44:13 45:25 64:24 67:14 69:24 75:18 89:5 90:11 95:7 95:25 96:22 99:15,18,24 100:16 102:23 111:12 117:10 121:3 122:1,14 123:10,24 124:19 125:9 126:2,2,3 127:3 128:9 128:17 129:6 130:16,22
cast 81:24
categories 41:4
cause 108:18
caused 102:2 113:14 130:10
caution 23:7,9 73:18
ceased 107:20 131:16
celebrated 126:2
cent 14:19 40:17 57:8 58:7 71:12 71:16,21,21

85:1 90:23 91:1,17,22 94:12 95:10 99:2 112:7,8 112:12 131:6 131:12,16
century 44:13 128:10
certain 62:7 65:15 80:23 89:5 90:11 114:3 115:7
certainly 19:15 68:19,25 71:25 73:12 76:9 77:13 78:11 97:23 105:20 129:13 131:24
certainty 62:21 63:21 121:14 121:16,20
certificate 74:8 74:10
cetera 85:5
Champion 83:13,14
Chancellor 5:22 9:14 74:2
change 3:12 20:21 29:11 70:10 86:8 113:2
changed 78:18 79:11 86:11
characterise 104:13,17
characterised 37:18
charges 40:14
cheap 109:23
check 67:4,5
Cherry 29:14 30:13
Chief 89:18
chimes 24:16 29:9,11
Chitty 102:3
choosing 64:21
chose 104:25 128:7
circumstance 39:25 80:21
circumstances 6:18 35:8 63:11 65:13 114:4 115:7 116:18
cited 83:8
123:19,24
cites 126:23
citing 9:15 85:15
civil 9:17
claim 13:12 16:2,5,9 47:4 47:5,22,25 48:2,9 50:8 52:20,23 53:2,4,5,7,7 53:11,12,14 53:17,18 54:3,11,14,15 55:12 57:24 57:25 58:16 64:6 74:13 81:11 82:6 114:14 115:4 116:9,15 117:17 118:23 130:17,19
claimed 8:25
claims 6:19 10:9,17 20:9 41:4 54:8 71:2 77:3 80:23 87:2,2 87:23 88:4 89:6 96:23 115:24 116:7 124:17,21
clause 89:1
cleaner 61:11
clear 2:13,13 3:21 15:21 26:25 27:3 32:22 48:15 62:3,16 64:20 84:16 97:22 98:6 98:15
clearer 57:17
clearly 8:6 49:15 57:20 65:8,16 77:6 114:17 126:5
code 18:7 20:6 21:8,9 23:25 26:21,22 28:19,19,24 29:2,16,17,20 30:1,20,21 33:21 34:10 38:17 43:25 44:10 46:18 50:11 53:19 54:3 56:4 62:23 63:1 63:13,18
64:9 91:13 111:24 113:21 115:20
codes 21:17
codification 73:16 86:7,9 90:15
codified 75:20 85:25
coherent 62:25 63:13,22
coin 26:15 31:23
column 8:20 9:3,11 10:2
combination 39:4 44:2
come 5:9 26:18 27:16 28:10 44:16 45:6 46:1 47:12 48:20 54:6 58:23 67:5 85:11 98:20 100:12 102:25 111:15 120:11
comes 31:18 77:1 102:12 117:5 129:14
coming 62:14 100:1
commencem... 40:17
commences 38:3
comment 14:11 72:5 125:12 129:21
commented 91:24,25 124:22
commenting 128:17
commission 4:23 94:8
commissioners 77:20,23
commissions 4:21
Committee 65:16 100:24 125:19 126:10 128:4
common 59:13 71:25 72:12 86:17 92:17 98:25 116:5 128:1
Commonwea... 69:19 81:17
companies 16:25 30:14 44:14,22 75:22 81:12 113:5,10,11
company 16:25 31:25 70:22 71:7,18 72:16 84:8 89:10,20,24 100:14,21,21 117:16 118:21,22 119:12,15 121:24 122:3 123:13 126:1 126:4 129:3 129:5,10,16
compare 55:5
comparison 56:7
compelled 118:19
compensate 20:8
compensation 47:4 63:3,5,6 64:10
competition 127:10
complete 20:21 63:1 91:13 111:23 113:2 115:19
completed 65:25
completely 36:8
complex 20:22 113:24
complexity 62:19 113:20
complicated 40:15
comply 43:17
compound 37:8,17 57:11 59:17 60:8,21,22 120:14,14,20 120:23 121:9
compounded 37:19
compounding 112:13
conceding 57:20
conceivably 10:15
conceive 68:2
concentrate 18:14 48:12 49:21
concept 27:24 32:22 33:19 35:11,21 36:1,20 37:25 46:12 46:13 61:4 71:8 77:20
concepts 20:5 27:25 76:15
conceptual 97:21
Conceptually 130:4
concerned 1:5 2:14,19 5:18 6:15 16:12 17:23 30:2 62:3 63:19 67:10 77:15 78:12 80:14 80:21,25 83:5 87:10 88:24 92:1 96:11 113:10 114:16,18 115:17 117:15 120:5 123:10 126:22 130:18
concerning 20:21 78:19
concession 59:20 91:8 110:2
conclude 36:11 101:20
concluded 8:1 114:9
concludes 25:3 79:19
concluding 18:21
conclusion 24:8 41:9 64:1 70:9 80:4,16 112:1 114:3 114:25 118:13,15,20
conditional 102:2 129:8
Confederation 74:16 99:17 108:16
conferring 82:8
confess 49:3
conjunction 19:12
conscious 58:19 130:25 131:2
consenting 11:20
consequence 44:4,8
consequences 103:7 118:16
consider 20:11 67:19 68:10 68:12 70:17 85:23 88:16 92:15 119:20
consideration 56:2 63:9 64:2 82:21 92:13
considered 18:6 23:5 69:24 70:3 82:17
considering 5:23 8:10 18:20 21:2 92:16
considers 25:22,23 89:12
consistent 8:14 46:11,15 63:13 93:18 117:6 120:2
consolidate 21:11
constitutes 58:14
constituting 32:23
constructed 69:8
construction 18:4 20:17 22:10,19 23:15 30:2,9 34:12 36:18 38:13 46:22 50:22 60:3 73:6 102:12 103:9,10 117:4 120:1 120:1
constructions 18:11
construe 76:5 105:11 107:7
construed 4:16 16:1 28:2
93:14
construing 21:8 23:8 26:20 77:16 82:24 88:17
contain 66:15 99:5
contained 4:22 78:18,20 79:4 99:18
contains 81:18 86:14
contemplated 81:1
contemplates 33:21
contend 40:24 50:7
contended 42:2
contending 122:21
contention 66:20
context 18:7 21:19,25 22:7 25:10 26:13,16 29:2 43:14 51:10,10 53:11 54:7 54:10,12 56:5 58:16 72:17 73:9 73:11 75:15 92:4 110:17 124:17
contingency 98:16
contingent 18:24 27:7 38:4 98:13 130:6
contingently 98:9
continuation 29:18
continue 15:7 23:20 55:11 73:21 106:10
continued 1:17 50:15 54:2 94:3 133:3
continues 72:21 111:14
continuing 2:15 15:11 53:6,18 64:7 98:22
contract 17:6 47:18 55:8 85:5 89:25

96:14 116:24
contractual 16:13 20:6 53:7,25 54:19 55:14 56:10,12,20 57:1,9 60:24 62:13 63:15 65:11,18 72:12,14 86:22 87:1,2 87:4,10,11,13 87:15,21 88:9 96:1,4 96:23 97:2 98:12,15 112:11 118:4 130:19
Contrary 119:19
convenience 82:2
convenient 34:20 100:2
conversion 53:12 54:8 57:24,25 116:15 124:17,20
convert 64:4
converted 52:23 115:24 116:1
convey 7:16
copy 101:9
core 55:25
Cork 14:10 62:4,22 64:13,19 65:16 100:23 100:24 113:19,23 123:9 124:15 124:16 128:4
corporate 16:17
correct 14:16 15:16 17:7 44:12 55:16 91:24 103:11 103:23 108:12 110:12 111:14
correctly 2:1 15:10
Cottenham 2:22 6:13 8:4 72:2 88:10 91:25 92:8 93:8 128:16
counsel 68:11 124:2,10 125:17
couple 38:15 113:4
course 17:16 17:23 22:18 25:7 26:19 27:8,10,23 28:25 29:12 44:22 68:4 68:12,13 70:15 73:23 78:8 80:7 81:25 83:8 84:8 87:5 98:21 102:16 103:22 105:16,23 106:17,20,25 107:22 111:2 111:8 115:1 122:17 125:18 126:15 131:7
court 10:14 22:5,22 26:19 36:11 67:20 73:20 76:4 81:4 83:6 84:16 85:15,17 89:12 117:11 123:20 124:14 125:3 129:23,25 130:18 132:3 132:6
courts 25:7 85:9,20 93:3 129:9,16
cover 18:12 61:1
covered 17:23 19:20 20:13 30:14 61:23 114:5,7
covering 82:5
co-existing 72:24
co-obligors 103:8
create 33:12
creditor 8:25 14:12 17:5,8 17:11 23:4 28:21 31:6 41:10 43:14 50:2,12,17 51:7,24 52:21 53:8 53:20 55:6 56:13 57:2 57:21 58:13 72:19 78:15 89:6,8 112:11,23 116:23 117:16,25 118:6
creditors 3:7 3:11 4:2 5:17 6:6,19,24 7:17 11:1,17 11:19 13:3 14:8 16:20 20:4,8 24:6 31:21 33:13 33:23,23 34:14 35:1 43:7 44:10 44:18,19,19 47:4,16 50:8 62:9 63:3 64:3 67:12 67:12 69:15 70:21 71:1 71:12 72:14 72:23 76:3 76:25 77:1 78:10 79:3,7 79:8 80:7,15 81:10 82:20 85:3 87:14 87:22 88:1,3 90:17,22,24 91:1 96:1,6,8 97:6 99:14 109:10,13,17 110:19 111:3 112:18 114:14 115:4 115:8 116:7 118:17 120:9 120:13,16,19 120:22 122:6 122:8 124:8 127:11,12 130:5
creditor's 8:16 36:5 53:24 117:19
criminal 71:11
critical 88:7 89:17
criticised 109:21
criticism 19:4 70:1 121:4
cross-claim 117:18
Crown 45:23
currency 52:24 53:2,8,12,14 54:8 55:15 57:21,24,25 58:4,7 64:3 116:8,9,15 124:17 127:11
current 31:16 51:10
cut 82:11
cuts 44:1
cutting 62:20
cut-off 82:10 82:11 85:7 86:2 121:17 121:24 122:4

D

D 24:2 25:22
danger 19:2
date 10:6 11:9 12:5,6,12,22 13:18,21 38:3,4 52:24 64:21 76:13 76:18,19 78:7 85:3,7 86:2 89:4 91:22 94:8 95:17 96:18 97:5 103:15 103:25 106:1 106:3,11 112:14 116:1 117:22 118:8 121:24 122:4
dates 11:18 55:3 125:4,5 129:13
David 1:4,25 2:5,9,18,24 3:5,13,23 4:5 4:10,12 5:1,6 5:16,20 6:2 6:20 7:3,10 7:22 8:3,8,11 8:23 9:9,19 9:22,25 10:18,23 11:3,6,11,22 12:6,8,14,16 13:5,21 14:1 14:5,15,18,24 15:5,9,19,23 17:1,17,20 18:2,15,17,22 19:14 20:15 21:12,23 22:14 23:23 24:11,19,23 25:1,6,11,19 25:25 26:4 26:23 27:6 27:18 28:13 28:15 29:25 30:12,18 31:1,16,19 32:4,17,21 33:9,18 34:11,17,21 35:4 37:14 39:2,14 40:7 40:10 41:6,8 41:15,18,23 42:4,6,17 43:2,20 44:3 44:12,16 45:1,5,9,15 45:19,24 46:2,20 47:1 47:8,10,14,21 48:2,5,11,15 48:19,22,24 49:6,9,15,23 50:9 51:1,9 51:19,23 52:2,6,16 54:18,23 55:2,5,13,17 55:19,22 56:8,16,18,22 56:24 57:5,7 57:11,15,19 57:23 58:2,6 58:9,18 59:2 59:8,18 60:9 61:8,18,21 62:8,24 64:18 65:4,8 65:13,24 66:5,16 67:1 67:6 68:1,8 68:14,19,25 69:6,12 72:3 74:9,17 76:8 78:24 83:24 84:10,22 85:19 89:3 89:14 90:2,4 90:14 91:7 92:12,15,22 94:1,13,21,24 95:13,21 96:9 97:14 98:11,19 99:21,25 100:5,9 101:2,5,10,12 101:18,24 102:20 106:1 106:3,16,20 106:22,25 107:5,13,21 108:7,13 109:8,24 110:7,15,24 111:4 113:9 114:6,16 115:9,13,15 117:12 118:5 118:9 121:6 121:12 123:22 124:3 124:4,22 125:1,7,10,20 126:11,14,24 127:5,20 128:3,22 130:3,13 131:1,18,21 131:25
Davies 106:5 107:3,12,16
Davies's 106:18
day 30:5
days 14:18 18:25 44:23 45:3
day-by-day 98:9
deal 4:18 6:17 8:12 15:14 59:11 71:14 97:19 101:23 114:2 115:1 115:2 131:24
dealing 13:23 19:11 21:16 22:8 27:23 48:18 63:1 66:11 75:17 77:10 85:21 86:15 90:20 93:19 95:25 113:5 131:9
deals 29:20 46:6 66:16 118:12
dealt 16:3 19:25 46:21 47:2 58:22 82:15 101:22 103:5 131:3
debt 11:9 12:10 14:13 15:11 15:17,17,22 17:2 32:8 33:24 34:4,6 35:6 37:4,10 37:19 39:5 46:15,16 52:22 53:1 55:14 59:16 60:14 63:7 65:19 85:2 103:16,16,19 103:21 104:4 104:7 107:9 107:20 109:15 112:16 117:15,16,18 117:22
debtor 12:2 16:12,17,19 22:3,20 24:3 24:6 25:15 25:15,22 51:7 70:21 72:18,20,23 75:24 76:1 76:25 78:10 82:8 87:15 117:17 118:1
debtors 80:15 88:1
debtor's 24:1
debts 2:15 3:8 3:11 4:3 6:7 9:8 11:15,18 13:17 15:3 15:18 16:8 27:7 31:22 32:7,19,20,24 33:14,14 36:23,23 37:23 38:4 39:1,6,12,13 39:18,24 40:14,15 55:13 64:11 71:5 75:25 76:16,17 77:23 78:3,3 78:6,20 79:3 79:12,13 81:8,25 82:14 85:4 90:22 94:9 94:11 97:17 97:25 102:17 104:1,19 105:8,10,14 105:17,24 106:8 107:18 108:9,24 111:18 113:16 116:1 124:9 127:13 130:16
decided 24:10 53:15 70:10

85:6 99:24 101:22 108:22 124:14,23
deciding 8:5
decision 6:13 9:17 22:5 23:5,11,13 66:22 77:15 85:13,15 106:18 117:10
decisions 8:2 25:4
declare 74:11
declared 4:17 93:16 101:17
deed 11:10,19 11:21 12:5,6 12:12
deeper 80:14
default 51:25 60:24
defendant 8:25
define 109:9
degree 19:8 65:15
deigning 128:8
delay 16:17 20:8 48:3,5 48:10
delays 120:6
deliberate 62:12
demand 22:12
demands 22:11 99:11
demonstrate 38:23
demonstrates 37:11 43:14
denizens 4:19
denominated 116:7
departs 75:4
depends 20:7 55:22 73:6 86:8
depositor's 118:23
depreciation 116:8
deprive 91:2
derived 53:24 62:18
derives 30:10
descendant 112:7
describe 88:19
described 41:11 59:20 72:1 73:24 91:19 93:17 96:2 109:22
describes 75:6
description 20:3,10
deserve 120:10
designed 38:23 39:3 73:2
desire 28:5 62:20 113:20
desk 4:9
despite 52:7 90:21 99:1 99:22
destroy 33:13
detail 22:2 66:2 75:18
detailed 83:4
determine 3:10
determined 53:13
determines 60:4 111:2
determining 7:5 22:22 60:13 81:24 110:11
developed 20:5 50:2 102:10 131:6
developing 21:4
Dicker 2:7 52:11 66:14 68:16,17,22 69:5,6,7,14 72:4 74:10 74:18 76:15 78:25 83:25 84:13,16,23 85:20 89:4 89:17 90:3,7 90:15 91:8 92:14,19,23 94:2,15,23,25 95:19,23 96:20 97:19 98:12,20 99:22 100:1 100:4,9,10 101:4,9,11,14 101:19,25 102:21 106:2 106:4,19,21 106:23 107:2 107:10,15,23 108:12,14 109:9,25 110:8,18,25 111:5 113:10 114:12,23 115:12,14,16 117:13 118:6 118:10 121:11,13 123:23 124:5 124:25 125:5 125:9,15,21 126:12,20,25 127:7,23 128:4,23 130:4,14 131:2,20,23 133:5
dictated 50:24
dictates 51:12 54:4
difference 17:3 47:22 91:4 91:15 99:3,9 99:15 102:11 102:13 106:25 116:17
different 17:12 21:16 26:14 26:22 33:4 36:2 53:22 56:19 64:2,8 70:9,22 97:17 102:7 113:12 131:14
differently 5:5
differs 97:25
difficult 46:12 66:9 83:5 125:15
difficulty 41:10 72:24 81:19 97:21 98:4 98:14 100:13 100:24 102:3 108:14 109:4 122:16,19 129:4,10,13 129:15 130:5 130:11
diminishing 95:15
direct 84:24 112:7
directed 44:17
direction 35:12 36:16 43:25 70:10 99:5 99:18
directly 97:1
disagree 38:2
disappeared 85:12
disappears 17:14
discarded 30:11
discharge 15:2 24:15 33:20 47:5 50:13 51:17 71:2,3 78:13 79:21 97:24 102:17 102:24
discharged 15:3,22 17:2 17:3 33:15 34:7 46:16 53:21 81:25
discharging 99:12
Discount 126:1
discounted 117:22 118:2 118:2,7
discounting 118:25
discovered 45:18 124:11
discussed 126:4
discussion 48:8 54:7 80:11 83:4
displaced 27:4
distinction 92:1 96:13 99:9,14,15 116:16 122:1 122:2
distribute 42:2 77:1
distributed 75:25 129:24
distributing 21:2 87:19
distribution 27:3 76:16 87:16 89:7 99:7 122:5
distributions 40:25 51:4 55:3
dividend 9:7 32:25 33:20 33:25 36:21 37:25 38:12 46:10,17 101:17 104:18
dividends 30:22 31:3 33:16 36:13 39:8 40:2 46:6 50:22 51:17 56:14 91:23 102:17
dividing 52:13
Dixon 81:4 82:16 83:21
docket 11:20
doctrine 12:1 78:13 88:13
doing 29:2 43:8 44:7,9 76:23 88:17 109:16 122:19
domiciled 26:10
dominant 28:4
doors 1:10
double 1:10 29:14 30:17
doubtless 59:19
draughtsman 38:9 108:21 109:16
draw 19:18 59:21
drawing 122:1
drawn 52:13
draws 29:5
drops 127:16
dry 119:25
due 8:18 9:24 78:3 79:2,12 79:13 91:21 91:22 95:17 96:6,12,14,14 97:4,17 99:14 118:21 118:22 130:8 130:17,20,21
dug 4:7
duty 13:3 87:18 99:10 99:12
Dynamics 125:10

E

E 24:2,8 106:24
earlier 96:15 124:7
early 22:7
easiest 31:14 75:19
easily 31:18 120:24
echo 129:20 130:2
echoed 80:18
echoes 16:10
Eckhardt 33:3
economic 120:25 121:10
Edgcombe 24:9
editor 83:15
effect 1:24 48:3 74:14 81:22 86:10 112:12 116:5,6 120:25
effected 30:23
effecting 119:1
effectively 76:24 80:6 80:11 86:22 90:25 92:24 94:16,18 96:25 98:5,6 98:9,17 102:17 104:16,18 106:6 107:3 107:12 118:1 118:6,24
effort 128:21
either 13:12 33:12 40:3 90:16 95:7 114:8
Eldon 84:1,11
element 36:25
elevate 61:12
embodied 11:21 92:2
emphasised 51:2
enable 56:13
enacted 4:15 4:25 93:14
enacts 86:10
encapsulated 20:18
encourage 1:6
endorsed 46:10
ends 28:12 78:25 81:7 129:24
England 69:18
English 102:7
enshrined 71:8 128:7
ensure 72:21 73:2 75:14 122:5 129:24
enter 107:23
entirely 15:10 73:18 77:12 86:8 93:18 102:22 114:21
entirety 93:22
entitled 17:5 17:12 23:20 42:22 47:24 71:1,12 76:1 80:8 84:25 87:16,23 89:6 94:19 112:15,23 116:23 120:13,19
entitlement 20:4 31:21 31:24 32:5 34:14 35:1,2 36:5 77:25 89:4 94:16
entitling 98:13
envisaged 84:19
envisages 87:14
equal 41:7 58:3
equally 38:25 39:1 41:4 57:19 111:9 111:14 115:6 120:7,10
equitable 71:24
equitably 81:10
equity 9:6 72:8 92:17
equivalent 39:15 56:4,4 65:1
essentially 80:2 80:5 88:17 89:13 90:13 91:19 97:5 99:10 102:1 104:13 109:17 116:14 117:19
establish 85:4
establishes 51:2
estate 7:17 13:9 16:18 40:13 70:24 71:6 77:21 79:21,22
et 85:5
Etherton 118:12 119:4
event 24:13 32:6 69:16 73:3 78:1 89:25 98:14

98:14 101:15 102:5 121:17 123:18 127:19 130:7
eventual 118:8
eventually 98:10
ex 7:9,9 83:12 83:13,14,23 84:2,4,5
exactly 50:9 70:18 72:22 108:17
examination 24:15
example 27:1 29:12 40:11 43:14,22 60:22 77:19 81:16 88:21 103:7 112:10 116:24
examples 27:14
exception 23:17,17
exchange 46:9
excise 56:7
exclude 79:7
excluded 82:6 131:14
excludes 111:9
exegesis 25:3 35:17
exercise 31:13 36:8 42:11 49:16 51:24 52:4 55:5,9,9 56:13 119:25
exhaust 100:10
exhaustive 14:8 111:24 115:20
exist 53:6,19
existed 71:15 121:22
existence 23:21 36:4,13 50:16 54:2 58:15 99:1
existing 20:22 21:11 62:5 63:15 64:5 76:12
exists 52:19 85:17
expect 72:22
expected 91:25 121:21
explain 12:21 20:20 52:12 107:25 117:13 120:18
explained 62:9
explaining 24:1
explains 24:8
explanation 64:23
explicit 4:1 29:10,16
explicitly 29:17
express 26:25 26:25 61:4 73:21 74:11 74:25 76:2 77:13 78:19 81:21 85:21 85:25 86:5 86:15,17 87:24 105:8
expressed 15:9 59:23 61:15 124:17
expressing 15:5
expression 81:14
expressly 4:17 93:16 94:10 110:9 111:9 111:11,16
extended 38:11 94:6
extending 4:19
extension 97:12,12
extent 33:16 53:9 81:13 95:25 119:16
extinguished 33:24
extraordinary 108:21 120:8 128:4,6
extreme 27:1
extremely 86:24

F

F 22:18 24:8 28:12
face 46:11
fact 2:4 3:6,25 6:17 7:24 8:24 12:5 13:23 63:4 86:7,14 90:16,21 91:1,10 96:3 97:24 103:19 104:4,15,19 110:3 111:25 112:4 122:8 122:21 129:12 130:21
factor 60:4,12 60:23,25
factors 60:19 60:21 61:5 71:15 110:10
facts 8:9 112:4
failed 6:24
fails 7:24
fair 69:25
fairly 21:17 22:7 27:24 27:24 97:14
fairness 72:9
fall 16:19
fallacy 106:6
false 60:17
familiar 73:13 73:15 83:10 86:1 125:17
far 1:4,12 2:19 16:12 17:22 24:24 25:14 25:14 37:16 62:2 78:12 83:4 114:24 115:16 120:4 123:10 126:21
Farwell's 129:21
fashion 75:4
favour 80:5,6 127:10
feature 105:8 105:15,22 112:25,25
features 73:24
February 1:1 124:14 132:7
feel 19:6 49:17
felt 81:19 118:19
fiddly 59:11
fifth 18:21
final 10:1 27:21 38:12 101:17
Finally 13:6 67:8 122:20
Finance 84:8
find 2:25 44:21 45:4 46:1 69:20,21 70:1 126:15 126:18
findings 32:1
finds 50:4
fine 64:18 66:1 67:6 68:20 100:16 129:6
firm 11:1 62:11
firmly 68:6 124:18
first 1:22 2:20 3:2 4:13 8:19 8:19 10:20 11:13,23 12:11,24 18:3 19:11 20:16 22:3 24:7 28:9,18 29:23 34:12 35:15,21 38:17 40:8 40:24 48:13 48:23 49:22 50:13 53:23 56:15 58:20 66:5 68:16 68:18 69:17 69:17,21,22 70:8,11,17,21 72:23 73:2 75:24 76:15 76:25 77:22 78:10,18 79:19 80:4,7 80:15 82:21 83:21,22 84:4 88:1 90:19 91:6,8 91:8 92:2,9 92:25 93:24 95:3 97:9 100:13 103:3 103:22 104:17 106:22,23 111:24 112:24 117:1 118:10,13,13 124:23 125:8 126:21,25 127:7 131:4 131:11
firstly 74:18 86:25 103:14 105:6 120:9 128:12
Fisher 119:7 119:20 126:20
fit 15:24
fits 15:13,24
five 10:20 18:1 34:21 83:12 100:5
flat 71:16,21 131:6,11,16
flatly 31:11 42:13 62:21
floating 40:14
floor 132:3,3
focus 56:8
focuses 112:6
focusing 126:3
follow 8:11 14:1 16:24 44:5,8 58:9 61:18 108:13 125:20 131:13
followed 85:8 102:18
following 7:7 9:16 94:25 106:6 123:24
follows 34:5 70:7
footnoted 19:2
force 5:9 35:24 36:7 44:25 93:1
foreign 52:23 53:2,8,12,14 54:8 57:20 58:4,7 64:3 116:8 124:21 127:11
forensic 59:19 109:22
forget 45:1
forgotten 125:22
form 35:11 44:1 61:1 62:13 63:8 81:23
formally 123:15
former 5:24 8:1
formula 118:20
formulate 55:23
fortiori 16:21
found 22:4 92:17
foundation 54:15
founded 50:20
four 2:11 6:14 8:19 22:2 49:1 83:22 103:10,12,14 127:1
fourth 18:18 88:18 104:6
Fourthly 103:20
framed 3:18
frankly 61:16
freed 16:8
frequency 60:22
Friday 2:14 3:24 16:11 61:24
friend 71:17 73:7 77:8 80:19,23 81:3 83:1 85:11 86:20 87:3 88:22 91:4 95:5 101:22 102:6 104:25 109:21 110:8 111:5,17 113:3 116:12 122:11,20 123:4 125:21 130:15
friends 60:16 113:18 116:2
friend's 86:13 91:18 93:6 93:11,19 104:12 131:3
full 21:19 32:9 32:12,13,18 32:23 34:7 35:7 39:13 39:23 42:24 43:5,12,16,19 44:10 48:8 53:7,20 54:4 71:2 77:2,2 79:19 83:21 84:4 87:23 103:17,19 104:2 105:8 106:9,10 108:9 115:8 124:9 126:25 127:7,13
fully 47:3 53:9 61:23
fund 20:7 32:2 34:15 35:2,6 35:11,22 36:11,19 37:4 72:25 129:24
fundamental 27:2,14 73:24,24 76:24 78:9 79:11,17 90:9,10,12 97:4,14 127:2 128:6
further 14:2 29:3 87:8 94:25 130:4
future 38:4 93:3 117:16 117:17,22

G

G 24:12 25:23 106:24
gap 76:21,22
general 8:16 10:4 17:9 21:18 47:6 71:24 72:8 74:15 75:11 96:7 99:16 108:16 111:7 111:13 112:17 117:2 118:16 119:24 130:11
generally 23:25
gently 49:12
George 93:25
getting 19:3 57:8 115:20
give 10:23 14:24 26:14 29:4 47:8 55:11 70:16 72:6 76:13 81:22 88:20 100:2 101:6 112:18 127:5
given 22:6,7 24:9 64:10 72:23 92:6 121:2,3 126:6 128:6 129:16
gives 31:21,24 90:16,24 91:1,10,10
giving 91:17 96:6
go 2:12 6:11 25:8,14 29:1 29:2 35:16 36:2 37:16 39:11 40:5 48:17 49:16 58:24 59:1 61:19 68:18 87:14 93:20 110:11

114:25 130:4
goes 4:3 24:7 24:24 25:14 25:21,24 45:22,22 64:23 68:23 77:3 81:6 83:9,20 84:6 87:8 89:1 111:19 114:8 127:17 128:15
going 1:8 16:7 20:12,16 21:14 25:12 27:21 31:9 35:16 41:25 48:12 49:21 61:19 68:16 80:7 94:17 97:19 105:16 105:17 110:15
good 14:19,24 34:18 68:14 122:4 131:25 132:2
Goodere 3:17 72:2 77:6,12 80:13 83:19 85:16 86:23 92:3 94:17 127:4,15
Gourlay 10:19 123:7,12,16
governed 93:3
governing 113:3
Graham 124:3 125:13,18
granted 90:21
grapple 105:1
great 35:16
greater 79:4
greatest 122:2
ground 17:23 18:13 20:13 59:14 61:23 71:25 72:12 86:17 98:25 116:5 128:1
group 28:21 41:11 57:2 58:13 67:18 68:10
Group's 31:6 50:2
Grover 101:21 123:12
Guarantee 123:13
guided 79:17
guts 38:21

H

H 24:12 25:24 26:6 124:5
half 1:13 68:20
Halfway 83:11
hallowed 26:24 27:25
hand 31:18 68:23 77:18 101:9 102:14 121:7,9
handed 68:25 94:7 101:9
hands 6:18 79:22
Hang 106:7
happen 34:9 62:17 78:15
happened 96:6 98:16
happening 75:19 87:24
happens 18:23 40:22 76:22 85:23 98:14
happy 58:23 120:22
Hardwicke 3:16 72:3,4 78:2,14,21 79:16 80:14 83:16 86:2 92:19 94:18
Hardwicke's 79:6 80:1
Harkness 72:5
Hart 83:10
Hat 123:14 129:22
head 66:24
headed 89:4
headnote 5:10
hear 114:1,21 131:21
heard 19:23
hearing 67:11
heir 7:14
heirs 6:22
held 5:3 7:7 53:8 76:4,17 78:2,4 84:17 86:3 121:25
help 19:19 52:12 69:7
helps 33:6 58:11
Hershel 21:20
hesitation 108:19
Hibernian 66:12 99:17 108:17 130:12
High 81:4 83:6 84:16 85:15
higher 57:8 58:7 65:10
highlight 31:10
highlighted 7:1
hindsight 27:7 27:12,17 98:7,17
hint 36:24
hinting 49:12
historical 20:10 35:17
history 20:3
hmm 7:10,10 78:24,24
Hoffmann 25:16 33:6
Hold 101:2
holders 62:2
holding 101:21 111:12
Holdings 96:10
holds 61:16
hole-punch 10:22,24 11:5 12:25 74:6 84:2 89:2 93:24
hope 19:19 59:7
hour 1:13 34:18 68:20
House 23:11,13
Housekeeping 1:3 133:2
Humber 45:6 84:9,14 85:16 110:17 121:23 124:6 126:1 127:14

I

idea 32:25 34:3 42:14 43:11 46:15 66:20 72:18 112:22 132:2
identical 120:25
identifiable 35:6
identified 104:9 111:19 113:25 129:1
identify 20:19 61:6 120:1 125:6
identifying 77:16
ignorant 128:5
ignores 104:23
Ill 110:16
illustrate 52:12 58:11
illustrated 38:22
illustrates 43:22
illustration 25:13 40:1 42:13 110:3 117:9
image 53:11,16
imagine 66:10 98:12 120:24
immediate 82:9
immediately 51:16
impact 16:18
impacts 16:19
implemented 62:23
implicit 4:1 29:19 30:7,7 76:4 85:24 124:6
implied 105:8
important 26:1 53:4 54:9 73:12 86:24 88:24 91:9 129:23
imposed 99:10 131:11
imposes 31:22 31:24
inapplicable 12:2 123:1
inappropriate 38:9
inaudible 100:19
inclined 27:12
include 57:11 59:17 60:3 126:9
included 7:8 21:6 22:12 109:23 110:9 110:25
includes 112:16
including 60:6 78:7 120:14 126:8
inclusion 80:3
incoherent 70:12
incompatible 103:12
incomprehen... 120:13
inconsistency 115:16
inconsistent 31:11 32:25 34:3 36:8,20 37:8,25 39:7 42:14 43:4 43:11 52:9 54:13 55:20 62:21 91:13 115:19
incorporate 89:22
incorrect 71:13 102:10 104:9 123:19
incorrectly 15:6
incrementally 96:21
INDEX 133:1
indicate 20:2 59:3 74:21 130:22
indicated 18:4 28:2 67:13
individuals 77:20
Industrial 100:16 129:6
inevitably 18:12
inexplicable 121:19
influence 28:5
inherent 75:10 85:24
inheritance 64:24
initially 76:17 106:7
innocuous 108:23
insofar 19:21 29:20 48:13
insolvencies 128:12
insolvency 18:7,8 20:25 21:25 22:1,2 26:24 29:10 51:11 63:10 70:23 72:17 72:25 73:15 87:25 88:4 88:20 96:8 97:6 101:15 109:14 117:15,20 118:25 119:14,24
insolvent 10:5 13:9,10 70:20 72:20 100:19,21 117:16 121:17,24 122:3 126:4
instance 70:17 118:10,14 124:24 125:8 126:21
instructing 9:6
instrument 46:9,11
intended 5:24 38:10 62:22 74:22 86:3 97:7 107:17 108:21 109:13 115:1 115:2 116:3
intending 26:14 58:22 100:10
intention 28:5
intentions 51:6
interconnected 19:16
interest 2:15 3:7 4:2 7:17 7:18 8:10,18 9:1,24 10:11 10:17 11:18 12:3,10,12,22 12:23 13:2 13:13,18,19 14:7,9,19,20 15:6,11,22 16:3,7,14 17:2,4,5,11 17:15 20:5 20:22 30:22 30:23 31:4,5 31:21 34:2 34:15 35:1 36:5,10,12,15 36:23 37:4,9 37:12,12,12 37:17,18,21 37:22 38:11 38:24 39:17 39:23 40:16 42:8,11 44:18 46:14 47:5,17,23,23 48:3,3,6,10 50:6,14 52:20,25 53:8,10,12,17 53:21 54:5 55:6,7,7 56:15 57:8 57:12 58:4 60:5,23,24,24 62:6 63:5,14 69:1,15,17,21 72:10 73:1,2 75:21 76:3,6 76:11,13,18 76:23 77:11 78:7,19 80:3 80:4,22,24 81:2,8 82:5,9 82:11,20,21 83:2 84:17 84:19 85:1,5 85:6,8,22 86:15,18 87:15,19 88:5 89:5,13 90:20,22,23 91:17,21,22 92:2 94:8,9 94:17,19,19 95:10 96:1,4 96:6,12,14,14 96:16,19,23 97:4,8,9,19 97:20 98:5,8 98:13,17,21 99:1,6,13,13 99:20 100:11 102:1,4,19 103:15,18,21 103:25 104:3 104:8,9,11,16 104:20,21 105:3,7,11,14 105:16,19,20 105:23,25 106:10 107:8 107:18,25 108:24 109:2 109:10,18 110:11 111:3 112:12,14,15 112:19,23,24 113:3,16,17 114:4,10,13 114:18,20 115:7,20,22 115:25 116:10,11,15 116:19,24 117:1 120:14

120:15,16,20 120:23 121:7 121:9 122:16 122:17 124:8 128:25 129:7 129:12,14 130:6,19,19 130:21 131:5 131:12,15
interested 67:18
interesting 23:24 25:1 46:7 111:10 117:9 127:22 129:20
Interestingly 30:12
interests 67:17 68:9
interest-bear... 2:15 3:11 4:3 9:8 10:10 11:9 14:13
interim 122:17
intermediate 82:5,15
internal 43:4 65:5,15
internally 42:25 43:24
interpret 119:21
interpreted 75:4
intervened 63:10
intimately 19:16
intractable 42:1
introduced 35:13 62:10 63:13 77:20
introducing 43:8,9
introduction 26:2 63:23 113:15
invalid 4:23 22:13
invariably 83:16
invited 70:8
involve 54:20 96:22
involved 24:4 99:18 117:14 124:11 130:16
involves 9:5
86:22
Ireland 102:9
Irish 66:7 126:9
Ironworks 45:6 84:9,14 85:16 110:17 121:23 124:6 126:1 127:14
irrelevant 4:18 8:7 122:23 122:25 131:10
irrevocably 104:19
issue 16:1 17:16 18:16 18:19,22,23 19:3,11,12 25:16 46:25 47:12,14 48:14,24 49:12,20,25 52:9,14,19 53:3,6,23,23 54:10,12 55:11,20,23 56:2 57:1,20 58:21 59:7 59:14 77:18 80:22 81:1 106:4 107:2 107:11,13 108:17 114:24 115:10 128:23
issued 4:24
issues 14:4 18:6,20,24 19:1,9,23 38:5 67:24
i.e 18:7 32:19 33:22 34:15 35:2,6 36:23 43:17 44:20 59:14 60:8 87:9

J

Jac 78:23
James 11:1
Jauncey 23:25 25:2
joint 17:22 37:7 50:6 59:20 63:17 126:1
judge 44:17 70:8 74:19 75:2 118:15
118:24 119:19
judges 69:23 76:13,17,23 108:18 122:14 130:11
judge-made 44:20 73:14 73:16 77:12 86:4,10
judgment 2:22 3:9 5:21 7:19 7:20,23 11:23 13:6 22:6,17 23:24 29:7 29:23 47:18 64:21 65:1,2 65:10,17,18 65:20 78:22 79:1,5 80:1 81:3 83:9,20 84:3 87:7 92:11 93:21 96:13,15,18 106:22,23 114:2 118:12
judgments 96:25 112:8 128:25
June 124:15
jurisdictions 69:19
justice 1:4,25 2:5,9,18,24 3:5,13,23 4:5 4:10,12 5:1,6 5:16,20 6:2 6:20 7:3,10 7:22 8:3,8,11 8:23 9:9,19 9:22,25 10:18,23 11:3,6,11,22 12:6,8,14,16 13:5,21 14:1 14:5,15,18,24 15:5,9,19,23 17:1,17,20 18:2,15,17,22 19:14 20:15 21:12,23 22:6,14 23:6 23:23 24:11 24:19,23 25:1,6,11,16 25:19,25 26:4,23 27:6 27:18 28:2 28:13,15
29:25 30:12 30:18 31:1 31:16,19 32:4,17,21 33:9,18 34:11,17,21 35:4 37:14 39:2,14 40:7 40:10 41:6,8 41:15,18,23 42:4,6,17 43:2,20 44:3 44:12,16 45:1,5,9,15 45:19,24 46:2,20 47:1 47:8,10,14,21 48:2,5,11,15 48:19,22,24 49:6,9,15,23 50:9 51:1,9 51:19,23 52:2,6,16 54:18,23 55:2,5,13,17 55:19,22 56:8,16,18,22 56:24 57:5,7 57:11,15,19 57:23 58:2,6 58:9,18 59:2 59:8,18 60:9 61:8,18,21 62:8,24 64:18 65:4,8 65:13,24 66:5,16 67:1 67:6 68:1,8 68:14,19,25 69:6,12 72:3 74:9,17 76:8 78:24 81:4 82:2,16 83:21,24 84:3,10,22 85:19 89:3 89:14,18 90:2,4,14 91:7 92:12 92:15,22 94:1,13,21,24 95:13,21,23 96:9,10 97:14 98:11 98:19 99:21 99:25 100:5 100:9 101:2 101:5,10,12 101:18,24 102:3,20 106:1,3,5,16
106:18,20,22 106:25 107:3 107:5,12,13 107:16,21 108:7,13 109:8,24 110:7,15,24 111:4 113:9 114:6,16 115:9,13,15 117:12 118:5 118:9,12 119:4 121:6 121:12 123:22 124:4 124:22,25 125:1,7,10,20 126:11,14,24 127:5,17,20 128:3,22 129:21 130:3 130:13 131:1 131:18,21,25
justification 97:2
justified 97:13
justify 71:16

K

Kaupthing 29:6,12 117:10
keep 1:11 6:22 40:20
keeps 23:10
kept 41:21 63:5 63:6
kindly 68:17
know 12:10 14:20 25:20 52:14 61:10 65:14 66:9 96:9 125:3 125:15,16 126:16
knowledge 125:16,24
known 125:13 127:24 129:18,25
knows 2:23 39:12 78:2 80:20 91:18
Koch 84:2

L

labour 127:23
lack 121:14
lacuna 114:4 114:10 115:3
Land 129:22
Langstaffe 93:18,20
language 26:8 26:25 27:9 37:17 38:10 51:15 73:17 73:22 74:20 81:21 82:4 96:24 100:25 103:1,2,13 109:4 119:22 122:24
large 28:22
late 64:10
law 7:14 8:16 9:15,17 13:15 17:9 20:4,21 21:11 22:9 22:10 23:16 25:3,8 26:24 29:1,10 35:23 44:20 51:3,23 70:20 71:7 72:9,20 73:8 73:8,9,14,16 73:19 77:12 81:20 86:4 86:10,19 87:25 90:1 90:21 92:17 94:3,11 97:7 113:2 123:13
laws 6:5
LBIE 52:20
lead 112:1
leading 25:4 33:20 69:10
leads 121:14
learned 60:16 71:16 73:7 77:8 80:19 80:23 81:3 83:1 85:11 86:13,20 87:2 88:22 91:4,18 93:6 93:11,19 95:5 101:22 102:6 104:12 104:25 109:21 110:8 111:5,17 113:3,18 116:2,12 122:11,20 123:4 125:21 130:15 131:3
leave 1:7 28:3 50:7
leaving 123:7
led 80:2,3,16
left 4:21 16:23 54:9 104:22 122:8
left-hand 9:11 10:2
legality 9:5
legislation 21:25 22:1,8 23:8 26:9 27:10 28:1 40:23 51:11 51:11 81:23
legislative 24:20 36:6
legislature 70:10 95:6 112:18,22 116:3 120:22 121:1 122:21
length 126:5
lengthy 25:2
letter 22:18 124:5
letters 106:23
level 62:19 63:21
Ley 22:20
liabilities 32:10 32:12,19 71:5 78:7 89:11 101:16 119:15
liability 31:24 32:5 33:22 33:22 34:1,4
light 56:17 123:6
limited 72:12 72:16 84:25 123:15
line 3:15 11:13 12:19,20,25 52:13 74:6 75:8 89:21
lines 4:18 7:20 70:4 83:12 83:22 85:13 89:21 90:3 106:5 107:16 108:4 109:2 111:22 123:6 123:9,18,19 124:12,13,23 125:8,10 126:21 127:1 127:21 128:1 128:14
linked 27:22 38:16 97:16

liquidation 39:16 62:12 64:22,24 76:14 110:21 121:18 126:16
list 11:17
literal 87:13
little 4:7 18:12 19:18 21:4,4 22:16 34:13 46:7 59:11 97:11 102:22 131:23
lobbying 65:9
local 23:19 24:9
locate 126:13
logic 60:11,17 64:20 65:5 65:15
logical 19:12
logistics 1:15
long 26:16,16 35:13 45:22 81:12 103:18 104:3 117:8
longer 6:23 71:11 79:16 112:2 113:15 123:3
look 5:4 6:3 27:16 36:3 45:4 59:1 82:10 96:22 103:1 110:16 118:24
looked 33:5 39:10 101:3 105:9
looking 17:10 22:2 23:25 30:8 45:7 52:15 54:8 59:15 95:24 107:6
looks 6:21 15:25 26:10 66:12 82:12 86:12 95:19
Lord 1:18,23 2:1,6,7,21,22 2:23 3:8,16 4:6,8 6:13,25 8:4,4,12,19 8:21 9:18 11:24 12:18 13:7 14:2,2 14:23 17:19 17:22 19:22 21:20 22:6 23:25 25:2 25:12 27:5 27:20 28:17 29:7,22 33:2 33:6 34:25 36:17 51:22 58:19 59:6 61:19 64:16 66:14 68:22 69:7 70:7,19 71:7,13,23 72:2,3,4,11 73:11,13 74:2,2,14 76:15 77:5,8 78:2,14,21 79:6,16 80:1 80:14,17 83:4,16 84:1 84:11 85:11 85:17,20 86:2,20,24 88:10 90:8 90:16 91:15 91:23,25 92:8,19,23 93:8,9,10,21 94:15,18,25 95:19 96:20 97:19,20 98:20 99:8 100:10,23 101:22 102:9 102:13 103:4 103:22 104:23 109:6 109:25 110:12,18 111:17,23 113:22 114:1 114:23 115:16 116:16 117:2 117:8 118:12 119:4 120:4 120:7 121:18 122:23 123:10,23 124:2 125:15 126:12,20 127:17,23 128:9,16,23 128:25 129:20,21 130:14,25 131:8
Lords 23:12,13
Lordship 18:19 19:18 19:23 20:11 20:11,14 21:5,14,21 22:19 23:10 24:18 25:13 25:21 27:21 28:6,11 29:4 29:9 30:15 31:14 32:1 32:10,14 33:3 35:18 38:16,18 39:12 40:1 41:13 46:4,5 46:8,19 52:10,15 53:13,15 54:9 58:25 59:9 60:19 62:5 63:11 63:12 64:13 64:14 67:22 68:5,18,22 70:7,12,15 72:1,6 73:13 74:4,15 77:7 77:14 78:2 78:22 80:20 80:25 81:6 81:15 83:7,9 83:14 84:1,6 84:7,13,23 85:14 86:1 88:15,20,23 89:1,20 91:18 93:4 93:20 95:4 95:20 97:10 99:16 100:15 100:23,25 101:9,19,25 104:8 105:6 107:10 110:5 110:14 111:18 113:4 113:7 114:3 117:5,11,13 118:11 121:15 123:11,20 124:13 130:15
Lordship's 20:1 58:20 59:21 114:2 114:25
lose 10:9 31:23 91:11
lost 123:5 125:24
lot 19:23 49:11 59:22 66:24 67:1
lots 130:16
lowest 73:12

M

Mack 83:11
MacKenzie 80:19 121:16 123:15
main 19:1 24:1 24:3 120:4
making 12:2 18:4 19:17 19:22 61:12 74:3 107:14 109:21 115:17 121:16
manage 77:21
managed 92:19 126:12
mandatory 35:12 37:2,5 43:24 99:5 99:18
manner 35:10 40:23
March 97:16 97:17
marked 101:11
Marris 2:3,19 2:20 6:14 8:6 8:15 17:9 19:25 30:5 30:11,25 34:9 35:24 36:1,7 42:10 43:9 44:23 50:20 51:2 54:16,21,24 56:6,9 57:3 57:13,21 58:17 59:25 59:25 60:12 61:2,9,14 62:19 66:8 69:20 71:23 79:25 80:10 80:12 83:3 85:12 86:18 86:21 87:3 88:11,19 89:23 90:19 91:3,12,20 92:1,9,24 95:2,11,22 96:5 97:3,3 98:25 99:22 102:4 103:11 107:6,21 108:11,22 110:10 111:1 112:2,21 113:22 120:21,24 121:2,3,8,13 121:20,25 122:13,22 123:5 124:1 124:7 125:13 126:19,23 127:3,14 128:5,10,16 128:24 131:13
Marris-type 63:24
Marshalsea 24:17
match 118:23
material 102:10
materially 63:23 102:7 113:12
materials 126:8,8
matter 1:21 5:8 16:16 17:7 29:21 30:14 31:17 36:15 37:17 43:24 47:5 60:2 63:2,3,19 70:6 71:3 87:7 95:14 104:14 122:23 123:1
matters 24:12 98:3 129:9
maximise 119:11
MC 27:22
McLelland 89:18
mean 12:9 16:13 17:8 21:9 23:12 32:8 42:6 44:6 51:1 56:24 65:16 66:19 67:21 87:12 91:11 95:14 98:12
meaning 25:17 26:14,19 27:23 28:10 32:24 38:7 60:18 105:12 109:12,20 119:23
means 32:8,11 32:18 76:17 85:25
meant 54:13 79:7,20
mechanics 70:21
Medicine 123:14 129:22
members 71:8
mention 125:18 128:8
mentioned 13:24 93:7 96:15 113:8
mercifully 5:9
mere 31:3 86:7 86:14 91:1 91:10 130:20
merely 87:3 99:6 104:14 111:7
merged 65:19
Mervyn 106:5 106:18 107:3 107:12,16
message 23:7
met 53:9 119:8
Metals 48:18
Metals-type 47:25 48:9
methodology 74:23
methods 69:17
middle 1:21 3:15 9:11 12:20 13:16 74:6 78:22
Midland 72:5 88:21
Millett 28:2
million 40:13 40:14,16,18 40:19,19,25 41:1,2,5,5 42:8,19
Mills 29:6 74:2 74:4 83:13 83:23 84:4
mind 8:5 44:3 49:19 87:9 110:7 113:23
minimum 1:11 29:19 90:25
minute 131:24
minutes 34:21 100:5
mirror 53:11 53:16 88:9 109:13
mirrored 112:19
mirrors 88:3
misconceived 70:12
missing 57:12
mode 42:2 88:12
model 62:13,16
modern 20:6 30:21 82:1
moment 6:7,11 10:23 11:4 12:18 14:24 34:19,20 47:8 100:2 101:6
Moncrieff 13:7
Monday 1:1
money 6:22 60:4 63:7 124:21 128:20
monies 89:7
Montagu 72:5 88:21
moratorium 23:15,22 65:5
morning 1:19 35:25 102:16 131:22 132:1
move 46:21,25 62:12 132:2
moves 23:11
moving 21:4
mustn't 31:23

N

natural 87:1 88:18 90:11 109:12,20 110:4
naturally 85:8 111:1
nature 19:24 58:12 105:25
neatly 20:18
necessarily 51:14 54:12 54:20 73:19 86:8 91:11 102:18 131:13
necessary 16:15 21:16 25:9 28:25 67:25 75:14 103:23 119:16 130:23
need 25:9 32:15 39:11

58:25 59:10 61:10 63:12 69:9 73:7,8 80:8 92:15 109:7 113:19 119:2 122:18
needed 49:18 102:19
needs 6:25 25:20 70:16 77:14 82:15 86:6 120:1
negotiable 46:9 46:11
neither 95:8,9
never 71:17 110:9 121:21
nevertheless 103:1 104:11 111:12 118:3
new 9:14,15 20:23 21:8,9 22:19 23:3,8 26:21,22 27:14 28:8 28:10,19,19 29:2 31:19 73:8,9 84:15 90:17,22,24 91:2,10,10 93:11 111:25 112:5,10 126:12
Nicholls 22:6
Nicholson 126:18
noise 1:11
non-existent 70:13
non-interest-... 5:17 8:10
non-preferen... 44:19
non-provable 47:22 50:8 52:19 54:14 55:11 58:16 64:6 114:14 115:4
notable 69:18 69:23 70:3
note 6:3 20:1 32:15 45:12 45:16 85:14 111:10 126:20
noted 44:13
notes 7:19
notices 22:24
noting 25:25
notional 30:21
35:8 36:8,20 42:10,14,20 42:25 44:1 103:24 104:10 106:13 108:3 109:3 111:6
notionally 39:7 106:14 108:11
notwithstand... 23:21 42:24 53:19 119:9
number 5:2 10:3 31:10 70:4 85:13 108:4 109:2 111:22 123:7 123:9,11,19 124:12,13,23 125:8,11 126:21 127:21 128:2 128:9,14
numerical 60:6 60:7,20

O

objection 129:15
objectionable 112:24
objective 63:1 119:23 120:3
objectives 117:7 119:17
obligation 32:2 32:6 39:5 42:24 76:12
obliged 77:23
obtain 24:6 58:4
obvious 19:16 70:5 86:6 93:7 96:21 122:3 128:1 128:15
obviously 21:1 24:24 49:9 61:24 70:14 71:19 73:5 87:8,12 91:15 92:25 93:21 95:9 107:17 112:16 128:11,23 129:23 131:14
occasions 26:17
occur 111:7
occurred 30:5 108:3
occurrence 32:6
occurs 64:18
odd 92:23
offence 71:11
office 62:2
Oh 57:22 59:8 65:10
Ohio 2:7 8:13 123:14
okay 41:18 45:24 127:20 127:22
old 20:5 22:9 23:8,16 25:8 28:4,23 29:1 29:13 31:16 33:13 51:16 51:23 65:22 73:8,19 95:25
once 15:2 17:14 31:5 33:22 52:4 54:3
ones 33:14 45:2 48:9 83:10
One-off 112:13
onwards 48:25
open 8:1 23:10 27:13 36:11 59:10
opening 1:17 17:21 103:6 133:3,4
operate 86:4
operates 50:12 56:17
operating 39:18 82:17
operation 43:10 50:16 53:19 54:14 56:3,6 70:1 73:14 81:19 88:16 90:1 91:14 108:22 113:25 130:23
operative 31:20
opinion 11:12 12:2 79:20
oral 59:3 87:5 131:7
order 3:18 9:5 25:10 29:1 42:11 43:17
50:24 64:25 79:25 81:25 83:15 84:23 92:3 94:20
ordinaries 41:20
ordinarily 26:10
ordinary 33:19 40:15,20 44:19 72:11 72:21 76:7 80:9 84:19 85:9 88:6,10 94:20 97:9
origin 45:21
original 36:21 37:25 39:8 47:7,11 53:2 85:4 118:4
originally 116:7
ought 16:24 18:11 25:13 35:17 38:15 46:8,19 129:16
oust 50:12
outcome 121:10
outside 29:16 47:17 88:3 109:14,18
outstanding 34:5 37:23 38:7 61:6 85:2 105:22 105:25 107:9 107:11,19,20 108:4,8,10,25
outward 117:17
outweighed 122:8
overall 8:15 110:10
overplus 77:24
owed 117:15 117:25 119:15
owing 33:14
o'clock 1:5,7,9 68:21 69:1 100:1 130:25

P

package 62:10 62:15 110:10 110:19
page 3:2,3,14 3:15,15 4:21
5:21 6:4 7:1 7:6,20,23 8:20 9:3,10 10:1,21,24 11:4,12,24,24 12:13,19,19 13:7 22:17 24:2,7 25:21 25:24 28:7,7 28:8 29:23 32:11 33:8 33:11 41:12 52:18 72:2,7 74:5 75:7 78:22 81:7 83:9,12,18,20 83:25 84:3,7 84:23 89:20 93:23,23 123:23 124:2 124:3,5,16 126:22 127:6 127:18
pages 49:2 81:5 89:1
paid 6:7 10:12 15:12 16:7 16:14 17:15 32:13 33:16 35:7 36:12 36:15 38:12 39:12,17 41:20 42:19 42:21 43:7 43:16,18 44:10 51:17 54:4 55:2 69:15 72:10 76:6 80:7,8 81:2 82:9 94:8,19 97:9 103:15,17,18 103:19,20,25 104:1,3,4,6 104:11,20,21 105:7,19,21 106:9,9 130:8
Palmer 113:5
paragraph 3:3 8:21 9:4,16 9:21 10:3,13 11:7,13,25 12:13 13:8,8 13:14,14,16 20:18 21:20 23:1 28:12 29:24 32:16 33:4,7,10 38:20,22,25 40:2,6 48:24
50:3 62:4 74:19 75:7 79:18,19 81:3,7 83:21 83:22 84:4 90:5,6 93:23 110:13 118:11,11,14 118:18 119:13 126:25 127:7 127:16
paragraphs 9:12 20:2 21:6 38:18 38:21 47:6 48:17 59:23 74:18 119:5
pari 27:2 39:17 44:20 75:25 76:16 77:24 85:4 122:5
Parliament 74:22 88:13
part 9:19 16:3 28:22 30:1,6 34:3 42:13 43:4 50:22 53:23 63:18 64:15 66:6,7 79:2 87:17 88:2 89:23 90:19,20,21 91:6,8,16,21 92:9,10,25 95:3,4 99:1,2 103:23 109:12 110:2 110:10
parte 7:9,9 83:12,13,14 83:23 84:2,4 84:5
particular 18:1 18:14 20:24 26:17,19 28:18 29:18 35:10 50:11 53:17 54:10 60:5 62:23 63:2 67:14 67:18 68:3 68:10 85:24 103:2 115:10 115:23
particularly 18:5 48:20 50:1 63:10
parties 13:1 38:2 67:11 67:15,15,18
69:19 89:25 91:16 128:14
parts 30:3 91:5
passage 9:18 10:25 13:7 23:24 26:1 33:2 74:4,5 81:6 106:21
passages 7:1 8:19 10:20
passed 126:20
passing 6:15 94:3
passu 27:2 39:17 44:20 75:25 76:16 77:24 85:4 122:5
Pause 2:25 10:23 14:25 21:22 28:15 41:18,22 42:5 45:11 49:2 89:15 90:5 101:6 106:24
pay 5:11,13 34:1 36:10 39:5,23 42:24 77:23 105:23 107:17 108:23 118:8
payable 4:2 10:6 37:9,21 37:22 38:11 38:25 39:1 53:10 54:5 60:5 80:3,22 82:13 83:2 84:17,19 85:7 86:19 90:20 94:9 94:11,20 96:19 98:6 102:5 107:8 114:4,11 115:22 118:3 131:5,15
paying 6:6 37:4 40:25 41:1 44:18 48:3,5 105:14,16,17
payment 7:17 11:14 12:1 14:7 20:8,22 31:25 32:7,7 32:9,12,18,24 33:19,25 34:4,7,8 36:22,22,25

37:11 38:1,8 40:2 42:7,8,9 42:19 43:5 43:12 46:6 46:10,13 50:21 52:24 63:4 64:10 76:3 78:5,6 82:14 87:19 89:13 95:18 96:17 97:15 97:17 99:6 99:13,19 102:1 104:9 104:16 108:9 114:13 115:8 118:8 122:16
payments 8:17 9:7,8,24 13:17,20 31:3,3 32:23 33:1,1 39:7,8 40:3 45:17 45:22 50:13 50:25 51:3,6 51:12 54:1 63:25 72:9 72:19 75:12 91:23 97:7 97:24 102:16 102:23 104:18 111:7 111:8,13,13 116:25 122:17
pejorative 95:15
penalty 79:4,8
penultimate 126:22 127:6
people 63:14 63:15 64:3,9
percentage 60:6,7,20
perfectly 33:19 84:16 88:18 90:11 97:13 110:3 113:22 119:20
period 2:16 10:10 37:20 37:21 38:2,6 38:10 60:5 96:17 105:21 107:8 108:7 108:9
periods 37:22 57:9 105:24 108:24
permissible 116:22,23
permits 103:18 104:3 108:2
perplex 22:13
person 26:10 71:4 79:21
personal 16:12
persons 47:16
perspective 63:21
petition 5:11 7:14 25:18
petitioner 7:16
Phillips 7:9
phrase 25:17 37:2 38:6 86:25 87:11 108:23 109:14 110:22
phrased 110:1
phrases 26:17
pick 27:18 66:6 93:9 112:25
picked 89:17
picking 83:10 100:12
picture 17:14
Pied 69:10
Piper 69:10
place 24:13 28:22 88:14 101:7
plain 92:11 113:22
play 50:21,23 95:12 127:21
please 19:20 42:5
plus 15:22 76:18 112:14
pm 69:4 100:6 100:8 132:5
point 2:6,12 6:9 7:18 8:12 9:15 10:20 12:8 13:24 13:24,24 14:10 15:1,2 15:16 16:4 17:1,13 22:16 24:12 30:16 34:12 35:18 36:17 36:18 37:6 38:22 39:21 44:3,25 45:16 46:7 50:1,8 54:6 55:25 59:11 61:8,12,20 62:1 64:7 65:19 66:17 70:4 74:1,3 83:6 85:15 86:6,25 87:10,21 88:18,24 91:9 92:12 93:4,6,9,19 94:25 95:16 96:21,22 98:24 101:19 101:20 104:3 104:6 107:14 107:22 108:25 109:6 109:22 110:8 111:17,24 114:7,22 115:9,14,17 117:4 121:16 125:11,12 127:23 128:21 130:14
pointed 2:1 78:15 80:23 95:23
pointless 78:16
points 1:19,22 2:11 18:14 21:18 28:18 38:13,15 66:1,2 67:19 75:23 77:22 81:5 100:12 103:10,12,14 103:22 112:9 118:14 125:4
policy 16:11,16 16:21 18:21 26:21 61:20 62:25 63:21 64:12 70:11 71:14 75:10 96:5,7 117:3 117:6 119:23 120:5
position 20:12 37:8 52:8 54:13 55:23 59:23 60:11 64:21 67:9 67:10,22,23 68:3 73:22 78:18 82:15 86:16 92:17 95:6 97:8,12 102:21 107:4 123:2 126:4 128:1 130:1
possibility 47:24,25 48:2 60:23 75:1
possible 1:7 81:22 119:11 119:21 128:11
post-adminis... 54:5
post-bankru... 14:9
post-fixed 89:4
post-insolven... 20:4 75:21 76:3,22 77:11 82:11 85:22 86:15 105:11
post-liquidat... 74:23 76:10 124:7
post-1986 123:3
potential 76:21
potentially 98:21
Potts 124:3
pound 33:25 38:8,12
powerful 119:9
practical 62:2 116:5,6 121:23 122:4 122:7,12
practitioners 125:24 126:6
praying 7:15
precedent 83:16
precisely 55:23 74:3 100:17 107:11 110:13
preferences 27:23
preferential 32:9,12,19 33:23 39:5 39:12,17,24 40:14 43:14 44:9,18 45:17,21 111:18
prefs 40:19 41:1,5,19 42:20,25 43:6,13,15
prejudiced 72:19 97:6
premise 114:25
prescribed 89:6,8
present 6:25 13:10 21:8 30:1 115:5 118:7
presented 119:10
preserve 88:9
preserves 111:11
pressure 24:5
presume 11:8
presumed 54:1 72:10
presumption 50:17
pretty 14:19 27:14 45:16 125:22
prevailed 94:4
prevents 105:4
previous 25:3 28:7 75:16 86:10 94:21 105:23 108:6 112:6 113:12 122:14 128:17
previously 79:16 112:13
pre-condition 36:4,14 99:6
pre-dated 2:2
pre-existing 87:6 112:20
pre-liquidation 124:9 127:12
pre-supposes 34:9
pre-1883 71:19
primarily 15:25
principal 8:17 10:11 15:11 30:22 31:4 34:4,6 36:25 37:13 39:23 42:9,21 43:6 46:14,16 51:13,15,17 53:13,15 54:4 55:2 56:15 61:5 69:17,22 70:11 72:10 76:18 81:24 96:7,19 102:18 103:3 104:16,22 106:9 112:14 117:1 129:13 130:8
principle 9:23 21:19 22:16 22:17 23:18 24:24 27:2,7 27:13 29:15 29:19 33:5 40:9 43:11 43:16 47:6 54:1 61:20 70:23 71:8,9 71:23 72:23 76:24 78:9 79:17 80:14 81:8,12,20,23 82:17 87:25 90:13 95:20 117:3 127:2 128:6 129:15
principles 9:17 18:3,9,10 23:8 26:24 27:15 29:10 29:13,18 30:10,19 46:22,23 62:18 63:25 70:20 71:17 73:25 77:17 79:11 89:9 89:11,19,23 90:9,10 117:7 119:24 120:2 124:18
priority 16:20 42:22
prison 24:17
pro 46:17 65:4
probably 2:20 12:21 59:10 113:9 129:1 131:10
problem 42:1 90:15 107:17 108:5 113:14 121:1,21 124:20 126:17
problems 122:12,15
proceed 73:20 129:11
proceeded 70:4
proceeding 129:4
proceedings 23:16,18
proceeds 96:20 111:20
process 35:8 37:1 51:3 72:9,20 86:1 97:7
processes 23:21
produce 119:22 128:13
produced 126:9
prohibition 78:19
proof 15:20 29:15 30:17 55:15 64:5 81:9
proper 25:10
properly 30:6 37:18
property 6:5 10:5
propose 27:1
proposing 64:16 103:4
proposition 14:6 15:13
propositions 21:13
prospect 13:11
protecting 72:14
provable 71:5 76:11
prove 58:4 84:25 85:3 112:14
proved 15:3,17 20:9 31:22 32:7,8,24 33:24 34:5,6 35:7 36:23 37:5,19,23 63:7 64:11 75:25 76:16 76:17 77:23 82:14 97:24 102:17 103:15,16,19 103:21 104:1 104:4,7,19 105:7,10,17 106:8 107:9 108:9 112:16
provide 71:21 88:8 114:12 115:6,7,21,21 116:11 124:19
provided 57:9 92:20 94:6 102:4 116:19
provides 38:24

64:9 105:7 105:13 115:25
providing 88:4 92:5
provision 14:7 21:10 28:8 28:10 29:17 31:20 37:24 76:1,2,20,20 77:10,13 78:21 85:21 85:25 86:5,9 86:15,17 98:13 100:18 100:19 107:7 107:14 112:7 122:18
provisions 20:23 21:3 21:10 23:15 24:22 29:16 31:11 39:15 81:18,21 108:18
proviso 4:20
public 24:15
published 124:15
purporting 3:10
purpose 32:3 36:18,19 37:3 38:19 43:15,18 44:10 59:14 59:16 82:19 117:21 119:14
purposes 1:21 6:6,25 11:14 21:8 22:13 25:18 30:23 31:17 40:12 44:18 56:20 59:19 61:7 62:14 64:4 73:1 81:9 102:11 119:1 124:12
pursuant 32:20 53:10 87:6 89:8 103:20 104:7
pursued 6:19
push 115:14
put 21:22 29:6 29:22 42:15 46:14 50:14 50:19 60:15 67:19 71:19 73:9 76:9 77:22 82:21 88:2 98:8 110:6 130:20
puts 33:17
putting 24:5 31:6 57:18 67:2

Q

QC 124:3
qualification 27:11
qualitative 64:7
qualitatively 53:21 64:1
quality 10:10 56:5
quantum 17:11
query 114:20
question 6:15 9:13 14:5 15:10 22:11 30:9 53:22 53:22 55:20 56:19,19 60:18 64:9 69:11,14 88:7 98:2 105:18 106:12,13 109:1 112:17 115:17,19 117:2 128:18
questions 14:3 20:16 65:21 68:15 98:22
quick 110:16
quickly 1:7 77:7
quid 65:4
quite 11:3 25:2 35:13 46:12 48:8 49:1,11 49:13 59:22 64:2,8,19 65:13 66:7 93:4 95:16
quo 65:4
quotation 127:16,17
quote 9:16

R

raise 66:2 112:17
raised 93:5
raises 98:21,22
ramifications 62:2
range 61:5
rank 39:1
ranked 44:20
ranking 105:10
ranks 38:25
rare 128:13
rate 14:19,20 37:9 40:16 52:21,25 57:9 58:6,7 59:15,17,17 60:3,13,18 61:3,6,10 64:21 65:2,6 65:10,11,18 65:18 71:16 71:21 85:1 94:10,11 101:17 109:15 112:8 128:25 131:6 131:12,16
rateable 79:2
rates 23:19
rationale 72:13 117:6
reach 64:15 70:8 92:19
reached 41:9 59:13 69:20 70:18 77:15 80:16 92:20 114:3
read 4:14 5:16 21:21 28:11 41:13,15,23 42:4 49:3 59:2 89:14 90:4 109:7,9 109:11
reading 3:19 4:16,23 5:12 7:25 10:5,10 10:16 12:3 12:22 13:11 22:22 23:3 24:4,14,21 26:8,13 74:11 75:10 84:10 93:15 93:22 101:16 110:4 119:8 119:11 126:3 127:2,11
reads 4:21 75:14
real 62:2 122:15
realisations 40:13
realised 41:3
really 20:12 27:15 30:11 38:19 46:4 47:14 49:6 49:10 50:1 61:16 67:10 115:10 116:14
reason 6:13 8:7 33:4 38:1 63:20 75:3 80:2 95:11 95:13 100:17 101:5,7 105:11 114:22 121:17 122:7 125:17
reasonably 60:25
reasoned 22:6
reasons 19:17 31:7 67:15 70:11 76:12 104:8 119:7 121:23 122:4 128:12 131:10
recalculating 98:16
recalculation 75:1 98:7 108:3
recall 24:18 52:10 62:5 74:2 83:14 88:15 95:4 100:16 101:25 129:21
recalls 88:23
receipt 33:20 50:21
receive 3:6 31:21 36:5 77:2 109:10 111:3 115:8 120:13,14 124:8
received 3:7 17:4 36:13 47:23 50:13 50:25 52:21 55:6,8 58:2 81:13 110:12
receiver 9:6
receivers 9:2 10:7
receivership 8:24 9:6
receives 116:25
receiving 120:16
reclaimer 11:8
recognised 94:5 121:23
recognition 81:13
recommend 101:1
reconcile 43:23 46:13
reconciling 81:19
recoveries 116:10
recovery 23:19
Red 31:15
redefined 28:1
redistribution 103:24
reenacting 24:14
Rees 80:19 121:16 123:15
Reeve 84:5
refer 6:12 14:22 128:10
reference 3:4,9 3:12,14 7:5,8 9:10 10:1,8 12:11 13:6 13:12,17 14:14,21 18:6 20:24 21:7 72:6 74:14,25 75:18 78:23 81:15 83:18 83:23,25 84:6,7,11,14 93:24 100:20 107:10 113:4 127:14
references 2:21 3:2 113:6,19 130:16
referred 3:16 60:19 72:11 77:24 83:8 84:21 92:4 92:18 93:12 113:4,7,19 121:15 125:25 128:7
referring 3:21 3:25 13:19 88:11 94:13 113:24 128:16
refers 3:16 9:17,23 13:15 83:12 111:12 123:8 129:22
reflect 88:8 97:8 109:13
reflected 64:6 73:5 79:25
reflection 78:8
reflects 72:8,17 88:3 105:10
regard 94:5
regarded 30:6 30:7 71:11 82:7 92:5 127:25,25
regime 71:19 73:5,6 75:16 75:20 85:25 105:9 108:6 113:11,13 114:17,20 117:7 120:3
regimes 39:18 105:15,23 112:6
regulated 88:12
rejected 79:17
relates 37:20 38:17 39:3 40:19,19 48:13,13
relation 16:25 22:10 23:15 23:17,18 27:7 30:16 35:14 39:16 50:10 53:16 53:16,23 58:21 60:22 63:14 66:18 67:22,24 77:9 81:6 86:2,13 91:16 93:20 95:1 98:24 100:19 103:7 110:23 111:18 112:9 115:5 116:22 116:23 128:24 129:2
relationship 71:22
relatively 108:23 128:11,13
release 119:15
released 15:17 79:12,12
releases 71:4
relevance 18:19 59:7
relevant 11:8 51:7 52:23 62:4 74:1,4 74:18 78:21 84:1 87:2 91:23 96:17 97:5 106:21 129:18
relied 14:6,9 54:15
relieved 79:1
rely 9:20 109:25
remain 33:14
remained 36:11
remaining 78:5
remains 34:5
remarkable 125:25
remarked 49:10
remarks 18:21
remember 44:13 66:11 72:1 93:11 125:3,11
remind 8:21 21:21 74:15 106:16
remission 16:13,16 20:6 49:23 54:19 56:10 56:12 57:1 86:22,25 87:11,21
remitted 47:18 87:12 110:19
remotely 90:8
remove 108:21
render 4:22
rendered 62:6
repeat 47:9 132:1
repeatedly 113:18
replaced 20:22
replaces 28:14
reply 47:7,12 48:20,22 49:1 69:5 101:23 131:4 133:5
report 5:9 7:1 8:20 9:11 10:2,21 14:10 62:4

62:22 64:13 64:19 66:8 66:11 100:23 113:19,23 123:9 124:15 124:16 126:9
reported 123:10 128:9
represented 67:15
representing 67:11
request 66:5,9
require 16:16 26:25 27:3 36:9 44:2 63:8 90:10 97:11 100:20
required 22:18 23:7,9 35:9 58:15 62:6 64:4 73:18 74:11 97:13 103:20 104:6 117:24 118:23
requirement 75:24
requires 39:11 39:16 42:23 43:5 70:15 91:21 103:2 103:16 106:13 117:20,21 129:11
requiring 16:6 29:10 76:6 82:18 97:4 99:19
reserved 86:18 90:20 94:10
resident 26:11
residue 7:16 71:1 87:19
resolved 127:10
resonated 96:3
respect 33:24 43:6 51:6 53:13,15 60:16 76:16 79:4 88:8 95:15 98:2 104:19,21 105:21,23 107:8,18 109:13 122:2 127:12
respectful 127:24
respectfully 30:4 32:8 37:15 43:3 43:21 62:17 64:14 120:8
respective 11:18
respects 88:2
respondent 83:11
respondent's 75:9
response 79:6 119:4
Restructuring 74:21
rests 60:22
result 51:19 69:25 71:11 78:11 79:15 92:20 114:14
resume 68:21 131:25
resurfaced 123:18
retain 64:5 74:12
retained 89:7
retrospective 1:24 5:3,25 7:6,7
retrospectivity 6:16
return 99:12
returnable 78:5
returned 78:14 84:18 122:7 122:9
reverse 73:22
reversed 123:1
reversion 62:13 63:8
revisited 49:6
revisiting 27:11
re-allocated 39:7 106:14
re-allocation 30:22 35:9 36:9,12,21 37:1 42:20 43:1,10 44:1 51:20 54:24 56:14 63:25 104:10 106:14,15 111:6
re-appropria... 51:21
re-argue 128:21
rhetorically 112:21
RICHARDS 1:4,25 2:5,9 2:18,24 3:5 3:13,23 4:5 4:10,12 5:1,6 5:16,20 6:2 6:20 7:3,10 7:22 8:3,8,11 8:23 9:9,19 9:22,25 10:18,23 11:3,6,11,22 12:6,8,14,16 13:5,21 14:1 14:5,15,18,24 15:5,9,19,23 17:1,17,20 18:2,15,17,22 19:14 20:15 21:12,23 22:14 23:23 24:11,19,23 25:1,6,11,19 25:25 26:4 26:23 27:6 27:18 28:13 28:15 29:25 30:12,18 31:1,16,19 32:4,17,21 33:9,18 34:11,17,21 35:4 37:14 39:2,14 40:7 40:10 41:6,8 41:15,18,23 42:4,6,17 43:2,20 44:3 44:12,16 45:1,5,9,15 45:19,24 46:2,20 47:1 47:8,10,14,21 48:2,5,11,15 48:19,22,24 49:6,9,15,23 50:9 51:1,9 51:19,23 52:2,6,16 54:18,23 55:2,5,13,17 55:19,22 56:8,16,18,22 56:24 57:5,7 57:11,15,19 57:23 58:2,6 58:9,18 59:2 59:8,18 60:9 61:8,18,21 62:8,24 64:18 65:4,8 65:13,24 66:5,16 67:1 67:6 68:1,8 68:14,19,25 69:6,12 72:3 74:9,17 76:8 78:24 83:24 84:10,22 85:19 89:3 89:14 90:2,4 90:14 91:7 92:12,15,22 94:1,13,21,24 95:13,21 96:9 97:14 98:11,19 99:21,25 100:5,9 101:2,5,10,12 101:18,24 102:20 106:1 106:3,16,20 106:22,25 107:5,13,21 108:7,13 109:8,24 110:7,15,24 111:4 113:9 114:6,16 115:9,13,15 117:12 118:5 118:9 121:6 121:12 123:22 124:4 124:22 125:1 125:7,10,20 126:11,14,24 127:5,20 128:3,22 130:3,13 131:1,18,21 131:25
rid 128:8
right 1:14 2:5 5:6 7:22,24 13:3 15:2 16:23 17:8 17:16 25:19 26:3 27:20 30:15 41:6 41:23 42:18 43:20 44:21 45:24 46:20 47:15,17 48:7,11 49:10 50:16 51:22,25 53:20,24,25 55:10,18 56:1,2,4,14 56:20 58:14 58:18 62:15 64:6,8 67:21 68:3,12,13 69:25 71:17 74:12 76:4,8 80:10 82:8 83:22 84:4 87:13 90:22 91:17 93:4,6 95:20 96:4 97:22 101:24 103:7 106:8 108:13,20 110:24 112:11,19 113:15 115:15 116:3 116:21 117:23 125:1 126:24 129:7 130:5 131:25
rightly 114:9
rights 3:10 8:16 14:8 16:14 20:6 33:13 45:23 47:19 49:24 54:19 56:10 56:13 57:1 62:10,13,15 63:9,15 64:2 72:12,14 81:9 82:19 86:22 87:1,4 87:6,10,11,15 87:22 88:3,8 88:9 90:17 90:24 91:2 91:10,11 96:1 97:2 109:14 110:19 111:25 112:4 112:20
right-hand 8:20 9:3
rise 34:21 55:11
Robin 124:3
role 50:21,23
Rolls-Royce 100:16 126:15 129:6
room 23:9 34:7 35:8 50:15 51:20 52:2,4 54:2 56:12
round 50:3 76:9 114:12
rule 7:13 10:4 16:1,4,6 18:12 19:24 20:25 21:1 28:19,23 29:14,14 30:6,8,10,16 30:24 32:20 32:25 34:9 38:24,24 39:6,15 40:4 46:3,4,5,24 50:11,19,22 52:5 53:10 54:15,16,20 56:6,17,21 57:9 59:14 60:11 61:2,7 61:14 62:11 70:2 71:23 71:24,24 72:8,8,13,24 73:1 75:11 75:15 79:25 80:9,11 82:2 82:10,11 83:3 88:19 88:19 89:22 90:13 91:3,5 91:14,21 94:4,13 95:7 97:3,5 99:22 102:12 103:1 103:10,11,13 103:21,23 104:7 105:2 105:7,13,20 107:1,24,24 108:5,11 110:9 111:1 111:2 112:21 113:21 114:24 119:21 120:20,23 121:1,4,20,21 122:13,22,25 125:16,21,24 126:6,18 128:17 130:23 131:13
rules 18:8 20:23 21:1 22:19 27:8 30:3 36:18 50:23 62:6 89:9,11,19,23 100:20 101:25 102:5 109:9,11 111:15 114:5 114:7,12 115:6,21,21 116:6,11,20 118:21,25
run 11:19 12:4 13:2 15:7,11 17:2 41:10 81:11
running 10:16
run-in 100:25

S

Sammon 7:9
satisfaction 77:3
satisfied 34:15 35:2 71:2 77:2 87:23 88:5 124:9 127:13
save 101:12 119:16
Savings 123:14
saw 86:2
saying 42:18 51:9 52:2 57:23 65:6 76:24 81:7 87:22 92:24 93:13 97:5 97:21 98:4 98:15 104:15 104:18 107:3 107:16,19 109:17 118:6 118:24 121:6 122:22 124:5 128:16 129:11,13,15 130:5 131:18
says 7:13 12:20 28:8 74:19 75:2 76:20 82:16 86:20 89:21 91:6 92:19 94:2 96:24 107:7 109:2 111:5 116:14 121:13 122:25 129:23 131:19
SCG 42:3
schedule 32:16
scheme 42:13 43:5,10,12 72:25 73:15 73:25 76:5,5

77:16,17 80:17 82:25 87:18 88:16 88:17,20,23 88:25 89:2 90:10,13 115:25
schemes 89:22
scintilla 16:6
Scottish 2:12
second 2:6 3:3 3:14 5:7 7:11 8:12 10:21 10:24 11:5 13:8 24:13 34:14 48:9 58:23 74:6 75:7 81:1 84:2 87:10 89:2 90:21 91:16 92:10 93:24 95:4 99:2 124:1 125:6 127:5
secondly 18:9 66:18 76:1 103:16 104:20 105:13 112:4 120:12 128:14 131:15
section 1:23 2:3 3:4 4:13 4:14 5:4,25 6:17 7:8 28:14,18 32:10,13 35:18,19,20 36:3 39:4 40:4 43:17 74:20 75:3 81:16 82:4,7 86:19,21 88:2 90:19 91:5,16 92:4 92:5,7,10,18 92:21 93:10 93:12 94:6 95:1,3 102:8 102:8 113:14 113:25
sections 5:23 7:7 20:25
secured 9:1
see 5:16 6:20 6:25 7:4,22 12:8,16 14:11 15:13 15:23 17:1 19:15 25:13 36:6 44:6,25 45:4,14,15 46:1,19 47:14 52:6 55:19 56:16 56:18,22,24 57:15,19 58:9 66:7 67:23 68:9 69:9 70:12 72:15 75:3 77:5,14 78:23 81:15 84:23 86:14 89:16,20 90:17 99:14 100:25 101:18 103:6 108:13,15 113:9 118:5 118:9,11 124:2,13 127:20
seen 35:25 46:5 63:11 68:5 84:1,7,13 99:16 112:2 123:11
sees 22:19 28:6 60:20 63:16
self-explanat... 20:3
Selwyn 127:17
Sempra 47:25 48:9,18
Senior 28:21 31:6 41:10 50:2 57:2 58:13
sense 29:12 87:13 94:15 96:20 97:11 98:15 112:5 113:11 114:24 115:1 120:2 130:22
sensible 19:12 117:6 119:22
sentence 74:7 75:7 82:3 94:22 110:18 119:13
separate 48:6 49:16 71:3
sequestration 13:22 82:20
series 20:19 21:7,10,13,17 26:16,17
seriousness 19:8
serving 23:4
set 21:19 22:23 25:10 29:1 74:13 117:24 119:2
sets 28:8 29:17 40:22 78:21
setting 1:9
settled 7:13
set-off 117:15 117:20 119:1 119:14
shareholders 120:9,11,15 120:17 122:7 122:10
Shepherd 5:8
short 1:20 5:9 7:19,23 11:7 17:25 18:5 18:16,18 34:18,23 59:6 61:20 69:3 100:3,7 118:14
shortfall 114:15 116:10
show 2:21 8:19 26:7 27:21 35:17 74:3 83:7 110:5 113:6
showed 1:23 88:22 110:13 130:15
shown 9:18,19
shows 8:6 11:7
side 8:20 13:12 26:15
sides 31:22
sight 31:23
signed 11:20
silentio 113:21
similar 24:21 72:5 74:14 98:12 112:9
similarly 112:13 115:5
simple 12:22 40:21 41:21 54:1 60:8,20 69:11,14 121:7
simpler 62:6
simplicity 62:21 113:20
simply 9:20 21:11 36:4 36:14 40:4 43:23 61:4 63:17 71:20 72:14,25 78:14 86:10 87:25 96:5 97:4 106:15 111:13 118:22 119:2 123:15 128:19
simultaneously 41:20,21
single 3:15 8:25 69:21 70:1 122:15
sit 1:5
sitting 1:4
situation 75:23 114:13 115:2 115:3,4 116:22 120:24
sixth 93:25
skate 19:7
skeleton 6:9 19:11 20:2 20:19 21:5 31:8 38:19 38:22 41:12 47:2,7,7,11 47:12 48:16 48:23 49:1 50:3 52:18 59:10,12,24 68:6 113:8 131:5
skeletons 48:8 49:4,7,9 58:25
skilful 69:8
skip 6:11
skipping 12:24
Slade 124:25
slight 15:16 18:25 39:19
slightly 19:1 22:15 24:16 33:4 55:22 64:23 70:22 98:1
slim 4:11
slow 57:16
Smith 23:14 25:23 29:5 37:16 68:16 68:17 101:22 123:13
snarled 1:8
solicitors 68:11
solution 116:12 116:13 124:20
solvent 72:18 100:15,22 126:16 129:5 129:10,17,18
somewhat 95:15
Sons 84:25
soon 132:3
sorry 23:12 26:4 49:9 56:23,25 57:15,17 72:4 83:21 84:10 90:2 101:5 104:17 104:21 110:15 127:5
sort 16:21 18:12,24 19:1 22:15 26:1 36:25 38:13 45:16 58:20 61:12 63:2 65:5 108:3 114:23 125:1
sorts 31:7
sought 56:1 114:1
sound 119:23
so-called 19:24 53:24 60:11
sparse 128:11
speak 82:18
SPEAKER 84:15
special 71:14
specific 20:7 32:3 35:9,11 90:10,12
specifically 4:24 21:15
spell 44:4
spells 30:21 31:2 62:16 64:20 111:6
spelt 44:8
spend 34:13 131:9
spirit 107:23
stage 43:7 51:5 64:17 78:13 85:23 86:4,7 91:9 100:11 106:8
stages 107:15
stake 128:20
standing 1:20 70:16
start 28:20 34:25 40:11 70:19 73:7 75:20 90:5 95:10 97:10 104:17 117:3 130:1
started 28:22 28:23 49:4,7
starting 25:22 28:13,14,23 33:7 108:25
starts 24:1 74:5 75:15 77:19 90:9 93:13
state 22:9 94:3
stated 89:22 111:16 124:19
statement 21:18 22:16 33:5
statements 40:8
states 105:20
statute 2:22 3:20 16:14 17:4,15 70:14 73:17 74:8,10 86:3 86:14 90:16 90:17 91:1 94:6 96:16 102:7
statutory 14:7 18:3,11 21:9 21:10 22:10 22:11,22 23:20 31:11 34:1 36:16 46:22 48:5 50:11 53:9 54:3 55:7 56:3 58:6 73:14,25 76:5 77:10 77:16 80:17 81:13 82:24 85:21,24 86:9,16 87:6 87:17 88:8 88:17 90:9 90:13 97:20 98:8,20 100:11 107:7 107:14 108:18 112:19 114:10,13,17 114:19 115:25 117:7 118:20 119:25 120:3 130:5
Staying 12:18
stays 23:16
step 86:24
steps 24:5
sterling 52:22 55:14 58:3 64:4 115:24 116:1,9 124:21
Stock 126:1
stop 10:16 76:13
stops 81:8
straight 6:12 48:14 64:13
straining 119:22
strands 47:15 48:6
stress 37:3 39:21 62:1
stressed 37:1
stretch 115:10
stricture 36:6
struck 117:21
structure 34:2
Stubs 127:1,7 128:7
stuff 71:7
stupid 56:25
sub 113:21
subject 29:21 35:12 63:2,2 63:19 68:17 86:5 128:18
submission 8:14 16:11 22:1,25 24:16 29:4 34:2,25 35:5 37:15,20 39:3 42:12 42:15 52:11 61:16 71:13 73:11 74:24 75:9,14 77:9 79:18 85:12 91:18 101:20 102:9 108:20 116:13 119:20 120:4 120:8,12,18 125:23 127:9 127:24 130:9 130:24 131:4 131:8
submissions 1:17 14:3 17:19,21,25 18:5,10,16

19:1,17,22 28:20 31:9 46:23 49:13 49:17 59:4 61:24 66:3 69:5,9 86:13 87:5 93:6 95:2,5 100:11 102:16 103:9 104:13 111:23 114:1 129:1 131:7 133:3,4,5
submit 30:4,20 32:9,22 33:21 36:20 39:25 41:25 93:18 112:17 117:9 122:3 122:15
submitted 3:8 3:24 22:21 99:8 102:6 102:15 119:7 122:11 127:1 127:8
subordinated 67:11
subsequent 26:9 51:20 73:15 80:18
subsequently 12:23 79:22 86:5 110:22
subsidiary 128:23
subsistence 64:8
subsisting 4:20 58:14
substance 75:19 105:1 112:5 116:13 122:24 123:2
substantial 95:16
substantive 33:13
subtle 102:22
sub-clause 89:8
sub-paragraph 38:20 40:11 41:12,24 42:18
sub-rule 37:24 65:22
sub-section 35:19,21 40:22
sub-8 41:16
succeeded 118:10
sue 78:16 87:14
suffered 114:15 116:8
suffering 120:6
sufficient 10:15 16:22 130:21
sufficiently 93:7 127:25
suggest 8:4 31:7 37:15 38:8 43:3,21 62:17,25 63:22 64:14 126:5,14
suggesting 6:21,22 126:17
suggestion 50:5 52:8 123:17 125:23
sum 79:4
summary 50:5
sums 117:24 118:21,22
supplemental 68:23 123:21
suppose 15:20 45:20 94:21
sure 44:4 45:10 45:12,16 62:5 64:19 65:24,24 69:13 109:22 114:8 115:10
surmised 125:2
surmising 128:19
surplus 3:7 4:2 5:13 6:18 7:25 11:15 16:7 31:5 34:16 35:3,6 35:12,22 36:3,9,14 37:11 39:20 39:22 41:2 64:11 69:16 73:3 74:23 76:2,6,21 77:1,3,25 78:4,5,6,13 80:22 81:2 81:11 82:8 82:13,13,22 84:18,25 85:7 87:16 87:18 89:10 94:5,7,10,18 97:22 98:5 98:10 99:7 99:11,13,19 100:14 101:16 102:2 102:5 104:15 105:13 109:11 112:15 114:5 115:22 122:6 122:9 128:13 129:3,8,9 130:6,7
surprised 114:21
surprising 16:10,15 90:8 92:8 126:7
surprisingly 96:2,23 130:17
survival 56:20
survive 29:15
surviving 56:3 56:5
suspect 101:8
sweeps 80:9

T

tab 2:23 4:13 5:7 6:12,12 7:11,12,14 8:13 10:20 22:4,4 23:11 25:16 28:7 33:7 35:20 36:3 72:6 74:5 77:8 80:20 88:22 93:12,21 100:24 117:11 123:21 126:13,22
tabs 6:11
Tahore 95:24 96:10
take 1:22 2:6 2:20 4:6 6:5 20:14 21:14 26:20,25 38:16 39:25 41:14,16 46:3 63:12 67:23 68:20 105:5 106:17 110:16 117:8 121:7 125:4 125:12 131:23
taken 26:4 33:3 39:6 45:2 47:5 60:12 69:22 82:5 83:16 95:7 102:23 108:15 117:20 121:2
takes 100:23 105:6 107:15
talk 118:25 125:9
talking 54:18 56:11
tanto 46:17
task 68:9 75:14
team 68:11
tease 21:24
technical 91:19 95:11,13,14 130:10
tell 66:18,21,24 108:1
tells 105:3
ten 17:12
tend 19:5
tendency 104:12
tension 39:19
termini 82:18
terminological 114:23
terms 28:3 29:17,20 62:16 63:20 76:10 86:9 88:25 96:3 96:24 102:7 102:8 116:19 118:4,20
territory 39:22
test 22:21
textbook 20:20 20:24 70:2 121:5
textbooks 113:5,7,10
thank 3:1 8:3 11:6 12:16 17:18,20 46:20 58:9 58:18 66:16 67:6 94:24 101:10 126:24 132:4
theory 17:7
thereon 9:1
thing 19:13 25:1 57:12 94:16
things 19:5 32:9 58:12 85:10 107:24 131:14
think 1:9,15 5:24 7:2 9:18 12:21 14:5 15:1 19:2,7 19:10 21:16 21:19 23:2 25:20 26:1 27:11,12 32:15 35:17 42:6 44:3,14 44:16,17 45:6,18,25 46:5 48:7,19 48:20,25 49:11 50:3 52:12,17 54:20 55:24 56:8,24 58:24 61:8 64:23 65:14 67:4,9,25 81:22 85:17 87:4 91:19 97:10 98:1 102:6 111:18 113:1,6,7,18 115:9 123:20 124:22 125:1 128:25 130:14 131:21 132:2
thinks 27:6 30:24
third 2:12 9:3 9:10 11:13 12:19 18:16 46:25 48:2,9 58:23 87:21 101:19 104:3
Thirdly 103:18 105:20 120:18
Thomas 84:24
thought 13:10 16:15,22 46:7,19 54:10 61:1 92:8 93:5 106:7 110:15 128:15
three 1:18,22 2:10 47:15 48:6 58:21 100:12 103:22
time 5:2 9:24 34:13 35:14 35:15,21,24 36:7 38:11 43:25 45:22 47:4 60:6 73:17,17 76:25 77:11 78:3,19 79:13 85:2,2 96:7 129:19 130:8,8 131:4,9
times 1:4
toe 99:14
told 1:10 59:13
tomorrow 131:22 132:1
top 12:19 66:24 79:18 81:7 83:18 93:23
topic 46:25 59:6,6 61:22 131:2
topics 17:24
total 40:18 42:21 52:20 60:4 110:11 111:2
totally 65:16
touched 66:8
touches 73:23
track 18:24 45:15
traditional 74:22 75:5
transcribers 100:2
traversed 49:13
treat 13:4 19:7 91:12 130:7
treated 13:3 33:1 39:8 40:3 43:15 43:18 64:25 100:21 103:17 111:7 111:13 120:7 120:10
treating 34:8 36:21 44:9 81:24 100:14 104:1
treatment 63:14 90:11
tried 40:20
tries 126:14,18
trouble 101:13
troubled 106:4 107:11 122:14
Trower 17:21 17:22 18:3 18:16,18 19:10,15 20:16 21:13 21:24 22:15 23:24 24:12 24:20,24 25:5,7,12,20 26:3,6 27:5 27:16,20 28:14,17 30:1,15,19 31:2,17,20 32:5,18,22 33:10,19 34:12,17,20 34:25 35:5 37:15 39:3 39:15 40:8 40:11 41:7,9 41:16,21,25 42:5,12,23 43:3,21 44:6 44:15,25 45:4,8,14,18 45:21 46:1,3 46:21 47:2,9 47:11,20 48:1,4,7,12 48:18,20,23 49:3,5,8,14 49:21,25 50:10 51:8 51:14,22 52:1,4,7,18 54:22 55:1,4 55:9,16,18,21 55:25 56:11 56:17,19,23 57:4,6,10,14 57:17,22,25 58:5,8,11,19 59:5,9,19 60:10 61:11 61:19,22 62:9,25 65:3 65:7,12,21,25 66:4,18,24 67:4,21 68:2 68:13 73:7 102:15 109:21 111:5 111:17 113:1 113:3 133:4
Trower's 116:12
true 10:4 17:13 19:24 23:14 30:2 58:12 61:6 77:13 79:24 83:4

104:5 111:8 126:2 128:9 130:1
trust 2:16 11:10,14 13:1 74:16 99:17 108:16 123:13 129:22,24
trustee 84:24
trustees 6:8 11:15 13:4 70:25 71:6
try 1:11 19:21 61:12 128:21
trying 21:24 27:13
Tuesday 132:7
turn 21:6 31:14 32:11,15 33:6 38:18 40:5 52:14 59:9 114:12 128:12
turning 11:23 103:9 129:8
turns 72:18
two 2:21 3:2 4:18 6:11 7:8 7:20 14:6 18:14,25 19:16 24:1,3 28:17 31:10 31:22 32:9 39:18 40:8 41:4 66:1 69:16 75:23 76:15,22 77:22 82:18 97:16 99:15 111:23 117:24 118:14 120:25 122:1 124:19 125:9 128:11 131:10,14
type 54:3

U

ultimate 13:12
ultimately 42:12 131:10
unable 23:2
unaware 124:11
uncertainty 62:20
uncontrovers... 117:4
underlying 21:15 37:19 70:23 73:25 96:5 97:8 130:17
undermined 63:23
undermines 65:15
underpin 77:17
underpinned 27:25
underpins 26:22
understand 44:6 53:4 96:11 102:13 102:21
understood 108:8,10 128:18
undoubtedly 17:14 75:13 117:23
unexercised 56:14
unfortunate 118:16
Unfortunately 101:11
unpaid 60:24
unsatisfactory 20:23 22:9
unsatisfied 16:24 122:9
unsecured 16:19 32:18 33:23 39:5 39:13,17,24 40:15,20 43:7
unsecureds 41:2,5 43:13 43:16
unsubordina... 67:12
unvindicated 64:5
updated 73:17
uplift 112:11
use 31:14,19 33:12 37:2,4 43:9 51:14 87:1 102:25
useful 22:16 75:13
uses 95:14

V

v 2:3,19,20 3:17 6:14 8:6 8:15 10:19 17:9 19:25 23:14 29:14 30:5,11,13,25 33:3 34:9 35:24 36:1,7 42:10 43:9 44:23 50:20 51:2 54:16 54:21,24 56:6,9 57:3 57:13,21 58:17 59:25 59:25 60:12 61:2,9,14 62:19 63:24 66:8 69:20 71:23 72:2,5 74:16 77:6 77:12 79:25 80:10,12,13 80:19 83:3 83:19 85:12 85:16 86:18 86:21,23 87:3 88:11 88:19 89:23 90:19 91:3 91:12,20 92:1,3,9,24 94:17 95:2 95:11,22 96:5 97:3,3 98:25 99:17 99:22 101:21 102:4 103:11 107:6,21 108:11,16,22 110:10 111:1 112:2,21 113:22 120:21,24 121:2,3,8,13 121:16,20,25 122:13,22 123:5,7,12,12 123:13,14,14 123:15 124:1 124:7 125:13 126:1,19,23 127:3,4,14,15 128:5,10,16 128:24 129:22 131:13
Vagliano 21:20
value 118:7 119:12
various 11:15 69:19 122:12 129:6
vested 7:25
Vice 5:22
view 62:17 64:7 65:21 76:10 82:2 124:18,18
vindicate 53:7
vindicated 56:1 58:15
Vinelott 23:6
virtue 96:18
vital 73:11
volume 4:11 35:23

W

wait 63:4,6
Walker 29:7 29:22
Walworth 9:14
want 15:13 18:13 41:15 49:20 66:1 66:10 106:17 109:17 117:8 131:9
wanted 34:12 46:3 59:21 64:12 68:15 112:18
wants 98:8 102:25 130:4
Warrant 84:8
wasn't 35:16 36:7 48:7 51:23 58:22 92:6,14 93:5 103:4 114:19 115:2
water 61:16
waterfall 16:20 30:12 32:1 53:14 66:19 67:9 114:2 114:22 115:11 124:23
Watson 10:19 11:2 12:9 123:7,12
way 4:2 15:25 16:2,7 19:5 21:22 25:13 28:1 29:6,11 29:22 30:8 30:24 31:5 33:17,20 36:10 42:15 43:21,23,23 45:22 46:14 50:14,19 55:6 56:17 57:17 59:23 60:5,6,15 61:11,15 62:22 67:2 69:8 76:7,8 77:5 80:9 84:20 85:9 87:22 88:2,6 91:13 93:17 94:20 98:8 103:3 104:10 106:15 109:25 110:4 110:5 114:8 129:17,25 130:20
weary 18:25
weekend 4:7
welcome 59:3
well-establis... 24:25
well-known 21:7,17,18 33:10
went 23:5 65:9 65:17 88:15
Wentworth 37:7 47:2 48:25 50:7 63:17 69:21 69:25 71:9 80:10 90:18 95:9 97:23 99:23 102:15 111:10 115:18 116:17 121:13
Wentworth's 20:19 48:16 95:1 102:21 113:8 120:4
weren't 27:9 79:13
we'll 1:5 27:16 45:4 46:1 54:6 67:5 68:20,21 131:25
we're 15:14 17:16 19:20 19:21 21:1 30:2 35:23 54:8,18 56:7 87:9 97:22 100:1 104:24 114:16 122:20 127:6
we've 41:3
Whichever 31:17
whilst 80:10 107:18
Whittingstall 101:21 123:12
wholly 34:3
wide 82:4
wider 96:5
Wight 33:3
Williams 84:3
Willys 123:14
winding 33:12 33:15 71:18 72:16 74:21 75:22 76:18 81:12 89:10 89:19,24 113:5,11,12
winding-up 64:25
wish 62:1
wishes 66:6
wishing 127:23
women 4:19
wonder 68:22
wondering 42:17
word 26:18 37:2 49:10 60:3,18 61:3 95:14 102:25 108:4 109:23
wording 32:13
words 3:19 4:16,20,23 5:12,23,25 8:1 9:20 10:6 10:11,16 12:3,23 13:11 22:12 22:23 23:3 24:5,14,21 26:8,13,14,20 27:3 29:11 37:24 61:1,4 72:21 74:11 74:12 75:10 75:21 82:10 87:24 89:17 89:18 93:15 101:16 106:9 109:20 110:4 115:21 116:10 119:8 119:11 122:1 127:2,12
work 19:5 40:4 43:24 125:5
worked 52:5 95:22
working 63:18
works 42:15 43:22 77:6 106:15 107:6
worry 101:12
worth 22:1 25:25 45:7 70:16 93:22
wouldn't 51:14 65:18
written 27:8 49:13,17
wrong 25:4 28:22 30:16 101:7 103:6 131:8,18
wrongly 24:10 99:24 101:21

Y

years 2:2 6:14 7:25 17:12 93:1 121:5 123:5 125:23 126:7
yellow 7:2
York 9:14,15 28:21 37:6 58:13
York's 41:11
Young 11:24 12:18

Z

Zacaroli 1:16 1:17,18 2:1,6 2:10,19 3:2,6 3:14,24 4:6 4:11,13 5:2,7 5:19,21 6:3 6:21 7:4,11 7:23 8:4,9,12 8:24 9:10,20 9:23 10:1,19 10:24 11:5,7 11:12,23 12:7,11,15,18 13:6,23 14:2 14:14,16,22 15:4,8,16,21 15:24 17:7 17:18,24 18:4,13 20:13 24:17 31:8 51:1 61:9,23 62:9 69:8 95:5 104:25 113:1 123:4 130:15 133:3
Zacaroli's 19:11 77:9

85:12 103:9

$

$100,000 9:1

1

1 4:13 30:12 32:1 41:5,5 53:14 66:19 78:23 93:12 97:16,17 100:1 114:2 114:22 115:11 123:19 124:13,23 125:8,11 126:21 127:21 133:2 133:3
1A 2:23 74:5 77:8 93:21
1B 8:13 80:20
1C 22:4 72:6 88:22 126:22
1C/95 106:19
1D 33:7
1D/133 74:16
1E 29:8 117:11
1.05 100:8
10 36:3 40:14 40:16,25 41:1 81:5,7 84:7
10.30 34:22 132:1,7
10.35 34:24
100 123:5 125:23 126:7
100p 33:25 38:8,12
103 22:4
105 28:7
106 23:12,12
11 12:14 13:2 81:5 124:14
11(3) 89:8
11.30 1:13 68:15 69:2
11.4 89:1,4
111 23:11 25:16
115 59:23 60:2 60:17 110:16
116 47:6,11 48:17
118 47:10 82:7
119 72:6 88:22
12 68:21 69:1
12.00 69:4
12.59 100:6
124 59:24 60:17
13 83:25 93:10
1309 124:16
132 1:23 2:3 3:4 5:23 6:17 7:8 33:7 36:3 81:16 86:19 86:21 88:2 90:19 91:5 91:16 92:4,6 92:10,18,21 92:25 95:1,3
132nd 94:6
135 4:14 5:23 93:12
1392 62:4
1395 101:5
1395C 101:1 101:14
15 20:18
153 117:11
155 33:8
156A 29:8
1570 77:19 78:12
16 93:25
1623 78:17,20
17 2:23 118:11 133:4
1705 79:11
175 39:4,10 40:4 43:17 43:24 44:2
175.2(a) 32:10 32:11,13
18 118:14
1824 75:22
1825 1:24 3:22 4:14 5:15 6:16 8:5 36:2 86:12 90:18 92:16 93:10 93:17,25 94:4 98:24 99:5,9 112:3 112:9
1828 5:8
1832 4:13 92:16
1835 9:13
1837 6:14
1842 70:8
1870 85:13 123:5
1883 14:8 35:15 71:10 131:5,11,19
1886 12:5,14 13:2
189 20:25
1890 128:10
19 78:23 93:21
19th 44:13
1921 9:1
1924 81:17
1933 81:17
1970s 126:16
1973 126:9
1982 124:14,15
1984 85:14 123:6
1986 20:20 21:25 24:4 24:14 26:8 28:1 70:9 71:20 75:22 99:4 112:1 113:2 131:17
1989 22:3

2

2 1:5,7,9 14:4 17:16 18:20 19:12 41:2 42:8,19 48:14 49:25 70:4 85:13 108:4 109:2 111:22 123:7 123:9,18 124:12 128:2 128:14 130:25
2.00 132:5
2.69 32:20
2.85(7) 119:21
2.88 18:12 21:1 28:18,19 30:2,8 39:15 39:22 43:24 44:2 46:24 50:11 52:5 54:15 56:17 62:11 75:15 103:10 105:2 105:6
2.88(7) 16:1,4 31:13,20 32:25 38:14 53:10 107:1 107:24,24 108:1,5 109:5,7
2.88(8) 38:17 38:24 39:6 40:4
2.88(9) 59:15 61:7 110:4 110:23
2.99 46:4
2.99(3) 46:8
20 93:1 118:11 118:18
2015 1:1 132:7
21 78:23
22 40:13 41:3
229 24:2
23 1:1 84:3
237 24:7
24 132:7
250 121:5
27 33:7 35:20
276 22:17
28 21:6,14 84:23
29 21:14

3

3 7:12 10:3 11:15 18:19 59:7,14 100:24 123:23
3A 35:20 36:3
30 21:20 52:9 52:14 53:6 54:12 55:11 55:20,23 56:2,21 57:20 74:19 89:21 90:3 115:17,19
31 21:6 89:21 119:5,6
32 75:2 119:9
324 89:1
328 72:7
33 75:7
331 89:20 90:2 90:3
34 119:5,18
35 89:21 90:3
357 3:2
358 3:15
39 14:4 16:1 18:16,20,22 18:23 19:3,7 19:11 46:25 47:12,14 48:24 49:12 49:20 53:23 53:23 54:10 57:1 58:21

4

4 7:1,11,14 9:12 10:13 14:19 40:19 40:19 71:12 71:16,21 75:8 83:9 90:23 91:1 91:17,22 93:25 94:12 95:10 99:2 100:24 112:7 124:2 131:6 131:12,16
4.93 20:25
40 35:19,20
41 38:18,20,20
41.4 38:21
42 38:21,22 40:2,6
43 38:18,21
45 20:2
453 106:22,23
456 50:3
463 8:21

5

5 6:12 7:1 9:10 35:19,21 40:11 77:8 83:18 93:23 124:3
51 10:20 78:22
52 72:2 79:18
558 25:21

6

6 10:1 38:5 40:22 123:21
64 8:13
643 74:5
645 127:18
65 110:13,16
65.2 32:16
66(1) 113:14,25
67 47:7,12 48:24
684 7:23
69 5:21 133:5

7

7 37:24 38:25 41:9,24 85:1
71 80:20
76 52:18
762 10:21,24 11:4 12:13
764 11:12
767 11:24
768 12:19
770 13:7
79 47:7,13

8

8 38:5 40:17,18 41:12,17,25 42:18 57:8 71:21 112:8 112:12 119:21 124:5
81(1) 82:4
811 29:23
83 35:19
85 81:16 99:4
86 20:2 28:7 102:8
87 28:7,9
88 47:6,11 48:17

9

9 65:22 74:5 83:20 109:7 126:13
9.30 1:2
90 126:22
95 74:20 75:3
95(1) 102:8